

***SEPTEMBER 2013
FOIA FILE***

***137
TOTAL DOCUMENTS***

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **September 2013**, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY JO WHITE, CHAIR

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

KARA M. STEIN, COMMISSIONER

MICHAEL S. PIWOWAR, COMMISSIONER

(90 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70401 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15488

In the Matter of

**MANIKAY PARTNERS
LLC,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Manikay Partners LLC ("Manikay" or "Respondent").

II.

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

17 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Manikay, a New York-based registered investment adviser. 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. In December 2009, Manikay, on behalf of an advisory client, bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. This violation resulted in profits of \$1,657,000.

Respondent

3. Manikay Partners LLC is a Delaware limited liability company with its principal place of business in New York, New York. Manikay has been registered with the Commission as an investment adviser since November 17, 2011 and provides advisory services to two domestic funds and one offshore fund with total assets under management in excess of \$1.5 billion.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Manikay's Violation of Rule 105 of Regulation M

6. On December 16, 2009, Manikay, on behalf of an advisory client, sold short 2,000,000 shares of Citigroup Inc. ("C") during the restricted period at an average price of \$3.4899 per share. On December 16, 2009, C announced the pricing of a follow-on offering of its common stock at \$3.15 per share. Manikay received an allocation of 30,000,000 shares in that offering. The difference between Manikay's proceeds from the restricted period short sales of C shares and the price paid for the 2,000,000 shares received in the offering was \$679,800. The purchase of the remaining 28,000,000 shares at a discount from C's market price resulted in an improper profit of \$977,200. Thus, Manikay's participation in the C offering netted total profits of \$1,657,000.

7. In total, Manikay's violation of Rule 105 resulted in profits of \$1,657,000.

Violations

8. As a result of the conduct described above, Manikay violated Rule 105 of Regulation M under the Exchange Act.

Manikay's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Manikay cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Manikay shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$1,657,000, prejudgment interest of \$214,841.31, and a civil money penalty in the amount of \$679,950 (for a total of \$2,551,791.30) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Manikay as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70402 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15489

In the Matter of

MERU CAPITAL GROUP,
LP,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Meru Capital Group, LP. ("Meru Capital" or "Respondent").

II.

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

18 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Meru Capital, a New York-based registered investment adviser. 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. On two occasions, from December 2009 through November 2011, Meru Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$262,616.

Respondent

3. Meru Capital Group, LP is a Delaware limited partnership with its principal place of business in New York, New York. Meru Capital Group, LP has been registered with the Commission since August 2011; it was not registered at the time of the violations. Meru Capital Group, LP provides advisory services to one domestic fund and three offshore funds and has total assets under management in excess of \$542 million.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Meru Capital's Violations of Rule 105 of Regulation M

6. On December 15, 2009, Meru Capital sold short 500,000 shares of Citigroup Inc. ("C") during the restricted period at a price of \$3.6399 per share. On December 16, 2009, C announced the pricing of a follow-on offering of its common stock at \$3.15 per share. Meru Capital received an allocation of 1 million shares in that offering. The difference between Meru Capital's proceeds received from the restricted period short sales of C shares and the price paid for the 500,000 shares received in the offering was \$244,950.00. Respondent also improperly obtained a benefit of \$17,450.00 by purchasing the remaining 500,000 shares at a discount from C's market price. Thus, Meru Capital's participation in the C offering netted total profits of \$262,400.

7. On November 11, 2011, Meru Capital sold short 648 shares of Dunkin' Brands Group ("DNKN") during the restricted period at a price of \$25.9581 per share. On November 16, 2011, DNKN announced the pricing of a follow-on offering of its common stock at \$25.62 per share. Meru Capital received an allocation of 5,000 shares in that offering. The difference between Meru Capital's proceeds from the restricted period short sales of DNKN shares and the price paid for the 648 shares received in the offering was \$215.52. Thus, Meru Capital's participation in the DNKN offering netted total profits of \$215.52.

8. In total, Meru Capital's violations of Rule 105 resulted in profits of \$262,616.

Violations

9. As a result of the conduct described above, Meru Capital violated Rule 105 of Regulation M under the Exchange Act.

Meru Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Meru Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Meru Capital shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$262,616, prejudgment interest of \$4,600.51, and a civil money penalty in the

amount of \$131,296.98 (for a total of \$398,513) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Meru Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 70405 / September 16, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15490

In the Matter of

MERUS CAPITAL
PARTNERS, LLC,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Merus Capital Partners, LLC ("Merus Capital" or "Respondent").

II.

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

20 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Merus Capital, a proprietary trading firm 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. On three occasions, from August 2012 through April 2013, Merus Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of approximately \$8,402.

Respondent

3. Merus Capital Partners, LLC is a limited liability company organized under the laws of Delaware with its principal place of business in New York, New York. Merus Capital is a proprietary trading firm and, as such, invests its own capital. Merus Capital is registered with the Philadelphia Stock Exchange as a broker dealer.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Merus Capital's Violations of Rule 105 of Regulation M

6. On August 3, 2012, Merus Capital sold short 24,412 shares of American International Group Inc. ("AIG") at prices ranging between \$31.15 and \$31.37. On August 3, 2012, AIG announced the pricing of a follow-on offering of 163,934,426 shares of its common stock at \$30.50 per share. Merus Capital received an allocation of 1,000 shares in that offering. The difference between Merus Capital's proceeds from the restricted period short sales of AIG shares and the price for 1,000 shares purchased in the offering was \$840. Thus, Merus Capital's participation in the AIG offering netted total profits of \$840.

7. During the period from March 5, 2013 through March 6, 2013, Merus Capital sold short a total of 82,500 shares of MGIC Investment Corp. ("MGIC") at prices ranging between \$4.89 and \$6.13. On March 7, 2013, MGIC announced the pricing of a follow-on offering of 135 million shares of its common stock at \$5.15 per share. Merus Capital received an allocation of 22,500 shares in that offering. The difference between Merus Capital's proceeds from the restricted period short sales of MGIC shares and the price for 22,500 shares purchased in the offering was \$6,300. Thus, Merus Capital's participation in the MGIC offering netted total profits of \$6,300.

8. During the period from April 4, 2013 through April 10, 2013, Merus Capital sold short a net total of 1,300 shares of Synergy Pharmaceuticals Inc. ("SGYP") at prices ranging between \$6.09 and \$7.33 per share. On April 10, 2013, SGYP announced the pricing of a follow-on offering of 16,375,000 shares of its common stock at \$5.50 per share. Merus Capital received an allocation of 25,000 shares in the offering. The difference between Merus Capital's proceeds from the restricted period short sales of SGYP shares and the price for 25,000 SGYP shares purchased in the offering was \$1,262. Thus, Merus Capital's participation in the SGYP offering netted total profits of \$1,262.

9. In total, Merus Capital's violations of Rule 105 resulted in profits of \$8,402.

Violations

10. As a result of the conduct described above, Merus Capital violated Rule 105 of Regulation M under the Exchange Act.

Merus Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Merus Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Merus Capital shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$8,402, prejudgment interest of \$63.65 and a civil money penalty in the amount of \$65,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Merus Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


By Jill M. Peterson
Assistant Secretary

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70412 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15494

In the Matter of

PHILADELPHIA
FINANCIAL
MANAGEMENT OF SAN
FRANCISCO, LLC,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Philadelphia Financial Management of San Francisco, LLC ("Philadelphia Financial" or "Respondent").

II.

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

21 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Philadelphia Financial, a California-based registered investment adviser. 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. On two occasions, from June 2009 through September 2009, Philadelphia Financial bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$137,524.

Respondent

3. Philadelphia Financial Management of San Francisco, LLC is a California limited liability company with its principal place of business in San Francisco, California. Philadelphia Financial Management of San Francisco, LLC has been registered with the Commission as an investment adviser since January 3, 2005 and provides advisory services to two domestic funds and two offshore funds with total assets under management in excess of \$764 million.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Philadelphia Financial's Violations of Rule 105 of Regulation M

6. From September 14 through September 17, 2009, Philadelphia Financial sold short 156,480 shares of Sonic Automotive Inc. ("SAH") during the restricted period at an average price of \$10.2341 per share. On September 17, 2009, SAH announced the pricing of a follow-on offering of its common stock at \$10.10 per share. Philadelphia Financial received an allocation of 150,000 shares in that offering. The difference between Philadelphia Financial's proceeds from the restricted period short sales of SAH shares and the price paid for the 150,000 shares received in the offering was \$20,115.00. Thus, Philadelphia Financial's participation in the SAH offering netted total profits of \$20,115.00.

7. On May 27, 2009, Philadelphia Financial sold short 5,388 shares of Prudential Financial Inc. ("PRU") during the restricted period at an average price of \$40.5283 per share. On June 2, 2009, PRU announced the pricing of a follow-on offering of its common stock at \$39.00 per share. Philadelphia Financial received an allocation of 70,000 shares in that offering. The difference between Philadelphia Financial's proceeds from the restricted period short sales of PRU shares and the price paid for the 5,388 shares received in the offering was \$8,234.48. Respondent also improperly obtained a benefit of \$109,174.90 by purchasing the remaining 64,612 shares at a discount from PRU's market price. Thus, Philadelphia Financial's participation in the PRU offering netted total profits of \$117,409.38.

8. In total, Philadelphia Financial's violations of Rule 105 resulted in profits of \$137,524.38.

Violations

9. As a result of the conduct described above, Philadelphia Financial violated Rule 105 of Regulation M under the Exchange Act.

Philadelphia Financial's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Philadelphia Financial cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Philadelphia Financial shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$137,524.38, prejudgment interest of \$16,919.26, and a civil money penalty in the amount of \$65,000 (for a total of \$219,443.64) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Philadelphia Financial as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-70414 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15495

In the Matter of

G-2 Trading LLC,

Respondent.

**CORRECTED ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against G-2 Trading LLC ("G-2" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

Summary

1. These proceedings arise out of willful violations of Rule 105 of Regulation M of the Exchange Act by G-2, a registered broker-dealer. Rule 105 prohibits buying an equity security that is the subject of an 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. On three occasions, from November 2009 through August 2012, G-2 bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering

22 of 90

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9448 / September 3, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70305 / September 3, 2013

Admin. Proc. File No. 3-14630

In the Matter of

DANIEL J. GALLAGHER

ORDER GRANTING
MOTION TO AMEND ORDER
INSTITUTING PROCEEDINGS

On November 16, 2011, the Commission instituted proceedings against Daniel J. Gallagher, alleging that he willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder.¹ The Order Instituting Proceedings ("OIP") alleges that Gallagher fraudulently offered securities of Nano Acquisition Group, LLC ("NAG") from October 2009 through July 2010. The OIP also alleges that Gallagher raised at least \$427,000 from twelve investors by falsely representing that their funds would be used by NAG to acquire or develop certain nanotechnology assets when, in reality, he withdrew approximately \$392,000 (92% of the funds raised) for his personal use. The OIP directs the institution of proceedings to determine what, if any, remedial action is appropriate in the public interest, including, but not limited to, disgorgement, prejudgment interest, and civil penalties pursuant to Securities Act Section 8A and Exchange Act Sections 15(b), 21B, and 21C.²

On December 2, 2011, an administrative law judge stayed the proceeding against Gallagher, at the request of the United States Attorney for the Eastern District of New York, "during the pendency of a criminal investigation arising out of the same facts at issue." On December 1, 2011, the U.S. Attorney had filed a criminal action against Gallagher, alleging misconduct virtually identical to that set forth in the OIP. On April 9, 2012, a jury convicted Gallagher of one count of securities fraud and two counts of wire fraud. On May 9, 2012, the United States District Court for the Eastern District of New York filed a judgment against

¹ 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

² 15 U.S.C. §§ 77h-1, 78o(b), 78u-2, 78u-3.

1 of 90

Gallagher, sentencing him to thirty-one months of incarceration and three years of supervised release,³ and deferring the determination of restitution until a later date.⁴

On May 22, 2013, the law judge lifted the stay in the case. She also granted the Division's request for leave to seek to amend the OIP to add or substitute Gallagher's conviction as a separate basis for the administrative proceeding. On May 31, 2013, the Division filed such a motion. In that motion, the Division also sought to withdraw its original request for civil penalties "because Gallagher has already been sufficiently penalized for his conduct" in connection with the terms of imprisonment and supervised release.⁵

Under Rule of Practice 200(d)(1), we may, at any time, upon motion by a party, amend an OIP to include new matters of fact or law.⁶ We have stated that such amendments to OIPs, which can as here reflect "subsequent developments"⁷ in a proceeding, "should be freely granted, subject only to the consideration that other parties should not be surprised nor their rights prejudiced."⁸ The Division's proposed amendment of the OIP to add Gallagher's criminal conviction for securities fraud and wire fraud as a basis for relief in this action satisfies this standard.⁹ The criminal proceeding against Gallagher was based on the same facts as the

³ As a condition of supervised release, the district court ordered that Gallagher "shall not engage in employment, directly or indirectly, which involves securities or solicitation of funds from investors and shall assist the US Probation Department in verifying the job description of any employment [Gallagher] secures while under supervision."

⁴ Gallagher later filed separate notices of appeal from that judgment and a subsequent amended judgment entered against him on July 10, 2013. *United States v. Gallagher*, appeal docketed, No. 13-1956 (2d Cir. May 17, 2013), appeal docketed, No. 13-2661 (2d Cir. July 12, 2013).

⁵ Gallagher did not file an opposition to the Division's motion but instead filed, before the presiding law judge, a "Motion to stay order to amend OIP and Summary Judgment" in which he requested that she stay "the order to amend the OIP, the Summary Judgment and all other motions regarding th[e] matter" until Gallagher's appeal of his conviction was finally determined.

⁶ 17 C.F.R. § 201.200(d)(1).

⁷ *Carl L. Shipley*, Securities Exchange Act Rel. No. 10870, 1974 WL 161761, at *4 (June 21, 1974) (finding that amendments to OIPs should be freely granted to, among other things, take into account subsequent developments).

⁸ *Robert David Beauchene*, Exchange Act Rel. No. 68974, 2013 WL 661619, at *2 (Feb. 25, 2013) (quoting *Charles K. Seavey*, Investment Advisers Act Rel. No. 1925A, 2001 WL 228030, at *2 (Mar. 9, 2001)).

⁹ See, e.g., *Beauchene*, 2013 WL 661619, at *2 (finding that adding to the OIP respondent's criminal conviction for securities fraud and wire fraud as a basis for relief could "neither surprise nor prejudice" respondent where the criminal proceeding was based on the same facts as the Commission's allegations in the OIP). We have found that amending an OIP is not prejudicial where, as here, "the fullness of [a respondent's] opportunity to defend on the merits" is

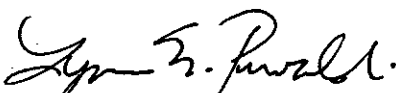
(continued...)

Commission's allegations in the OIP.¹⁰ Further, Gallagher's criminal conviction provides an independent basis for remedial sanctions, and it is more efficient to resolve all issues related to this conduct in a single proceeding.¹¹ We additionally have determined, as an exercise of our discretion, to grant the Division's request to withdraw the OIP's civil penalty claim, given Gallagher's prison sentence and period of supervised release.¹²

Accordingly, IT IS ORDERED that the Division of Enforcement's motion to amend the Order Instituting Proceedings against Daniel J. Gallagher is granted.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Lynn M. Powalski
Deputy Secretary

(...continued)

"unimpaired." *First Minneapolis Inv. Corp.*, Exchange Act Rel. No. 10644, 1974 WL 161422, at *2 (Feb. 14, 1974); *see also Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) (finding that amending an OIP was not prejudicial because respondent did not "suggest that anything stopped him from reorienting his defense" during the remainder of the administrative proceeding).

¹⁰ *See Beauchene*, 2013 WL 661619, at *2.

¹¹ *See id.* We find Gallagher's request to stay the amendment of the OIP pending the completion of his criminal appeal, *see supra* note 5, to be without merit. Our precedent holds that an administrative proceeding may go forward notwithstanding the appeal of a related court case. *See, e.g., James E. Franklin*, Exchange Act Rel. No. 56649, 2007 WL 2974200, at *8 n.15 (Oct. 12, 2007) (rejecting request for stay of administrative proceeding based on pending appeal of injunctive action), *petition denied*, 285 F. App'x 761 (2008); *Joseph P. Galluzzi*, Exchange Act Rel. No. 46405, 55 SEC 1110, 2002 WL 1941502, at *5 n.21 (Aug. 23, 2002) (finding that "the pendency of an appeal does not preclude us from acting to protect the public interest" where respondent relied on purported appeal of criminal sentencing).

¹² We do not suggest any view as to the outcome of these proceedings.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 70331 / September 5, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15456

In the Matter of

Axius, 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 Axius, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Axius, Inc. (CIK No. 1415935) is a Nevada corporation. Currently, it has no assets, offices, officers, directors or employees, and it has not filed its required reports with Nevada. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. During the relevant period, its stock was quoted on the OTC Bulletin Board. Axius is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2012, which reported a net loss of \$207,810 for the prior nine months.

2 of 90

B. DELINQUENT PERIODIC FILINGS

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

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

10. As a result of the foregoing, 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 Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f),

221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].


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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES AND EXCHANGE ACT OF 1934
Release No. 70332 / September 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14891

In the Matter of

SPENCER C. BARASCH

Respondent.

ORDER PERMITTING ATTORNEY TO
RESUME APPEARING AND PRACTICING
UNDER RULE 102(e)(5) OF THE
COMMISSION'S RULES OF PRACTICE

I.

On May 24, 2012, the Commission entered an Order Instituting Administrative Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions that, among other things, denied Spencer C. Barasch ("Barasch") the privilege of appearing or practicing before the Commission as an attorney, with the right to reapply for reinstatement after one year ("Order"). *In the Matter of Spencer C. Barasch*, Securities Exchange Act Rel. No. 67060, Admin. Proc. 3-14891 (May 24, 2012). Barasch paid \$50,000 to the Department of Justice as part of a settlement of claims pertaining to Barasch's representation of Stanford Group Company ("SGC").

II.

On or about May 28, 2013, more than one year after he had been denied the privilege of appearing or practicing before the Commission as an attorney, Barasch filed an application for reinstatement. As part of the reinstatement process, Barasch has sworn under penalty of perjury that he has complied with the Order, that he is not subject to any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice. Since entry of the Order, no information has come to the attention of the Commission relating to Barasch's character, integrity, professional conduct, or qualifications to practice before the Commission that would be a basis for denying his application, or that would be a basis for an adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice.

III.

Based on the foregoing, the Commission has determined that, for good cause shown, it is appropriate to reinstate Barasch, pursuant to Rule 102(e)(5), to appear or practice before the Commission.

Accordingly, it is HEREBY ORDERED that Spencer C. Barasch is reinstated to practice as an attorney before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

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

Commissioner Aguilar
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES AND EXCHANGE ACT OF 1934
Release No. 70332 / September 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14891

In the Matter of

SPENCER C. BARASCH

Respondent.

ORDER PERMITTING ATTORNEY TO
RESUME APPEARING AND PRACTICING
UNDER RULE 102(e)(5) OF THE
COMMISSION'S RULES OF PRACTICE

I.

On May 24, 2012, the Commission entered an Order Instituting Administrative Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions that, among other things, denied Spencer C. Barasch ("Barasch") the privilege of appearing or practicing before the Commission as an attorney, with the right to reapply for reinstatement after one year ("Order"). *In the Matter of Spencer C. Barasch*, Securities Exchange Act Rel. No. 67060, Admin. Proc. 3-14891 (May 24, 2012). Barasch paid \$50,000 to the Department of Justice as part of a settlement of claims pertaining to Barasch's representation of Stanford Group Company ("SGC").

II.

On or about May 28, 2013, more than one year after he had been denied the privilege of appearing or practicing before the Commission as an attorney, Barasch filed an application for reinstatement. As part of the reinstatement process, Barasch has sworn under penalty of perjury that he has complied with the Order, that he is not subject to any suspension or disbarment as an attorney by a court of the United States or of any state, territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice. Since entry of the Order, no information has come to the attention of the Commission relating to Barasch's character, integrity, professional conduct, or qualifications to practice before the Commission that would be a basis for denying his application, or that would be a basis for an adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice.

III.

Based on the foregoing, the Commission has determined that, for good cause shown, it is appropriate to reinstate Barasch, pursuant to Rule 102(e)(5), to appear or practice before the Commission.

Accordingly, it is **HEREBY ORDERED** that Spencer C. Barasch is reinstated to practice as an attorney before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70337 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15458

In the Matter of

LAWRENCE D. POLIZZOTTO

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT
TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND
IMPOSING CIVIL PENALTIES AND A
CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Lawrence D. Polizzotto ("Polizzotto" or "Respondent").

II.

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

4 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

On September 21, 2011, Polizzotto, the former head of investor relations for First Solar, Inc. ("First Solar"), selectively disclosed to approximately 20 sell-side analysts and institutional investors that First Solar would not receive a significant loan guarantee from the U.S. Department of Energy ("DOE") it and industry analysts had previously anticipated the company would receive. Polizzotto also directed a subordinate to make similar calls, and provided the subordinate with a list of talking points. The next morning, First Solar publicly disclosed the loss of the DOE loan guarantee and its stock price dropped by 6%. As a result of his conduct, Polizzotto caused First Solar's violation of Section 13(a) of the Exchange Act and Regulation FD promulgated thereunder.

Facts

1. First Solar is a Delaware corporation headquartered in Tempe, Arizona. The company manufactures and sells solar modules. It also designs, constructs, and sells complete solar power systems. The company's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on The NASDAQ Stock Market LLC under the trading symbol FSLR.
2. Respondent Polizzotto, is a resident of Arizona, and was First Solar's vice president of investor relations between April 2008 and November 2011. He was also a member of First Solar's Disclosure Committee, which among other things, focused on compliance with Regulation FD.
3. At all relevant times, Polizzotto was authorized by First Solar to speak on its behalf to investors, analysts, and other securities professionals, and was aware that Exchange Act Regulation FD [17 C.F.R. §§ 243.100, *et seq.*] prohibited him from selectively disclosing material nonpublic information to one party that was not publicly disclosed to all.
4. In June 2011, First Solar received conditional commitments from the DOE for loan guarantees of approximately \$4.5 billion relating to three separate First Solar projects: Antelope Valley Solar Ranch 1 ("AVSR"), Desert Sunlight, and Topaz Solar ("Topaz"). The loan guarantees were important to First Solar because they would allow the company to receive guaranteed low-cost financing from the federal government. However, each of the guarantees was

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.

conditioned upon First Solar meeting several requirements prior to September 30, 2011, the last day on which the DOE could make the loan guarantees.

5. Between June and September 2011, analysts wrote numerous reports speculating as to whether First Solar would be able to meet the September 30 deadline with respect to all three loan guarantees. Most analysts believed the company would meet the deadline for AVSR and Desert Sunlight, but the Topaz loan guarantee was the subject of more discussion because it had more regulatory hurdles to overcome prior to September 30. Topaz was also the largest of the three projects, having received a conditional \$1.93 billion loan guarantee commitment.

6. On September 13, 2011, Polizzotto attended an investor conference with First Solar's CEO at the time. During the conference, First Solar's CEO publicly expressed confidence that the company would receive all three loan guarantees.

7. On September 15, 2011, Polizzotto and several other executives learned that the DOE had decided not to provide a loan guarantee with respect to the Topaz project. The group of employees responsible for public disclosure regarding the DOE loans, including Polizzotto and one of First Solar's in-house lawyers, began discussing how and when the company should disclose the loss of the Topaz loan guarantee.

8. Late on the evening of September 15, in response to questions regarding the timing and content of a press release, the in-house lawyer sent an e-mail to the team, including Polizzotto, which stated the following:

"[I]f we receive a DOE notice tomorrow, we would not have to issue a press release or post something to our website the same day. We would, though, be restricted by Regulation FD in any [sic] answering questions asked by analysts, investors, etc. until such time that we do issue a press release or post to our website (assuming DOE itself doesn't make this notice public). ..."

9. After reading this e-mail and in anticipation of a meeting between a First Solar representative and a DOE representative to discuss the Topaz situation, Polizzotto sent an internal email that included the following statements:

"They [the DOE] need to recognize we are a public company and this is a material event for us. If they notify us of this without the other 2 approvals it will create huge concern to the investment community. We need them to communicate the whole picture with other 2 at the same time. ..."

10. Between Friday, September 16, and Wednesday, September 21, First Solar continued to work on the timing and content of the Topaz press release. The company also coordinated with the DOE to allow it to review the release.

11. On September 20, the U.S. House of Representatives' Committee on Energy and Commerce sent a letter to the DOE (the "Congressional Inquiry") inquiring about its loan guarantee program and the status of the guarantees that had not yet been closed, including all three

of First Solar's conditional guarantees. This event caused concern within the solar industry regarding whether the DOE would be able to move forward with its conditional loan guarantee commitments. On the morning of September 21, First Solar's stock dropped at the open by more than \$6 (or approximately 8%), from \$79.21 to below \$73. In addition, analysts began issuing research reports about the Congressional Inquiry, and Polizzotto began receiving numerous calls from analysts and investors.

12. When Polizzotto arrived at work on the morning of September 21, he knew the Topaz press release had not yet been issued, and found out shortly thereafter that it would not be issued until the following morning. Nevertheless, he drafted several Topaz-related talking points, which he and a subordinate investor relations employee delivered to more than 30 analysts and investors with whom they spoke that day. The talking points indicated that there was a higher probability the company would receive the loan guarantees for AVSR and Desert Sunlight, and a lower probability the company would receive the Topaz guarantee. As part of the "high probability/low probability" message, Polizzotto reminded analysts and institutional investors of previously-disclosed facts about Topaz that shed a negative light on the project, such as permitting obstacles, pending litigation, and a need to secure financing. The message effectively signaled that, contrary to the message that had been delivered by First Solar's CEO at a conference the prior week, the company no longer believed it would receive the Topaz guarantee. In addition, Polizzotto referred to a rumor that had been circulating regarding a potential Topaz buyer. According to the rumor, which First Solar had not publicly confirmed, a large energy company was in discussions with First Solar regarding the purchase of the Topaz project and could provide financing at a very low cost of capital, thereby significantly reducing the negative effect of not receiving the DOE loan guarantee.

13. In addition, in certain discussions, Polizzotto went further than his "high probability/low probability" message, and told at least one analyst and one institutional investor that if they wanted to be conservative, they should assume First Solar would not receive the Topaz loan guarantee.

14. In some instances, immediately after speaking with Polizzotto, analysts e-mailed the equity sales teams within their organizations with the message that they expected First Solar to receive two out of the three loan guarantees.

15. On the evening of September 21, First Solar's management learned from a news article that Polizzotto may have selectively disclosed the Topaz information to certain analysts and investors. As a result, they finalized their plans regarding the Topaz press release and issued it prior to the opening of the market on September 22. The company's stock opened that morning at \$68.95, down 6%.

16. As a result of the conduct described above, Polizzotto caused a violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)], and Regulation FD [17 C.F.R. §§ 243.100 *et seq.*] promulgated thereunder, by First Solar in connection with the selective disclosure of material nonpublic information described above.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Lawrence D. Polizzotto cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Regulation FD promulgated thereunder.

B. Respondent shall pay a civil money penalty of \$50,000 to the United States Treasury. Payment shall be made in the following installments: \$25,000.00 within 10 days of the entry of this Order; and \$25,000.00 within 365 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Lawrence D. Polizzotto as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Lorraine B. Echavarria, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., Suite 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary

5
By: *Jill M. Peterson*
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3668 / September 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15406

In the Matter of

**BENJAMIN DANIEL
DEHAAN,**

Respondent.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940**

I.

On August 5, 2013, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Benjamin Daniel DeHaan ("DeHaan" or "Respondent").

II.

In response to 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 Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

III.

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

5 of 90

1. DeHaan was the owner and president of Lighthouse Financial Partners, LLC ("Lighthouse"), an investment adviser registered with the State of Georgia, from 2007 until mid-2012. DeHaan, 38 years old, is a resident of Tucker, Georgia.

2. On October 10, 2012, an Order of Permanent Injunction was entered by consent against DeHaan, permanently enjoining him from future violations of Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Benjamin Daniel DeHaan and Lighthouse Financial Partners, LLC, Civil Action Number 1:12-CV-1996-TWT, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint in the civil action alleged that from approximately January 2011 through early May 2012, DeHaan moved approximately \$1.2 million in funds belonging to his clients from their accounts at a custodial broker-dealer into a bank account in Lighthouse's name that he controlled, thus gaining custody and control of these client assets. DeHaan and Lighthouse told the clients that these funds would be used to open new accounts at another broker-dealer. The complaint further alleged that once in this account, at least some of these funds were moved to a personal account belonging to DeHaan and to accounts used by Lighthouse for business expenses. At least \$600,000 in client funds remained unaccounted for at the time the complaint was filed. DeHaan was also alleged to have provided false documents to the Commission's staff and to an examiner for the State of Georgia.

4. On February 1, 2013, DeHaan pled guilty to one count of wire fraud in violation of Title 18, United States Code, Section 1343 before the United States District Court for the Northern District of Georgia, in United States of America v. Benjamin Daniel DeHaan, Criminal Information No. 1:13-CR-27-SCJ (N.D. Ga. Feb. 1, 2013).

5. The count of the criminal information to which DeHaan pled guilty alleged, among other things, that DeHaan defrauded investors and misappropriated funds from them to pay his own expenses and those of Lighthouse while providing false information to them in quarterly account statements.

6. On July 24, 2012, the Commissioner of Securities for the State of Georgia ("Commissioner") issued an administrative order revoking the registration of Lighthouse as an investment adviser and DeHaan as an investment adviser representative. In the Matter of Lighthouse Financial Partners, LLC (CRD# 142816), and Benjamin Daniel DeHaan (CRD# 4213868), Case No. ENSC-120156 (July 24, 2012).

7. The Commissioner's order found, among other things, that Lighthouse and DeHaan had provided false information and documents to the Commissioner's staff during an examination of Lighthouse's books and records.

IV.

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

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


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70388 / September 13, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3669 / September 13, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30687 / September 13, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15471

In the Matter of

SARKAUSKAS AND
ASSOCIATES, INC. and
JAMES M. SARKAUSKAS

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTIONS 203(e), 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(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Sarkauskas and Associates, Inc. (the "Adviser") and James M. Sarkauskas ("Sarkauskas") (collectively, "Respondents").

6 of 90

II.

In anticipation of the institution of these proceedings, the Adviser and Sarkauskas have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Exchange Act, Sections 203(e), 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, 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. The Adviser and its principal, Sarkauskas, violated Sections 206(1) and (2) of the Advisers Act when they purchased unit investment trust ("UIT") units bearing transactional sales charges in their clients' accounts without disclosing that identical UIT units sold at net asset value ("NAV") with no transactional sales charges ("no-load") were available for purchase and that the Adviser's purchases of the units bearing transactional sales charges substantially increased the Respondents' compensation, thereby creating a conflict of interest. Between August 2009 and August 2012 ("the relevant period"), the Adviser, through Sarkauskas, collected \$331,433.98 in such sales charges in addition to the Adviser's asset management fees.

Respondents

2. The Adviser is an investment adviser incorporated in Wisconsin and located in Rhinelander, Wisconsin. The Adviser was registered with the Commission as an investment adviser from March 19, 1995 through July 31, 2009, when it withdrew its registration because its assets under management fell below \$25 million, the statutory minimum for registration with the Commission at that time. It is currently registered with the State of Wisconsin.

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.

3. As of February 2012, the Adviser managed approximately \$18 million for approximately 140 clients. During the relevant period, the Adviser charged its advisory clients an annual asset management fee of between .75% and 1.75% of assets under management.

4. Sarkauskas, age 68, is a resident of Rhinelander, Wisconsin. He founded the Adviser in 1993. During the relevant period, Sarkauskas was the Adviser's president and chief compliance officer and exercised control over management and policies of the Adviser. He has been a registered representative associated with various registered broker-dealers since the 1970s.

Background

5. During the relevant period, Sarkauskas was a registered representative associated with a broker-dealer registered with the Commission ("broker-dealer"), and received transaction-based compensation from his brokerage activities. All of the Adviser's clients had accounts at this broker-dealer, where their assets were held. Sarkauskas was a registered representative of record on all of these advisory accounts.

6. The asset management fees charged to the clients were deducted from their brokerage accounts, and all advisory client trades were made through the broker-dealer. Under its agreement with Sarkauskas, the broker-dealer received 9% of the asset management fees and transaction-based compensation charged to the advisory clients' accounts, and it transmitted the remaining 91% to Sarkauskas. Sarkauskas then assigned these funds to the Adviser.

7. During the relevant period, the Adviser's primary investment strategy was to purchase UITs sponsored by a broker-dealer registered with the Commission (the "UIT sponsor"). Sarkauskas established the Adviser's practices regarding the units of UITs to be purchased for the Adviser's clients. He also purchased UITs for advisory clients.

8. A UIT is a pooled investment vehicle in which a portfolio of securities is selected by the sponsor (or its product partner) and deposited into the trust. The securities are invested according to a specific investment objective or strategy in a fixed, unmanaged portfolio which is held for a predetermined period of time. Most of the UITs that the Adviser purchased had termination dates within 12 to 15 months of when they were purchased.

9. The sales charges for the relevant UITs included the following components: 1) an initial sales charge, which is applied to the purchase amount and is paid at the time of purchase; and 2) a deferred sales charge, which is a fixed dollar amount deducted in periodic installments, typically following the end of the initial offering period. The combination of the initial and deferred sales charges was defined in the relevant UITs' prospectuses as the "transactional sales charge."

10. The UIT sponsor generally makes available units of the same UIT that are identical, except that some are sold with a transactional sales charge and others are sold at NAV with no transactional sales charge. The no-load units are designed for fee-based accounts, where the adviser or account manager is primarily compensated by a fee based on a fixed rate or a percentage

of assets in the account. The maximum transactional sales charges for the UITs purchased by Sarkauskas were generally 2.95%.

11. The Adviser and Sarkauskas could have purchased the same UITs on a no-load basis for their clients. Instead, they chose to purchase units that carried transactional sales charges, thereby substantially increasing their compensation at the expense of their clients.

12. During the relevant period, the Adviser, through Sarkauskas, collected \$331,433.98 in transactional sales charges from the sale of UITs to advisory clients, in addition to the Adviser's asset management fees. UIT transactional sales charges were a significant portion of the Adviser's revenue, comprising approximately 20% of total revenue. Moreover, in several instances, the Adviser's practice of collecting transactional sales charges along with asset management fees significantly increased the clients' overall expenses.

13. During the relevant period, the Adviser failed to disclose the facts setting forth the conflict of interest arising from its purchases of the UITs. The Adviser purchased UIT units bearing transactional sales charges in its clients' accounts without disclosing that identical no-load UIT units were available for purchase and that the Adviser received substantially more compensation when it purchased the units with loads.

14. In September 2008, examiners from the Commission's Chicago Regional Office's Branch of Investment Management Examinations conducted an examination of the Adviser. On August 7, 2009, the exam staff sent the Adviser a deficiency letter which advised that the Adviser may have violated the antifraud provisions of the Advisers Act by purchasing the UIT units that bore transactional sales charges and by failing to disclose the conflict of interest that arose when the Adviser purchased UIT units which bore transactional sales charges on behalf of its clients.

15. After receiving the deficiency letter, Sarkauskas failed to change the Adviser's practices or disclosures relating to its purchases of UITs bearing transactional sales charges, and continued to purchase the UITs bearing transactional sales charges.

16. As a result of the conduct described above, the Adviser willfully violated Sections 206(1) and 206(2) of the Advisers Act which prohibit fraudulent conduct by an investment adviser.

17. As a result of the conduct described above, Sarkauskas willfully violated Sections 206(1) and 206(2) of the Advisers Act which prohibit fraudulent conduct by an investment adviser.

Undertaking

18. The Adviser has undertaken to cease operations and wind down its business within 90 days of the entry of this Order.

19. The Adviser has undertaken to certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to

demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Kathryn A. Pyszka, Assistant Regional Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

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

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

A. The Adviser cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

B. Sarkauskas cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

C. Sarkauskas 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;

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

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.

D. Any reapplication for association by Sarkauskas 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 Sarkauskas, 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.

E. The Adviser and Sarkauskas, jointly and severally, shall pay disgorgement of \$331,433.98, and prejudgment interest of \$18,403.22, for a total of \$349,837.20, plus post Order interest, to the Securities and Exchange Commission. Payment shall be made in the following installments: \$150,000 of the total \$349,837.20 in disgorgement and prejudgment interest within 60 days of the date of entry of the Order, and the remainder, plus any post Order interest accrued thereon, within one year of the date of entry of the Order. Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post Order interest, which accrues pursuant to SEC Rule of Practice 600 on any unpaid amounts due after 30 days of issuance of the Order. Prior to making the final payment set forth herein, Sarkauskas shall contact the staff of the Commission for the additional amount due for the final payment. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalty, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Sarkauskas and Associates, Inc. and James M. Sarkauskas as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Timothy L. Warren, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL 60604.

F. Sarkauskas shall, within one year of the date of entry of this Order, pay a civil money penalty in the amount of \$100,000, plus any post Order interest accrued thereon, to the Securities and Exchange Commission. Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post Order interest, which accrues

² The minimum threshold for transmission of payment electronically is \$1,000,000 as of December 31, 2012. For amounts below the threshold, Respondents must make payments pursuant to option (2) or (3) above.

pursuant to 31 U.S.C. 3717 on any unpaid amounts due after 30 days of issuance of the Order. Prior to making the final payment set forth herein, Sarkauskas shall contact the staff of the Commission for the additional amount due for the final payment. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalty, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;³
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Sarkauskas and Associates, Inc. and James M. Sarkauskas as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Timothy L. Warren, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL 60604.

G. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, interest and civil penalty referenced in paragraphs E. and F. 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, Sarkauskas agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Sarkauskas's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Sarkauskas agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought

³ See note 2 above.

against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

H. The disgorgement, prejudgment interest and civil penalty shall be aggregated in the Fair Fund, which shall be maintained in the type of account directed by the 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 clients for 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.

I. The Adviser shall comply with the undertakings enumerated in in Section III, Paragraphs 18 and 19 above.

By the Commission.

Elizabeth M. Murphy
Secretary


By Jill M. Peterson
Assistant Secretary

*Commissioner Gallagher
Commissioner Fineman
Disapproved*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9450 / September 13, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15472

In the Matter of

PUBLIC HEALTH TRUST OF
MIAMI-DADE COUNTY, FLORIDA

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
8A OF THE SECURITIES ACT OF 1933,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against the Public Health Trust of Miami-Dade County, Florida ("Respondent" or "PHT").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

7 of 90

SUMMARY

1. This matter involves misrepresentations and omissions in an \$83 million municipal bond offering in August 2009 (the "Bonds") conducted on behalf of the PHT, which significantly misstated PHT's revenues and misrepresented that PHT's financial statements were prepared according to generally accepted accounting principles ("GAAP"). The Bonds were issued by Miami-Dade County, Florida, ("the County") for the benefit of PHT, a quasi-governmental entity that operates the County's public hospital system known as the Jackson Health System ("Jackson").

2. In the August 18, 2009 Official Statement describing the offering ("Official Statement"), PHT made material misrepresentations and omissions regarding PHT's current and future revenue. The Official Statement represented that PHT's projected non-operating loss for full fiscal year 2009 ending September 30, 2009 would be \$56 million. Several months after the Bonds were sold, PHT's external auditors discovered problems with the patient accounts receivable valuation resulting in a large adjustment to net income. PHT ultimately reported a non-operating loss of \$244 million for 2009, or more than four times what had been projected in the Official Statement. PHT also misrepresented the projected loss in the Official Statement as an "operating" loss rather than a "non-operating" loss, which are materially different concepts that in 2008 differed by \$453 million. PHT lacked a reasonable basis for its \$56 million loss projection.

3. PHT also misrepresented unaudited information in the Official Statement. The Official Statement purported to show tabular income statement information for the eight month period that ended May 31, 2009. However, the tables setting forth this partial-year information were materially misleading in that they actually contained information only through April 30, 2009, a seven month period, rather than the eight month time period as represented in the tables. This resulted in the material misrepresentation of the partial year information, including the non-operating loss to date.

4. PHT also failed to properly account for an adverse arbitration award involving patient accounts receivable in the 2008 audited financial statements appended to the Official Statement. That December 2008 arbitration award required PHT to pay \$3.9 million in cash to a third-party receivables company (the "TPRC") as well as transfer to the TPRC of \$360 million face amount of existing accounts receivable and \$250 million face amount of future accounts receivable. Accordingly, PHT misrepresented that its 2008 audited financial statements were prepared in accordance with generally accepted accounting principles ("GAAP").

5. By engaging in this conduct discussed above and more fully below, PHT violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

RESPONDENT

6. The Public Health Trust of Miami-Dade County, Florida, is a quasi-governmental agency that operates the public health system in the County pursuant to ordinance and Florida state law. PHT contracts with the County to provide medical care to indigent patients

and other services. At the time relevant to the conduct described in this Order, PHT was governed by a 17 member board of trustees (including two County Commissioners) that were appointed by a nominating council for three year terms. Since May 2011 PHT has been governed by a temporary 7 member Fiscal Recovery Board.

FACTS

A. PHT's Relationship With The County

7. PHT was created as a separate legal entity in 1973 pursuant to a Florida statute and County ordinance to operate and manage the public health system in the County. The primary hospital within the health system is Jackson Memorial Hospital, one of the largest medical centers in the United States. There are also more than a dozen other clinics and medical facilities under PHT's purview.

8. PHT's principal source of revenue consists of charges for patient services, generally paid by commercial insurers, Medicaid, and Medicare. Due to the large number of indigent patients treated by the health system and other unfunded mandates, PHT's patient revenue falls far short of expenses. For 2007 and 2008, the two fiscal years prior to the bond issue, PHT had operating losses of \$424 million and \$427 million, respectively.

9. The County contributes non-operating revenues to PHT to offset the operating losses in several ways. Since 1991, the County has levied a voter approved 0.5% sales tax to be used for the operation, maintenance, and administration of PHT's hospitals and clinics. The County also makes state-mandated appropriations to PHT and makes voluntary contributions in years that extra funds are available, although it has represented that PHT should not expect voluntary contributions in the foreseeable future. For 2007 and 2008, the sales tax revenue and other County contributions represented nearly 20% of the PHT's combined total operating and non-operating revenues.

B. 2009 Bond Offering

10. In early 2009, PHT began discussions with the County about a new bond issue. The County was the issuer of the Bonds, which are not general obligations of the County and are to be repaid solely from PHT's revenues. The proceeds of the new issue were to be used for capital improvements in the public hospitals operated by PHT. The County offered the Bonds to the public on or about August 18, 2009.

11. The County's payment of the debt service on the Bonds is secured by a pledge of PHT's "gross revenues," which are defined as all revenues and other monies received by PHT, including both operating and non-operating revenues. Pursuant to the ordinance authorizing the Bonds, PHT covenanted to charge appropriate rates for patient services such that net revenue equals at least 110% of the debt service requirement (the "Rate Covenant").

12. Pursuant to a Memorandum of Understanding between the County and PHT, the County makes monthly deposits of a portion of the sales tax revenue into a debt service fund in an amount sufficient to cover the debt service prior to any of the sales tax revenue being used for hospital operational expenses. While the sales tax produced sufficient revenue to cover the debt service, as noted in the Official Statement, there is no guarantee that the sales tax will remain in effect through the term of these Bonds.

C. PHT's Worsening Financial Situation

13. PHT was aware of indications prior to the sale of the Bonds that its financial condition was deteriorating. On October 1, 2008, the first day of PHT's 2009 fiscal year, PHT implemented a new billing system to handle patient accounts and billing. During the implementation, PHT failed to issue many bills for months due to problems with coding and billing functions, and many bills that were issued ended up being returned due to errors, causing further delays to PHT's receipt of funds. As a result, PHT's patient accounts receivable began to rise and cash receipts began to decline.

14. PHT's cash position became troubling in early 2009, around the same time the Bonds were first contemplated. The term "days cash on hand" ("DCOH") as used in PHT's financial reporting refers to how many days PHT would be able to pay bills based on existing available funds. In fiscal years 2007 and 2008 the average DCOH was approximately 42 days. For the eight months ended May 31, 2009, PHT's DCOH averaged 20.9 days, less than half of the previous years' average. These amounts were disclosed in the Official Statement.

15. The rising level of patient accounts receivable and declining cash on hand caused concern among PHT trustees and executive management. PHT's former Controller began questioning the amount of accounts receivable and collection rates reported that were used to calculate PHT's revenue figures. Initially, the Controller and other PHT managers believed that the rising accounts receivable and declining cash on hand were due to the widespread billing delays caused by implementation of the new billing system.

16. During the summer of 2009, the Controller had a number of meetings with the director of the revenue cycle department and the head of the budgeting department, neither of whom reported to him, in order to determine the cause of the rising accounts receivable. They performed various analyses and generated several reports on PHT's revenue and patient accounts receivable, with inconsistent results. Nearly all of the analyses showed that the amount of accounts receivable on the books was too high, although at least one showed they were too low. It was not until November 2009, after the audit for the fiscal year ended September 30, 2009, had commenced and after the Bonds had been issued, that the Controller concluded that a downward adjustment to accounts receivable would be required.

17. The audited financial statements in March 2010 included an adjustment to accounts receivable, and therefore revenue, in excess of \$180 million. The auditor found material weaknesses in PHT's internal controls that caused an overstatement of accounts receivable. For example, the auditor found the new billing system applied inaccurate higher collection rates to the

gross patient charges and captured patient charges for services that were not reimbursable by insurers. The auditor further noted that PHT's system did not discover PHT was treating more patients with lower potential for collection than in prior years.

D. Preparation of the Official Statement

18. During the summer of 2009, the same time the Controller was looking into the billing and accounts receivable issues, the bond working group was preparing initial drafts of the Official Statement. The bond working group responsible for preparation of the Official Statement consisted of, among others, PHT's former Controller and the former CFO, members of the County's finance department, members of the County Attorney's office, bond counsel, disclosure counsel, underwriters, and a financial advisor.

1. Projected Financial Information

19. The Controller was primarily responsible for providing the contents of Appendix A which contained financial information about PHT, including PHT's unaudited financial statements with partial year information through May 31, 2009. This partial information included tables that were intended to show income statement information for the eight month period that ended May 31, 2009. However the tables were materially misleading in that they actually contained information only through April 30, 2009, while the relevant column heading stated that the information was as of May 31, 2009. This resulted in the misreporting of a number of income statement items. For example, the loss from operations through May 31st, although reported as negative \$255 million, was actually negative \$290 million.

20. The Controller and the CFO attended a meeting of the bond working group in July 2009, at which time they informed the working group that the billing problems affecting PHT's then current cash collection rate would likely lead to an inability to meet the rate covenant requirement that PHT's net revenue must equal at least 110% of debt service. To address this deficiency in the bond documents, disclosure counsel subsequently added language to the Official Statement stating that PHT's management believed the rate covenant would likely not be met. The new disclosure language also listed factors causing the inability to meet the rate covenant requirements, including a decline in revenue from the 0.5% sales tax due to economic conditions, an increase in indigent patient care, and an absence of voluntary contributions from the County. While the Official Statement attributed the decline in cash flow, in part, to the problems with the new billing system, it did not connect the problems with the new system to the failure to meet the rate covenant.

21. Disclosure counsel also modified Appendix A to include PHT's internal projections showing it would suffer a loss of \$56 million for fiscal year 2009. This number was generated by the budget department using stale cash collection numbers in the midst of known problems with the new billing system. Moreover, by virtue of the lack of adequate communication among departments, the budget department was not updating its collection rates in a timely fashion. In short, PHT lacked a reasonable basis for its loss projection, making this statement materially misleading.

2. Arbitration Award

22. In December 2006, PHT sold to the TPRC approximately \$1.8 billion face value of patient accounts receivable. Most, if not all, of these accounts receivable were "self-pay" accounts (patients with no insurance) with discharge dates between 1998 and 2005 for which PHT was not going to spend further resources in collecting and had purportedly written off.

23. Soon after the sale, the TPRC disputed the quality of the accounts receivable that were sold, leading to the TPRC's filing of a lawsuit against PHT in December 2007 for breach of contract. The TPRC allegedly discovered that some of the accounts receivable were uncollectible for various reasons, including that patients had filed for bankruptcy, or the patients had already paid their bills or were deceased. There were also instances in which patients made payments directly to PHT for accounts that had been sold to TPRC and those payments were not remitted to TPRC.

24. In September 2008, the parties agreed to arbitrate all claims asserted in the lawsuit. TPRC prevailed on its claims and the arbitrator signed an award in TPRC's favor in December 2008. The award required:

- Immediate payment by PHT to the TPRC of \$3.9 million;
- Immediate transfer of \$360 million face amount of self-pay accounts receivable; and
- Future transfer of approximately \$250 million face amount of self-pay accounts receivable over a 24 month period.

The potential value of the accounts receivable transferred under the arbitration award was greater than the original accounts receivable sold to the TPRC because they were recent and the award required that no collection efforts be made by PHT prior to transfer.

25. PHT had historically valued self-pay accounts receivable at 2% to 5% of their face amount. However, PHT wrote the transferred accounts receivable off completely at the time of transfer without any analysis to determine the value of the replacement accounts awarded to TPRC pursuant to the arbitration award. Under the relevant accounting standards, PHT was required to perform such an analysis as part of its evaluation of whether to accrue an expense related to the arbitration award or to disclose the arbitration award in the notes to its financial statements. As a result of PHT's failure to perform the analysis, it failed to properly account for the arbitration award in its 2008 audited financial statements, which were included in the Official Statement.

E. Misrepresentations and Omissions in the Official Statement

26. The Official Statement for the 2009 bond issue contained material misrepresentations concerning PHT's projected loss for fiscal year 2009 and the purported eight month partial year information. The Official Statement also included 2008 audited financial statements in which PHT failed to properly account for the adverse arbitration award and,

therefore, PHT misrepresented that its 2008 audited financial statements were prepared in accordance with GAAP.

1. The Projected Loss for Fiscal Year 2009

27. Appendix A to the Official Statement contained unaudited financial information and made revenue projections for fiscal year 2009. That appendix stated: "Internal projections for the Trust indicate that in the absence of corrective action, the Trust could experience an operating loss of \$56 million for the current fiscal year and \$168 million for the following year."

28. PHT lacked a reasonable basis to support its projected \$56 million non-operating loss for the fiscal year 2009 contained in the Official Statement. PHT based the projection on stale cash collection rates and, due to lack of communications between departments, failed to timely identify the overstated accounts receivable, causing the Official Statement to be inaccurate. Additionally, the Official Statement misrepresented the projected non-operating loss as an operating loss, materially different concepts that in 2008 differed by \$453 million.

29. Moreover, the tables in Appendix A to the Official Statement containing partial year information were materially misleading in that they actually contained information only through April 30, 2009, while the relevant column heading stated that the information was as of May 31, 2009. Consequently, the loss from operations through May 31st, although reported as negative \$255 million, was actually negative \$290 million.

2. PHT Misrepresented its Compliance with GAAP

30. In the Official Statement for the Bonds, PHT misrepresented that its 2008 audited financial statements were prepared in accordance with GAAP. PHT did not comply with GAAP by failing to properly account for the arbitration award in the financial statements.

31. Despite the fact that PHT wrote-off the value of the accounts receivable completely when PHT transferred them to the TPRC, the \$610 million face amount of replacement accounts had sufficient value such that PHT should have conducted an evaluation. PHT performed no analysis on the value of the accounts transferred to determine whether to accrue an expense related to the arbitration award or to disclose the arbitration award in the notes to its financial statements as required by the relevant accounting standards.

LEGAL DISCUSSION

32. Municipal securities represent an important part of the financial markets available to investors. Although the County was the issuer of the Bonds, the relevant information contained in the Official Statement was that of PHT and was provided by PHT employees. PHT had an obligation to ensure that financial information contained in its disclosure documents provided to issuers is not materially misleading. Proper disclosure allows investors to understand and evaluate the financial health of the state or local municipality in which they invest.

33. PHT, which provided the financial information set forth in the Official Statement, is subject to the antifraud provisions of the federal securities laws, including Section 17(a) of the Securities Act. Section 17(a)(2) of the Securities Act makes it unlawful "in the offer or sale of any securities ... to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 17(a)(3) of the Securities Act makes it unlawful "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." A fact is material if there is a substantial likelihood that its disclosure would be considered significant by a reasonable investor. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); In the Matter of the City of Miami Florida, et al., 79 S.E.C. Docket 2580, 2003 WL 1412636, Release Nos 33-8213, 34-47552 (March 21, 2003). Violations of Sections 17(a)(2) and (3) may be established by showing negligence. SEC v. Hughes Capital Corp., 124 F.3d 449, 453-54 (3d Cir. 1997); SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992); In the Matter of the State of New Jersey, Securities Act Release No. 33-9135, Admin. Proc. File No. 3-14009 (August 18, 2010).

VIOLATIONS

34. As a result of the negligent conduct described above, PHT violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Specifically, PHT lacked a reasonable basis for the \$56 million loss projection for fiscal year 2009 in the Official Statement, and made material misrepresentations concerning its eight month partial year figures. PHT also materially misrepresented that its 2008 financial statements were prepared in accordance with GAAP because it failed to properly account for the patient accounts receivable required to be transferred pursuant to the arbitration award as described above. These misrepresentations and omissions were material because they were important to investors in evaluating whether to purchase Bonds through this municipal securities offering, and constitute violations of Section 17(a)(2) of the Securities Act.

35. PHT also violated Section 17(a)(3) of the Securities Act by engaging in a course of conduct or business practice that operated as a fraud or deceit upon purchasers of the Bonds. PHT failed to apply accurate collection rates to the calculation of patient revenue and accounts receivable in its new billing system, resulting in an overstatement of accounts receivable and an inaccurate projected loss in the Official Statement. Additionally, PHT failed to ensure that liabilities related to litigation claims were accurately disclosed in its financial statements.

PHT'S REMEDIAL EFFORTS

36. In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff and the remedial acts taken by PHT, including the hiring of outside consultants after the 2009 audit results were announced and a restructuring of the PHT board to focus on regaining financial health.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, it is hereby ORDERED that:

The Public Health Trust of Miami-Dade County, Florida shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

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. 70411 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15486

In the Matter of

WAR CHEST CAPITAL
PARTNERS LLC,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against War Chest Capital Partners LLC ("War Chest" or "Respondent").

II.

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

8 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by War Chest, a New York-based private equity firm. 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. On seven occasions, from November 2010 through September 2011, War Chest bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$187,036.

Respondent

3. War Chest Capital Partners LLC is a Delaware limited liability company, which was incorporated on March 30, 2009, with its principal place of business in New York, New York. The company provides advisory services to one domestic fund with total assets under management of approximately \$8,000,000. It is not a registered investment adviser.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

War Chest's Violations of Rule 105 of Regulation M

6. On November 8, 2010, War Chest sold short 11,000 shares of BlackRock Inc. ("BLK") during the restricted period at a price of \$169.2811 per share. On November 8, 2010, BLK announced the pricing of a follow-on offering of its common stock at \$163.00 per share. War Chest received an allocation of 31,375 shares in that offering. The difference between War Chest's proceeds received from the restricted period short sales of BLK shares and the price paid for the 11,000 shares received in the offering was \$69,092.11. Respondent also improperly obtained a benefit of \$54,849.50 by purchasing the remaining 20,375 shares at a discount from BLK's market price. Thus, War Chest's participation in the BLK offering netted total profits of \$123,941.60.

7. On December 14, 2010, War Chest sold short 15,000 shares of HCP Inc. ("HCP") during the restricted period at an average price of \$33.32 per share. On December 14, 2010, HCP announced the pricing of a follow-on offering of its common stock at \$32 per share. War Chest received an allocation of 18,600 shares in that offering. The difference between War Chest's proceeds received from the restricted period short sales of HCP shares and the price paid for the 15,000 shares received in the offering was \$19,800.00. Respondent also improperly obtained a benefit of \$6,388.92 by purchasing the remaining 3,600 shares at a discount from HCP's market price. Thus, War Chest's participation in the HCP offering netted total profits of \$26,188.92.

8. On December 15, 2010, War Chest sold short 12,500 shares of Cloud Peak Energy Inc. ("CLD") during the restricted period at an average price of \$20.0180 per share. On December 15, 2010, CLD announced the pricing of a follow-on offering of its common stock at \$19.50 per share. War Chest received an allocation of 16,100 shares in that offering. The difference between War Chest's proceeds received from the restricted period short sales of CLD shares and the price paid for the 12,500 shares received in the offering was \$6,475.00. Respondent also improperly obtained a benefit of \$1,033.56 by purchasing the remaining 3,600 shares at a discount from CLD's market price. Thus, War Chest's participation in the CLD offering netted total profits of \$7,508.56.

9. On April 11, 2011, War Chest sold short 5,000 shares of Cobalt International Energy Inc. ("CIE") during the restricted period at a price of \$15.04 per share. On April 11, 2011, CIE announced the pricing of a follow-on offering of its common stock at \$14 per share. War Chest received an allocation of 20,630 shares in that offering. The difference between War Chest's proceeds received from the restricted period short sales of CIE shares and the price paid for the 5,000 shares received in the offering was \$5,200.00. Respondent also improperly obtained a benefit of \$1,178.50 by purchasing the remaining 15,630 shares at a discount from CIE's market price. Thus, War Chest's participation in the CIE offering netted total profits of \$6,378.50.

10. On May 11, 2011, War Chest sold short 7,500 shares of NorthStar Realty Finance Co. ("NRF") during the restricted period at a price of \$4.6654 per share. On May 11, 2011, NRF announced the pricing of a follow-on offering of its common stock at \$4.25 per share. War Chest received an allocation of 42,880 shares in that offering. The difference between War Chest's proceeds received from the restricted period short sales of NRF shares and the price paid for the 7,500 shares received in the offering was \$3,115.50. Respondent also improperly obtained a

benefit of \$4,355.28 by purchasing the remaining 35,380 shares at a discount from NRF's market price. Thus, War Chest's participation in the NRF offering netted total profits of \$7,470.78.

11. On July 14, 2011, War Chest sold short 3,000 shares of Spectrum Brands Holdings Inc. ("SPB") during the restricted period at a price of \$28.5760 per share. On July 15, 2011, SPB announced the pricing of a follow-on offering of its common stock at \$28.00 per share. War Chest received an allocation of 15,600 shares in that offering. The difference between War Chest's proceeds from the restricted period short sales of SPB shares and the price paid for the 3,000 shares received in the offering was \$1,728.00. Thus, War Chest's participation in the SPB offering netted total profits of \$1,728.00.

12. On September 20, 2011 and September 21, 2011, War Chest sold short 84,370 shares of NewCastle Investment Corp. ("NCT") during the restricted period at an average price of \$4.7138 per share. On September 21, 2011, NCT announced the pricing of a follow-on offering of its common stock at \$4.55 per share. War Chest received an allocation of 176,935 shares in that offering. The difference between War Chest's proceeds from the restricted period short sales of NCT shares and the price paid for the 84,370 shares received in the offering was \$13,819.81. Thus, War Chest's participation in the NCT offering netted total profits of \$13,819.81.

13. In total, War Chest's violations of Rule 105 resulted in profits of \$187,036.17.

Violations

14. As a result of the conduct described above, War Chest violated Rule 105 of Regulation M under the Exchange Act.

War Chest's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent War Chest cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. War Chest shall pay disgorgement of \$187,036.17, prejudgment interest of \$10,533.18, and a civil money penalty in the amount of \$130,000 (for a total of \$327,569.35) to the United States Treasury. Payments shall be made in the following installments:

1. \$65,000.35 on the day of entry of this Order;
2. \$65,000 within 90 days of entry of this Order;
3. \$65,000 within 180 days of entry of this Order;
4. \$65,000 within 270 days of entry of this Order
5. \$67,569, plus post-judgment interest on the payments described in Section IV.B.1-4 pursuant to SEC Rule of Practice 600, within 360 days of entry of this Order.

Prior to making the payment described in Section IV.B.5., Respondent shall contact the Commission staff to ensure the inclusion of post-judgment interest. If any payment is not made by the date the payment is required by Section IV.B.1-5 of this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying War Chest as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary

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

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70392 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15473

In the Matter of

Blackthorn Investment
Group, LLC,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Blackthorn Investment Group, LLC. ("Blackthorn" or "Respondent").

II.

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

9 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Blackthorn, a Kansas-based registered investment adviser with the Commission. 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. On sixteen occasions, from June 2009 through May 2011, Blackthorn bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$270,729.

Respondent

3. Blackthorn Investment Group, LLC is a Kansas limited liability company with its principal place of business in Overland Park, Kansas. Blackthorn, a registered investment adviser, manages one domestic fund and one offshore fund and has over \$826 million in regulatory assets under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Blackthorn's Violations of Rule 105 of Regulation M

6. On October 21, 2009 and October 22, 2009, Blackthorn sold short 15,000 shares of American Capital Agency Corp. ("AGNC") during the restricted period at an average price of \$28.6435 per share. On October 26, 2009, AGNC announced the pricing of a follow-on offering of its common stock at \$26.60 per share. Blackthorn received an allocation of 50,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of AGNC shares and the price paid for the 15,000 shares received in the offering was \$30,652.50. Thus, Blackthorn's participation in the AGNC offering netted total profits of \$30,652.50.

7. On September 21, 2010, Blackthorn sold short 5,000 shares of American Capital Agency Corp. ("AGNC") during the restricted period at an average price of \$29.7002 per share. On September 28, 2010, AGNC announced the pricing of a follow-on offering of its common stock at \$26.00 per share. Blackthorn received an allocation of 25,000 shares in that offering. The difference between Blackthorn's proceeds received from the restricted period short sales of AGNC shares and the price paid for the 5,000 shares received in the offering was \$18,501.00. Respondent also improperly obtained a benefit of \$6,170.00 by purchasing the remaining 20,000 shares at a discount from AGNC's market price. Thus, Blackthorn's participation in the AGNC offering netted total profits of \$24,671.00.

8. On May 3, 2011 and May 4, 2011, Blackthorn sold short 12,640 shares of BRE Properties Inc. CL A ("BRE") during the restricted period at an average price of \$50.0663 per share. On May 6, 2011, BRE announced the pricing of a follow-on offering of its common stock at \$48.00 per share. Blackthorn received an allocation of 15,000 shares in that offering. The difference between Blackthorn's proceeds received from the restricted period short sales of BRE shares and the price paid for the 12,640 shares received in the offering was \$26,118.03. Respondent also improperly obtained a benefit of \$35.16 by purchasing the remaining 2,360 shares at a discount from BRE's market price. Thus, Blackthorn's participation in the BRE offering netted total profits of \$26,153.19.

9. On November 1, 2010 and November 2, 2010, Blackthorn sold short 12,350 shares of Chimera Investment Corp. ("CIM") during the restricted period at an average price of \$4.0671 per share. On November 3, 2010, CIM announced the pricing of a follow-on offering of its common stock at \$3.85 per share. Blackthorn received an allocation of 100,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of CIM shares and the price paid for the 12,350 shares received in the offering was \$2,681.19. Respondent also improperly obtained a benefit of \$2,200.02 by purchasing the remaining 87,650 shares at a discount from CIM's market price. Thus, Blackthorn's participation in the CIM offering netted total profits of \$4,881.21.

10. On November 15, 2010 and November 16, 2010, Blackthorn sold short 25,000 shares of CVR Energy Inc. ("CVI") during the restricted period at an average price of \$11.0838 per share. On November 18, 2010, CVI announced the pricing of a follow-on offering of its common stock at \$10.75 per share. Blackthorn received an allocation of 5,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of

CVI shares and the price paid for the 5,000 shares received in the offering was \$1,669.00. Thus, Blackthorn's participation in the CVI offering netted total profits of \$1,669.00.

11. On February 2, 2011, Blackthorn sold short 600 shares of CVR Energy Inc. ("CVI") during the restricted period at a price of \$17.5467 per share. On February 2, 2011, CVI announced the pricing of a follow-on offering of its common stock at \$16.75 per share. Blackthorn received an allocation of 150,000 shares in that offering. The difference between Blackthorn's proceeds received from the restricted period short sales of CVI shares and the price paid for the 600 shares received in the offering was \$478.02. Respondent also improperly obtained a benefit of \$27,205.74 by purchasing the remaining 149,400 shares at a discount from CVI's market price. Thus, Blackthorn's participation in the CVI offering netted total profits of \$27,683.76.

12. On January 5, 2010, Blackthorn sold short 13,400 shares of Energy Transfer Partners LP ("ETP") during the restricted period at a price of \$46.3803 per share. On January 6, 2010, ETP announced the pricing of a follow-on offering of its common stock at \$44.72 per share. Blackthorn received an allocation of 11,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of ETP shares and the price paid for the 11,000 shares received in the offering was \$18,263.30. Thus, Blackthorn's participation in the ETP offering netted total profits of \$18,263.30.

13. On January 26, 2011, Blackthorn sold short 15,000 shares of Fifth Street Finance Corp. ("FSC") during the restricted period at an average price of \$13.2037 per share. On February 1, 2011, FSC announced the pricing of a follow-on offering of its common stock at \$12.65 per share. Blackthorn received an allocation of 4,500 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of FSC shares and the price paid for the 4,500 shares received in the offering was \$2,491.65. Thus, Blackthorn's participation in the FSC offering netted total profits of \$2,491.65.

14. On March 17, 2010, Blackthorn sold short 10,000 shares of Genpact Ltd. ("G") during the restricted period at an average price of \$15.4358 per share. On March 18, 2010, G announced the pricing of a follow-on offering of its common stock at \$15.00 per share. Blackthorn received an allocation of 10,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of G shares and the price paid for the 10,000 shares received in the offering was \$4,358.00. Thus, Blackthorn's participation in the G offering netted total profits of \$4,358.00.

15. On March 21, 2011, Blackthorn sold short 30,000 shares of Gulfport Energy Corp. ("GPOR") during the restricted period at an average price of \$33.4194 per share. On March 25, 2011, GPOR announced the pricing of a follow-on offering of its common stock at \$32.00 per share. Blackthorn received an allocation of 17,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of GPOR shares and the price paid for the 17,000 shares received in the offering was \$24,129.80. Thus, Blackthorn's participation in the GPOR offering netted total profits of \$24,129.80.

16. From March 11, 2011 through March 16, 2011, Blackthorn sold short 20,000 shares of Hatteras Financial Corp. ("HTS") during the restricted period at an average price of \$30.1960 per share. On March 18, 2011, HTS announced the pricing of a follow-on offering of its common stock at \$28.50 per share. Blackthorn received an allocation of 5,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of HTS shares and the price paid for the 5,000 shares received in the offering was \$8,480.00. Thus, Blackthorn's participation in the HTS offering netted total profits of \$8,480.00.

17. On March 16, 2011, Blackthorn sold short 25,000 shares of Invesco Mortgage Capital Inc. ("IVR") during the restricted period at an average price of \$23.4785 per share. On March 22, 2011, IVR announced the pricing of a follow-on offering of its common stock at \$21.25 per share. Blackthorn received an allocation of 25,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of IVR shares and the price paid for the 25,000 shares received in the offering was \$55,712.50. Thus, Blackthorn's participation in the IVR offering netted total profits of \$55,712.50.

18. On July 12, 2010, Blackthorn sold short 20,000 shares of Annaly Capital Management Inc. ("NLY") during the restricted period at an average price of \$18.16 per share. On July 14, 2010, NLY announced the pricing of a follow-on offering of its common stock. Blackthorn received an allocation of 20,000 shares in that offering at \$17.60 per share. The difference between Blackthorn's proceeds from the restricted period short sales of NLY shares and the price paid for the 20,000 shares received in the offering was \$11,200.00. Thus, Blackthorn's participation in the NLY offering netted total profits of \$11,200.00.

19. From June 4, 2009 through June 9, 2009, Blackthorn sold short 171,700 shares of Stone Energy Corp. ("SGY") during the restricted period at an average price of \$8.6012 per share. On June 10, 2009, SGY announced the pricing of a follow-on offering of its common stock at \$8.00 per share. Blackthorn received an allocation of 26,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of SGY shares and the price paid for the 26,000 shares received in the offering was \$15,631.20. Thus, Blackthorn's participation in the SGY offering netted total profits of \$15,631.20.

20. On May 10, 2011, Blackthorn sold short 10,000 shares of Starwood Property Trust Inc. ("STWD") during the restricted period at an average price of \$22.7394 per share. On May 11, 2011, STWD announced the pricing of a follow-on offering of its common stock at \$21.95 per share. Blackthorn received an allocation of 50,000 shares in that offering. The difference between Blackthorn's proceeds received from the restricted period short sales of STWD shares and the price paid for the 10,000 shares received in the offering was \$7,894.00. Thus, Blackthorn's participation in the STWD offering netted total profits of \$7,894.00.

21. On March 10, 2011, Blackthorn sold short 20,000 shares of Two Harbors Investment Corp. ("TWO") during the restricted period at an average price of \$10.7972 per share. On March 10, 2011, TWO announced the pricing of a follow-on offering of its common stock at \$10.25 per share. Blackthorn received an allocation of 15,000 shares in that offering. The difference between Blackthorn's proceeds from the restricted period short sales of TWO shares and

the price paid for the 15,000 shares received in the offering was \$6,858.00. Thus, Blackthorn's participation in the TWO offering netted total profits of \$6,858.00.

22. In total, Blackthorn's violations of Rule 105 resulted in profits of \$270,729².

Violations

23. As a result of the conduct described above, Blackthorn violated Rule 105 of Regulation M under the Exchange Act.

Blackthorn's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Blackthorn cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Blackthorn shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$244,378.24, prejudgment interest of \$15,829.74, and a civil money penalty in the amount of \$260,000.00 (for a total of \$520,207.98) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;³
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

² Although Blackthorn's total profits were \$270,729, Blackthorn previously voluntarily disgorged profits in the amount of \$26,350.76, making Blackthorn's net ill-gotten gain \$244,378.24.

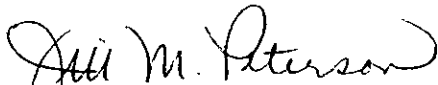
³ The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Blackthorn as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70393 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15474

In the Matter of

CLARITAS INVESTMENTS
LTD.,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Claritas Investment, Ltd. ("Claritas" or "Respondent").

II.

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

10 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of a violation of Rule 105 of Regulation M of the Exchange Act by Claritas, which, at the time of the violation, operated as a Cayman Islands-based asset management firm. 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. In February 2011, Claritas bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. This violation resulted in profits of \$73,883.

Respondent

3. Claritas Investments Ltd. is a limited liability company domiciled in the Cayman Islands and is registered with the Cayman Islands Monetary Authority. Until February 2012, Claritas advised the fund that engaged in the violation. Claritas currently conducts business as a selling agent in connection with the investment of assets.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Claritas' Violation of Rule 105 of Regulation M

6. From February 3, 2011 through February 9, 2011, Claritas sold short 42,513 shares of Tenium S.A. ("TX") during the restricted period at an average price of \$37.7379 per share. On February 9, 2011, TX announced the pricing of a follow-on offering of its common stock at \$36.00 per share. Claritas received an allocation of 175,000 shares in that offering. The difference between Claritas' proceeds from the restricted period short sales of TX shares and the price paid for the 42,513 shares received in the offering was \$73,882.86.

7. In total, Claritas' violation of Rule 105 resulted in profits of \$73,883.

Violations

8. As a result of the conduct described above, Claritas violated Rule 105 of Regulation M under the Exchange Act.

Claritas' Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Claritas cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Claritas shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$73,883, prejudgment interest of \$5,936.67, and a civil money penalty in the amount of \$65,000 (for a total of \$144,819.67) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MaClaritasthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Claritas as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70404 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15483

In the Matter of

**SOUTHPOINT CAPITAL
ADVISORS LP,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Southpoint Capital Advisors LP ("Southpoint Capital" or "Respondent").

II.

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

11 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Southpoint Capital, a New York-based registered investment adviser. 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. On two occasions, from December 2010 through November 2011, Southpoint Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$346,568.

Respondent

3. Southpoint Capital Advisors LP is a Delaware limited partnership with its principal place of business in New York, New York. Southpoint Capital has been registered with the Commission since March 2012 and was not registered with the Commission at the time of the violations at issue. Southpoint Capital manages several private investment funds that utilize a master-feeder structure and has over \$2 billion in assets under management. The trading described in this Order refers to trading by Southpoint Capital on behalf of those funds.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Southpoint Capital's Violations of Rule 105 of Regulation M

6. On December 6, 2010 and December 7, 2010, Southpoint Capital sold short 111,141 shares of Fuel Systems Solutions, Inc. ("FSYS") during the restricted period at an average price of \$33.8769 per share. On December 9, 2010, FSYS announced the pricing of a follow-on offering of its common stock at \$30.00 per share. Southpoint Capital received an allocation of 75,000 shares in that offering. The difference between Southpoint Capital's proceeds from the restricted period short sales of FSYS shares and the price paid for the 75,000 shares received in the offering was \$290,767.50. Thus, Southpoint Capital's participation in the FSYS offering netted total profits of \$290,767.50.

7. On November 14, 2011, Southpoint Capital sold short 138,594 shares of Cadence Pharmaceuticals ("CADX") during the restricted period at an average price of \$4.15262 per share. On November 15, 2011, CADX announced the pricing of a follow-on offering of its common stock at \$3.75 per share. Southpoint Capital received an allocation of 450,000 shares in that offering. The difference between Southpoint Capital's proceeds from the restricted period short sales of CADX shares and the price paid for 138,594 shares received in the offering was \$55,800.72. Thus, Southpoint Capital's participation in the CADX offering netted total profits of \$55,800.72.

8. In total, Southpoint Capital's violations of Rule 105 resulted in profits of \$346,568.

Violations

9. As a result of the conduct described above, Southpoint Capital violated Rule 105 of Regulation M under the Exchange Act.

Southpoint Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Southpoint Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Southpoint Capital shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$346,568, prejudgment interest of \$17,695.76, and a civil money penalty in the

amount of \$170,494.00 (for a total of \$534,758) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Southpoint Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70406 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15484

In the Matter of

TALKOT CAPITAL LLC,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Talkot Capital LLC ("Talkot Capital" or "Respondent").

II.

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

12 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Talkot Capital, a California-based registered investment adviser. 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. In June 2010, Talkot Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. This violation resulted in profits of \$17,640.

Respondent

3. Talkot Capital LLC is a California limited liability company with its principal place of business in Sausalito, California. Talkot Capital LLC has been registered with the Commission as an investment adviser since July 11, 2013 and provides advisory services to two domestic funds and two offshore funds with total assets under management in excess of \$162 million.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception, 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Talkot Capital's Violation of Rule 105 of Regulation M

6. On June 24, 2010, Talkot Capital sold short 50,000 shares of Cypress Sharpridge Investments Inc. ("CYS") during the restricted period at an average price of \$12.7320 per share. On June 24, 2010, CYC announced the pricing of a follow-on offering of its common stock at \$12.50 per share. Talkot Capital received an allocation of 250,000 shares in that offering. The difference between Talkot Capital's proceeds from the restricted period short sales of CYC shares and the price paid for the 50,000 shares received in the offering was \$11,600. Respondent also improperly obtained a benefit of \$6,040 by purchasing the remaining 200,000 shares at a discount from CYC's market price. Thus, Talkot Capital's participation in the CYC offering netted total profits of \$17,640.

7. In total, Talkot Capital's violation of Rule 105 resulted in profits of \$17,640.

Violations

8. As a result of the conduct described above, Talkot Capital violated Rule 105 of Regulation M under the Exchange Act.

Talkot Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Talkot Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Talkot Capital shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$17,640, prejudgment interest of \$1,897.68, and a civil money penalty in the amount of \$65,000 (for a total of \$84,537.68) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Talkot Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70397 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15481

In the Matter of

**POLO CAPITAL
INTERNATIONAL
GESTAO DE
RECURSOS LTDA.**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Polo Capital International Gestão de Recursos Ltda. ("Polo Capital" or "Respondent").

II.

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

13 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Polo Capital, a Brazilian-based investment adviser. 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. In March 2011, Polo Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. This violation resulted in profits of \$191,833.

Respondent

3. Polo Capital International Gestão de Recursos Ltda. a/k/a Polo Capital Management is a Brazilian company organized under the laws of Brazil as a Brazilian Sociedade Limitada with its principal place of business in Rio de Janeiro, Brazil. Since March 2012, Polo Capital has had exempt adviser reporting status with the Commission; it was not registered with the Commission at the time of the violations. Polo Capital is the investment adviser to two offshore funds and has over \$259 million in assets under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Polo Capital's Violations of Rule 105 of Regulation M

6. From March 21, 2011 through March 22, 2011, Polo Capital sold short 91,628 shares of YPF S.A., Inc. ("YPF") during the restricted period at an average price of \$43.0241 per share. On March 23, 2011, YPF announced the pricing of a follow-on offering of its common stock at \$41.00 per share. Polo Capital received an allocation of 110,000 shares in that offering. The difference between Polo Capital's proceeds from the restricted period short sales of YPF shares and the price paid for the 91,628 shares received in the offering was \$185,463.90. Respondent also improperly obtained a benefit of \$6,369.57 by purchasing the remaining 18,372 shares at a discount from YPF's market price. Thus, Polo Capital's participation in the YPF offering netted total profits of \$191,833.47.

7. In total, Polo Capital's violation of Rule 105 resulted in profits of \$191,833.47.

Violations

8. As a result of the conduct described above, Polo Capital violated Rule 105 of Regulation M under the Exchange Act.

Polo Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Polo Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Polo Capital shall within fourteen (14) days of the entry of this Order, cause to pay disgorgement of \$191,833, prejudgment interest of \$ 14,887.51, and a civil money penalty in the amount of \$76,000 (for a total of \$282,720.51) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Polo Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


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

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70403 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15482

In the Matter of

SOUNDPOST PARTNERS,
LP,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Soundpost Partners, LP. ("Soundpost" or "Respondent").

II.

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

14 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Soundpost, a New York-based investment adviser. 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. On two occasions, from May 2011 through June 2011, Soundpost bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$45,135.

Respondent

3. Soundpost Partners, LP is a Delaware limited partnership with its principal place of business in New York, New York. Since March 2012, Soundpost has had exempt adviser reporting status with the Commission; it was not registered with the Commission at the time of the violations. Soundpost manages two domestic funds and has \$65 million in assets under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Soundpost's Violations of Rule 105 of Regulation M

6. On June 21, 2011, Soundpost sold short 100,000 shares of American Capital Agency Corp. ("AGNC") during the restricted period at \$28.5476 per share. On June 23, 2011, AGNC announced the pricing of a follow-on offering of its common stock at \$27.90 per share. Soundpost received an allocation of 30,000 shares in that offering. The difference between Soundpost's proceeds from the restricted period short sales of AGNC shares and the price paid for the 30,000 shares received in the offering was \$19,428. Thus, Soundpost's participation in the AGNC offering netted total profits of \$19,428.

7. On May 20, 2011, Soundpost sold short 10,200 shares of MakeMyTrip Ltd. ("MMYT") during the restricted period at an average price of \$26.5203 per share. On May 27, 2011, MMYT announced the pricing of a follow-on offering of its common stock at \$24.00 per share. Soundpost received an allocation of 20,000 shares in that offering. The difference between Soundpost's proceeds from the restricted period short sales of MMYT shares and the price paid for the 20,000 shares received in the offering was \$25,707. Thus, Soundpost's participation in the MMYT offering netted total profits of \$25,707.

8. In total, Soundpost's violations of Rule 105 resulted in profits of \$45,135.

Violations

9. As a result of the conduct described above, Soundpost violated Rule 105 of Regulation M under the Exchange Act.

Soundpost's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Soundpost cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Soundpost shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$45,135, prejudgment interest of \$3,180.85, and a civil money penalty in the amount of \$65,000 (for a total of \$113,315.85) to the United States Treasury. If timely payment is

not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Soundpost as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary

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

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70409 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15492

In the Matter of

PAN CAPITAL AB,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Pan Capital AB ("Pan Capital" or "Respondent").

II.

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

15 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Pan Capital, a Swedish-based investment firm. 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. On four occasions, in May 2009, Pan Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$424,593.

Respondent

3. Pan Capital AB is an international investment firm headquartered in Stockholm, Sweden. The firm trades in foreign exchange markets, bonds, other interest-bearing instruments, and derivatives. The firm was founded in 1998 and has additional offices in Hong Kong and Fort Lauderdale, Florida.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Pan Capital's Violations of Rule 105 of Regulation M

6. On May 13, 2009, Pan Capital sold short 50,369 shares of MGM Resorts International ("MGM") during the restricted period at an average price of \$10.3436 per share. On May 13, 2009, MGM announced the pricing of a follow-on offering of its common stock at \$7.00 per share. Pan Capital received an allocation of 50,000 shares in that offering. The difference between Pan Capital's proceeds from the restricted period short sales of MGM shares and the price paid for the 50,000 shares received in the offering was \$167,180. Thus, Pan Capital's participation in the MGM offering netted total profits of \$167,180.

7. On May 11, 2009, Pan Capital sold short 50,954 shares of U.S. Bancorp ("USB") during the restricted period at a price of \$19.4649 per share. On May 12, 2009, USB announced the pricing of a follow-on offering of its common stock at \$18.00 per share. Pan Capital received an allocation of 10,000 shares in that offering. The difference between Pan Capital's proceeds from the restricted period short sales of USB shares and the price paid for the 10,000 shares received in the offering was \$14,649. Thus, Pan Capital's participation in the USB offering netted total profits of \$14,649.

8. On May 11, 2009, Pan Capital sold short 39,985 shares of BB&T Corp. ("BBT") during the restricted period at a price of \$25.1326 per share. On May 12, 2009, BBT announced the pricing of a follow-on offering of its common stock at \$20.00 per share. Pan Capital received an allocation of 25,000 shares in that offering. The difference between Pan Capital's proceeds from the restricted period short sales of BBT shares and the price paid for the 25,000 shares received in the offering was \$128,315. Thus, Pan Capital's participation in the BBT offering netted total profits of \$128,315.

9. On May 12, 2009, Pan Capital sold short 170,981 shares of Ford Motor Co. ("F") during the restricted period at an average price of \$5.3744 per share. On May 12, 2009, F announced the pricing of a follow-on offering of its common stock at \$4.75 per share. Pan Capital received an allocation of 250,000 shares in that offering. The difference between Pan Capital's proceeds from the restricted period short sales of F shares and the price paid for the 170,981 shares received in the offering was \$106,760.54. Respondent also improperly obtained a benefit of \$7,688.55 by purchasing the remaining 79,019 shares at a discount from F's market price. Thus, Pan Capital's participation in the F offering netted total profits of \$114,449.09.

10. In total, Pan Capital's violations of Rule 105 resulted in profits of \$424,593.

Violations

11. As a result of the conduct described above, Pan Capital violated Rule 105 of Regulation M under the Exchange Act.

Pan Capital Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Pan Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Pan Capital shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$424,593, prejudgment interest of \$17,249.80, and a civil money penalty in the amount of \$220,655 (for a total of \$662,497.80) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

Payments by check or money order must be accompanied by a cover letter identifying Pan Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70407 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15491

In the Matter of

**ONTARIO TEACHERS'
PENSION PLAN BOARD,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Ontario Teachers' Pension Plan Board ("OTPPB" or "Respondent").

II.

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

16 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by OTPPB, a non-share corporation continued under the Teachers' Pension Act (Ontario). 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. On four occasions, from July 2010 through February 2011, OTPPB bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$144,898.

Respondent

3. OTPPB, established in 1990 and headquartered in Toronto, is an independent corporation with the purpose of administering the Ontario Teachers' Pension Plan (the "Plan") and managing its investments for the benefit of the Plan's beneficiaries. OTPPB pays pensions and invests plan assets on behalf of over 300,000 working and retired teachers in the Province of Ontario. The Plan is Canada's largest single-profession pension plan with Cdn. \$129.5 billion in net assets as of December 31, 2012.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

OTPPB's Violations of Rule 105 of Regulation M

6. On July 12, 2010, OTPPB sold short 31,900 shares of BioMimetic Therapeutics Inc. ("BMTI") during the restricted period at a price of \$10.03 per share. On July 14, 2010, BMTI announced the pricing of a follow-on offering of its common stock at \$8.50 per share. OTPPB received an allocation of 25,000 shares in that offering. The difference between OTPPB's proceeds from the restricted period short sales of BMTI shares and the price paid for the 25,000 shares received in the offering was \$38,250.00. Thus, OTPPB's participation in the BMTI offering netted total profits of \$38,250.00.

7. On July 21, 2010, OTPPB sold short 50,000 shares of Pebblebrook Hotel Trust ("PEB") during the restricted period at a price of \$17.03 per share. On July 22, 2010, PEB announced the pricing of a follow-on offering of its common stock at \$17.00 per share. OTPPB received an allocation of 25,000 shares in that offering. The difference between OTPPB's proceeds from the restricted period short sales of PEB shares and the price paid for the 25,000 shares received in the offering was \$750. Thus, OTPPB's participation in the PEB offering netted total profits of \$750.00.

8. On November 3, 2010, OTPPB sold short 9,600 shares of BlackRock Inc. ("BLK") during the restricted period at an average price of \$167.9267 per share. On November 8, 2010, BLK announced the pricing of a follow-on offering of its common stock at \$163.00 per share. OTPPB received an allocation of 15,000 shares in that offering. The difference between OTPPB's proceeds received from the restricted period short sales of BLK shares and the price paid for the 9,600 shares received in the offering was \$47,296.32. Respondent also improperly obtained a benefit of \$14,536.80 by purchasing the remaining 5,400 shares at a discount from BLK's market price. Thus, OTPPB's participation in the BLK offering netted total profits of \$61,833.12.

9. On January 28, 2011, OTPPB sold short 40,192 shares of SS&C Technologies Holdings ("SSNC") during the restricted period at an average price of \$18.4434 per share. On February 3, 2011, SSNC announced the pricing of a follow-on offering of its common stock at \$17.60 per share. OTPPB received an allocation of 50,000 shares in that offering. The difference between OTPPB's proceeds from the restricted period short sales of SSNC shares and the price paid for the shares received in the offering was \$33,897.93. Respondent also improperly obtained a benefit of \$10,166.97 by purchasing the remaining 9,808 shares at a discount from SSNC's market price. Thus, OTPPB's participation in the SSNC offering netted total profits of \$44,064.90.

10. In total, OTPPB's violations of Rule 105 resulted in profits of \$144,898.

Violations

11. As a result of the conduct described above, OTPPB violated Rule 105 of Regulation M under the Exchange Act.

OTPPB's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent OTPPB cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. OTPPB shall within fourteen (14) days of the entry of the Order, pay disgorgement of \$144,898, prejudgment interest of \$11,642.90, and a civil money penalty in the amount of \$68,295 (for a total of \$224,835.90) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

Payments by check or money order must be accompanied by a cover letter identifying OTPPB as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$13,248.

Respondent

3. G-2 is a Delaware limited liability company and a registered broker-dealer based in New York, New York.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. The Commission adopted Rule 105 “to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity.” Id. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller’s intent in effecting the short sale. Id.

G-2’s Willful Violations of Rule 105 of Regulation M

6. On August 3, 2012, G-2 sold short 10,000 shares of American International Group, Inc. (“AIG”) during the restricted period at a price of \$30.8421 per share. On August 3, 2012, AIG announced the pricing of a follow-on offering of its common stock at \$30.50 per share. G-2 received an allocation of 1,600 shares in that offering. The difference between G-2’s proceeds from the restricted period short sales of AIG shares and the price paid for the 1,600 shares received in the offering was \$560. Thus, G-2’s participation in the AIG offering resulted in total profits of \$560.

7. On February 24 and February 25, 2010, G-2 sold short a total of 6,000 shares of Seabridge Gold, Inc. (“SA”) during the restricted period at an average price of \$22.6664 per share. On February 25, 2010, SA announced the pricing of a follow-on offering of its common stock at \$22.90 per share. G-2 received an allocation of 10,000 shares in that offering. The offering price exceeded the prices at which the firm had sold short. By purchasing the offered shares despite having shorted the stock during the restricted period, G-2 improperly obtained a discount from the stock’s market price and avoided losses of \$7,074. G-2 also improperly obtained a benefit of \$4,716 by purchasing the remaining 4,000 shares in the offering at a discount from SA’s market price. Thus, G-2’s participation in the SA offering resulted in total profits of \$11,790.

8. On November 6, 2009, G-2 sold short 3,000 shares of Standard Parking Corp. ("STAN") during the restricted period at an average price of \$16.8983 per share. On November 9, 2009, STAN announced the pricing of a follow-on offering of its common stock at \$16 per share. G-2 received an allocation of 1,000 shares in that offering. The difference between G-2's proceeds from the restricted period short sales of STAN shares and the price paid for the 1,000 shares received in the offering was \$898. Thus, G-2's participation in the STAN offering resulted in profits of \$898.

9. In total, G-2's violations of Rule 105 resulted in profits of \$13,248.

Violations

10. As a result of the conduct described above, G-2 willfully violated Rule 105 of Regulation M under the Exchange Act.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70398 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15477

In the Matter of

DEERFIELD
MANAGEMENT
COMPANY, L.P.,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Deerfield Management Company, L.P. ("Deerfield" or "Respondent").

II.

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

23 of 90

III.

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

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Deerfield, a New York-based hedge fund adviser. 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. On six occasions, from December 2010 through January 2013, Deerfield bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$1,273,707.

Respondent

3. Deerfield, a Delaware limited partnership located in New York, New York, is a registered investment adviser that provides advisory services exclusively to its associated private funds, which have over \$3 billion under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

Deerfield's Violations of Rule 105 of Regulation M

6. On December 2, 2010, Deerfield sold short 25,000 shares of Geron Corporation ("GERN") during the restricted period at an average price of \$5.97 per share. On December 7, 2010, GERN announced the pricing of a follow-on offering of its common stock at \$5.00 per share.

Deerfield received an allocation of 2,900,000 shares in that offering. The difference between Deerfield's proceeds received from the restricted period short sales of GERN shares and the price for the 25,000 shares received in the offering was \$24,313. Respondent also improperly obtained a benefit of \$336,088 by purchasing the remaining 2,875,000 shares at a discount from GERN's market price. Thus, Deerfield's participation in the GERN offering netted total profits of \$360,401.

7. On April 1, 2011, Deerfield sold short 12,363 shares of Sangamo BioSciences, Inc. ("SGMO") during the restricted period at an average price of \$8.26 per share. On April 8, 2011, SGMO announced the pricing of a follow-on offering of its common stock at \$7.70 per share. Deerfield received an allocation of 250,000 shares in that offering. The difference between Deerfield's proceeds received from the restricted period short sales of SGMO shares and the price for the 12,363 shares received in the offering was \$6,921. Respondent also improperly obtained a benefit of \$8,032 by purchasing the remaining 237,637 shares at a discount from SGMO's market price. Thus, Deerfield's participation in the SGMO offering netted total profits of \$14,953.

8. During the period from February 2, 2012, through February 8, 2012, Deerfield sold short 1,417,818 shares of Array BioPharma, Inc. ("ARRY") during the restricted period at an average price of \$3.10 per share. On February 9, 2012, ARRY announced the pricing of a follow-on offering of its common stock at \$2.60 per share. Deerfield received an allocation of 1,000,000 shares in that offering. The difference between Deerfield's proceeds received from the restricted period short sales of ARRY shares and the price for the 1,000,000 shares received in the offering was \$502,576. Thus, Deerfield's participation in the ARRY offering netted total profits of \$502,576.

9. On March 26, 2012, Deerfield sold short 233,212 shares of Derma Sciences, Inc. ("DSCI") during the restricted period at an average price of \$9.28 per share. On April 2, 2012, DSCI announced the pricing of a follow-on offering of its common stock at \$9.25 per share. Deerfield received an allocation of 500,000 shares in that offering. The difference between Deerfield's proceeds received from the restricted period short sales of DSCI shares and the price for the 233,212 shares received in the offering was \$7,198. Respondent also improperly obtained a benefit of \$133,554 by purchasing the remaining 266,788 shares at a discount from DSCI's market price. Thus, Deerfield's participation in the DSCI offering netted total profits of \$140,752.

10. During the period from April 4, 2012, through April 5, 2012, Deerfield sold short 64,900 shares of TearLab Corporation ("TEAR") during the restricted period at an average price of \$3.89 per share. On April 11, 2012, TEAR announced the pricing of a follow-on offering of its common stock at \$3.60 per share. Deerfield received an allocation of 100,000 shares in that offering. The difference between Deerfield's proceeds received from the restricted period short sales of TEAR shares and the price for the 64,900 shares received in the offering was \$18,704. Respondent also improperly obtained a benefit of \$13,770 by purchasing the remaining 35,100 shares at a discount from TEAR's market price. Thus, Deerfield's participation in the TEAR offering netted total profits of \$32,474.

11. During the period from December 31, 2012, through January 3, 2013, Deerfield sold short 268,900 shares of Insulet Corporation ("PODD") during the restricted period at an average price of \$21.56 per share. On January 4, 2013, PODD announced the pricing of a follow-on offering of its common stock at \$20.75 per share. Deerfield received an allocation of 275,000 shares in that offering. The difference between Deerfield's proceeds received from the restricted period short sales of PODD shares and the price for the 268,900 shares received in the offering was \$217,237. Respondent also improperly obtained a benefit of \$5,314 by purchasing the remaining 6,100 shares at a discount from PODD's market price. Thus, Deerfield's participation in the PODD offering netted total profits of \$222,551.

12. In total, Deerfield's violations of Rule 105 resulted in profits of \$1,273,707.

Violations

13. As a result of the conduct described above, Deerfield violated Rule 105 of Regulation M under the Exchange Act.

Deerfield's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Deerfield cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Deerfield shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$1,273,707, prejudgment interest of \$19,035, and a civil money penalty in the amount of \$609,482 (for a total of \$1,902,224) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;¹
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

¹ The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Deerfield as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Ian S. Karpel, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, Denver Regional Office, 1801 California Street, Suite 1500, Denver, CO 80202.

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. 70394 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15475

In the Matter of

CREDENTIALIA GROUP, LLC,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Credentia Group, LLC ("Credentia" or "Respondent").

II.

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

24 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of a violation of Rule 105 of Regulation M of the Exchange Act by Credentia, a Kansas-based professional money management firm. 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. In August 2012, Credentia bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. This violation resulted in profits of \$4,091.

Respondent

3. Credentia Group, LLC is a professional money management firm specializing in the management, analysis and trading of structured mortgage securities and publicly traded financial equity securities. Credentia's primary fund's net assets are in excess of \$40 million. Credentia is not a registered investment adviser.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Credentia's Violations of Rule 105 of Regulation M

6. On August 16, 2012, Credentia sold short 4,590 shares of PennyMac Mortgage Investment Trust ("PMT") during the restricted period at a price of \$21.7724 per share. On August 17, 2012, PMT announced the pricing of a follow-on offering of its common stock at \$20.93 per share. Credentia received an allocation of 10,000 shares in that offering. The difference between Credentia's proceeds received from the restricted period short sales of PMT shares and the price paid for the 4,590 shares received in the offering was \$3,866.62. Respondent also improperly obtained a benefit of \$224.51 by purchasing the remaining 5,410 shares at a discount from PMT's market price. Thus, Credentia's participation in the PMT offering netted total profits of \$4,091.13.

7. In total, Credentia's violations of Rule 105 resulted in profits of \$4,091.

Violations

8. As a result of the conduct described above, Credentia violated Rule 105 of Regulation M under the Exchange Act.

Credentia's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Credentia cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Credentia shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$4,091, prejudgment interest of \$113.38, and a civil money penalty in the amount of \$65,000 (for a total of \$69,204.38) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- 1
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
 - (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Credentia as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70399 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15478

In the Matter of

HUDSON BAY CAPITAL
MANAGEMENT LP,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Hudson Bay Capital Management LP. ("Hudson Bay" or "Respondent").

II.

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

25 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Hudson Bay, a New York-based registered investment adviser. 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. On four occasions, from May 2009 through December 2012, Hudson Bay bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$665,674.96.

Respondent

3. Hudson Bay Capital Management LP is a Delaware limited partnership with its principal place of business in New York, New York. Hudson Bay Capital Management has been registered with the Commission as an investment adviser since March 30, 2012 and provides advisory services to two funds, each organized in a master-feeder structure, with total assets under management in excess of \$2.9 billion.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Hudson Bay's Violations of Rule 105 of Regulation M

6. On April 20, 2010, Hudson Bay sold short 444,500 shares of MGIC Investment Corp. ("MTG") during the restricted period at a weighted average price of \$11.1833 per share. On April 21, 2010, MTG announced the pricing of a follow-on offering of its common stock at \$10.75 per share. Hudson Bay received an allocation of 135,000 shares in that offering. The difference between Hudson Bay's proceeds from the restricted period short sales of MTG shares and the price paid for the 135,000 shares received in the offering was \$58,495.50. Thus, Hudson Bay's participation in the MTG offering netted total profits of \$58,495.50.

7. On December 7, 2012, Hudson Bay sold short 9,904 shares of American International Group, Inc. ("AIG") during the restricted period at a weighted average price of \$34.07 per share. On December 10, 2012, AIG announced the pricing of a follow-on offering of its common stock at \$32.50 per share. Hudson Bay received an allocation of 20,000 shares in that offering. The difference between Hudson Bay's proceeds from the restricted period short sales of AIG shares and the price paid for the 9,904 shares received in the offering was \$15,549.28. Respondent also improperly obtained a benefit of \$22,209.18 by purchasing the remaining 10,096 shares at a discount from AIG's market price. Thus, Hudson Bay's participation in the AIG offering netted total profits of \$37,758.46.

8. From September 17, 2010 through September 23, 2010, Hudson Bay sold short 465,000 shares of Petroleo Brasileiro SA ("PBR") during the restricted period at a weighted average price of \$35.0667 per share. On September 23, 2010, PBR announced the pricing of a follow-on offering of its common stock at \$34.49 per share. Hudson Bay received an allocation of 150,000 shares in that offering. The difference between Hudson Bay's proceeds from the restricted period short sales of PBR shares and the price paid for the 150,000 shares received in the offering was \$85,505.00. Thus, Hudson Bay's participation in the PBR offering netted total profits of \$85,505.00.

9. On May 6, 2009, Hudson Bay sold short 2,000 shares of Wells Fargo Co. ("WFC") during the restricted period at a weighted average price of \$24.69 per share. On May 8, 2009, WFC announced the pricing of a follow-on offering of its common stock at \$22.00 per share. Hudson Bay received an allocation of 150,000 shares in that offering. The difference between Hudson Bay's proceeds from the restricted period short sales of WFC shares and the price paid for the 2,000 shares received in the offering was \$5,380.00. Respondent also improperly obtained a benefit of \$478,536.00 by purchasing the remaining 148,000 shares at a discount from WFC's market price. Thus, Hudson Bay's participation in the WFC offering netted total profits of \$483,916.00.

10. In total, Hudson Bay's violations of Rule 105 resulted in profits of \$665,674.96.

Violations

11. As a result of the conduct described above, Hudson Bay violated Rule 105 of Regulation M under the Exchange Act.

Hudson Bay's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Hudson Bay cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Hudson Bay shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$665,674.96, prejudgment interest of \$11,661.31 and a civil money penalty in the amount of \$272,118 (for a total of \$949,454.27) 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. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Hudson Bay as a Respondent in these proceedings, and the file number of these proceedings; a

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Gallagher
Disapproved*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70396 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15476

In the Matter of

D. E. Shaw & Co., L.P.,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against D. E. Shaw & Co., L.P. ("D. E. Shaw" or "Respondent").

II.

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

26 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by D. E. Shaw, a New York-based registered investment adviser. 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. On five occasions, from May 2010 through March 2012, D. E. Shaw bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. The violations resulted in profits of \$447,794.

Respondent

3. D. E. Shaw & Co., L.P. is a Delaware limited partnership with its principal place of business in New York, New York. D. E. Shaw & Co., L.P. has been registered with the Commission as an investment adviser since January 1999 and, together with its affiliated advisers, provides advisory services to various domestic and offshore funds, with total assets under management of approximately \$32 billion as of July 1, 2013. The trading described herein refers to trading on behalf of certain of those funds.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

D. E. Shaw's Violation of Rule 105 of Regulation M

6. From April 29 through May 4, 2010, D. E. Shaw sold short 103,560 shares of Radian Group Inc. ("RDN") during the restricted period at a weighted average price of \$14.4586 per share. On May 5, 2010, RDN announced the pricing of a follow-on offering of its common stock at \$11.00 per share. D. E. Shaw received an allocation of 1,250,000 shares in that offering. The difference between D. E. Shaw's proceeds from the restricted period short sales of RDN shares and the price paid for the 103,560 shares received in the offering was \$358,172.62. Thus, D. E. Shaw's participation in the RDN offering netted total profits of \$358,172.62.

7. On March 1, 2011, D. E. Shaw sold short 2,200 shares of DDR Corp. ("DDR") during the restricted period at a weighted average price of \$14.1005 per share. On March 1, 2011, DDR announced the pricing of a follow-on offering of its common stock at \$13.80 per share. D. E. Shaw received an allocation of 700,000 shares in that offering. The difference between D. E. Shaw's proceeds from the restricted period short sales of DDR shares and the price paid for the 2,200 shares received in the offering was \$661.10. Thus, D. E. Shaw's participation in the DDR offering netted total profits of \$661.10.

8. From March 30 through March 31, 2011, D. E. Shaw sold short 400 shares of Kraton Performance Polymers Inc. ("KRA") during the restricted period at a weighted average price of \$ 39.7775 per share. On March 31, 2011, KRA announced the pricing of a follow-on offering of its common stock at \$37.75 per share. D. E. Shaw received an allocation of 100,000 shares in that offering. The difference between D. E. Shaw's proceeds from the restricted period short sales of KRA shares and the price paid for the 400 shares received in the offering was \$811.00. Respondent also improperly obtained a benefit of \$3,555.72 by purchasing the remaining 99,600 shares at a discount from KRA's market price. Thus, D. E. Shaw's participation in the KRA offering netted total profits of \$4,366.72.

9. On January 3, 2012, D. E. Shaw sold short 4,878 shares of Vical Incorporated ("VICL") during the restricted period at a weighted average price of \$ 4.47 per share. On January 6, 2012, VICL announced the pricing of a follow-on offering of its common stock at \$3.75 per share. D. E. Shaw received an allocation of 50,000 shares in that offering. The difference between D. E. Shaw's proceeds from the restricted period short sales of VICL shares and the price paid for the 4,878 shares received in the offering was \$3,512.16. Respondent also improperly obtained a benefit of \$49.63 by purchasing the remaining 45,122 shares at a discount from VICL's market price. Thus, D. E. Shaw's participation in the VICL offering netted total profits of \$3,561.79.

10. On March 21, 2012, D. E. Shaw sold short 14,263 shares of Hercules Offshore, Inc. ("HERO") during the restricted period at a weighted average price of \$ 5.4110 per share. On March 22, 2012, HERO announced the pricing of a follow-on offering of its common stock at \$5.10 per share. D. E. Shaw received an allocation of 700,000 shares in that offering. The difference between D. E. Shaw's proceeds from the restricted period short sales of HERO shares and the price paid for the 14,263 shares received in the offering was \$4,435.79. Respondent also

improperly obtained a benefit of \$76,596.82 by purchasing the remaining 685,737 shares at a discount from HERO's market price. Thus, D. E. Shaw's participation in the HERO offering netted total profits of \$81,032.61.

11. In total, D. E. Shaw's violations of Rule 105 resulted in profits to certain funds advised by D.E. Shaw of \$447,794.

Violations

12. As a result of the conduct described above, D. E. Shaw violated Rule 105 of Regulation M under the Exchange Act.

D. E. Shaw's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent D. E. Shaw cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. D. E. Shaw shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$447,794 prejudgment interest of \$18,192.37, and a civil money penalty in the amount of \$201,506.00 (for a total of \$667,492.37) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying D. E. Shaw as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70415 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15479

In the Matter of

JGP GLOBAL GESTAO DE
RECURSOS LTDA.

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against JGP Global Gestão de Recursos Ltda. ("JGP" or "Respondent").

II.

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

27 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act ("Rule 105") by JGP, a Brazilian-based investment adviser. 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. On three occasions from September 2009 through October 2011, JGP bought offered shares for its advised funds from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$2,537,114.

Respondent

3. JGP is a Brazilian company organized under the laws of Brazil as a Brazilian Sociedade Limitada with its principal place of business in Rio de Janeiro, Brazil. Since July 2012, JGP has had exempt adviser reporting status with the Commission under the Investment Advisers Act of 1940; it was not registered with the Commission at the time of the violations. JGP is the investment adviser to four offshore funds and has over \$1.2 billion in assets under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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

JGP's Violations of Rule 105 of Regulation M

6. On September 18, 21, and 22, 2009, JGP sold short for its advised funds a total of 686,300 shares of Cemex, S.A.B. de C.V. Sponsore ("Cemex") at prices ranging from \$13.22 to \$14.15 per share. On September 22, 2009, after the market closed, Cemex announced a public offering of American depository shares priced at \$12.50 per share (the "Cemex Offering"). JGP received an allocation of 1,000,000 shares in that offering. The difference between the proceeds from the short sales of Cemex's shares during the Rule 105 restricted period and the cost of acquiring the shares in the Cemex Offering was \$786,521. In addition, the fund advised by JGP improperly obtained a benefit of \$187,248 from the remaining 313,700 shares it received in the Cemex Offering at a market discount from Cemex's market price. Accordingly, the total fund's profit from purchasing securities in the Cemex Offering was \$973,769.

7. On December 16, 2009, JGP sold short for its advised funds a total of 850,000 shares of Citigroup at a price of \$3.46 per share. On December 16, 2009, after the market closed, Citigroup announced a public offering of common stock priced at \$3.15 per share (the "Citigroup Offering"). JGP received an allocation of 22,500,000 shares in that offering. The difference between the proceeds from the short sales of Citigroup shares during the Rule 105 restricted period and the cost of acquiring the shares in the Citigroup Offering was \$263,500. In addition, the funds advised by JGP improperly obtained a benefit of \$161,265 from the remaining 21,650,000 shares they received in the Citigroup Offering at a market discount from Citigroup's market price. Accordingly, the total funds' profit from purchasing securities in the Citigroup Offering was \$424,765.

8. On October 17, 18, and 19, 2011, JGP sold short for its advised funds a total of 721,823 shares of Arcos Dorado Holdings Inc. ("Arcos") at prices ranging from \$22.74 to \$24.51 per share. On October 19, 2011, after the market closed, Arcos announced a public offering of Class A shares priced at \$22.00 per share (the "Arcos Offering"). JGP received an allocation of 1,000,000 shares in that offering. The difference between the proceeds from the short sales of Arcos' shares during the Rule 105 restricted period and the cost of acquiring the shares in the Arcos Offering was \$1,064,393. In addition, the funds advised by JGP improperly obtained a benefit of \$74,187 from the remaining 278,167 shares they received in the Arcos Offering at a market discount from Arcos' market price. Accordingly, the total funds' profit from purchasing securities in the Arcos Offering was \$1,138,580.

9. In total, JGP's violations of Rule 105 resulted in profits of \$2,537,114.

Violations

10. As a result of the conduct described above, JGP violated Rule 105 of Regulation M under the Exchange Act.

JGP's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent JGP cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Respondent JGP shall cause to pay disgorgement of \$2,537,114, prejudgment interest of \$129,310, and a civil penalty of \$514,000 (for a total of \$3,180,424) to the Commission for transfer to the United States Treasury. Payment shall be made in the following installments:

1. Respondent JGP shall within ten days of the entry of this Order cause to pay a civil money penalty in the amount of \$514,000 to the Commission for transfer to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.
2. Respondent JGP shall cause to pay disgorgement of \$2,537,114 and prejudgment interest of \$129,310, for a total of \$2,666,424, to the Commission for transfer to the United States Treasury. Payments shall be made in the following installments:
 - a. \$500,000 within 40 days of the entry of this Order;
 - b. \$500,000 within 70 days of the entry of this Order;
 - c. \$500,000 within 100 days of the entry of this Order;
 - d. \$500,000 within 130 days of the entry of this Order;
 - e. \$500,000 within 160 days of the entry of this Order;
 - f. \$166,424, plus post-judgment interest on the payments described in Sections IV.B.2(a)-(f) pursuant to SEC Rule of Practice 600, within 190 days of the entry of this Order.

Prior to making the payment described in Section IV.B.2(f), Respondent JGP shall contact the Commission staff to ensure the inclusion of post-judgment interest. If any payment is not made by the date the payment is required by Section IV.B.2 of this Order, the entire outstanding balance of disgorgement, prejudgment interest, plus any additional interest accrued pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application.

C. Payment must be made in one of the following ways:

- 1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request,²
- 2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- 3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying JGP Global Gestão de Recursos Ltda. as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Julie K. Lutz, Acting Regional Director, Division of Enforcement, Securities and Exchange Commission, Denver Regional Office, 1801 California St., Suite 1500, Denver, Colorado 80202.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70400 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15480

In the Matter of

M.S. JUNIOR, INC., SWISS
CAPITAL HOLDINGS,
INC., AND MICHAEL
STANGO,

Respondents.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against M.S. Junior, Inc., Swiss Capital Holdings, Inc., and Michael Anthony Stango ("M.S. Junior", "Swiss Capital", and "Stango" or "Respondents").

II.

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

28 of 90

III.

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

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by M.S. Junior, Swiss Capital, and Stango. M.S. Junior and Swiss Capital are Florida-based corporations and Stango is the sole principal of each corporation. 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. On thirteen occasions, from December 2010 through July 2011, Respondents bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$247,039.

Respondents

3. M.S. Junior, Inc. is a corporation that is incorporated in Florida with a principal place of business in Jupiter, Florida. M.S. Junior is engaged primarily in commercial real estate ventures. It is not a registered investment adviser.

4. Swiss Capital Holdings, Inc. is a corporation that is incorporated in Florida with a principal place of business in Jupiter, Florida. It is not a registered investment adviser.

5. Michael Anthony Stango, 53, resides in Jupiter, Florida. During all relevant times through the present, Stango was (and continues to be) the sole owner, principal and officer of M.S. Junior and Swiss Capital and, therefore, responsible for the trading activity of these two corporations.

Legal Framework

6. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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

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.

registration statement or notification on Exchange Act Form 1-A or Form 1-E and ending with pricing.

7. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

Respondents' Violations of Rule 105 of Regulation M

8. On June 1, 2011 and June 2, 2011, Respondents sold short 216,700 shares of Arch Coal Inc. ("ACI") during the restricted period at an average price of \$27.6856 per share. On June 3, 2011, ACI announced the pricing of a follow-on offering of its common stock at \$27.00 per share. Respondents received an allocation of 211,500 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of ACI shares and the price paid for the 211,500 shares received in the offering was \$145,005.00. Thus, Respondents' participation in the ACI offering netted total profits of \$145,005.00.

9. On December 9, 2010, Respondents' sold short 2,000 shares of Camelot Information Systems Inc. ADS ("CIS") during the restricted period at a price of \$20.00 per share. On December 9, 2010, CIS announced the pricing of a follow-on offering of its common stock at \$19.50 per share. Respondents' received an allocation of 2,000 shares in that offering. The difference between Respondents' proceeds from the restricted period short sales of CIS shares and the price paid for 2,000 shares received in the offering was \$1,000. Thus, Respondents' participation in the CIS offering netted total profits of \$1,000.00.

10. From December 13, 2010 through December 15, 2010, Respondents' sold short 19,000 shares of Cloud Peak Energy Inc. ("CLD") during the restricted period at an average price of \$20.3095 per share. On December 15, 2010, CLD announced the pricing of a follow-on offering of its common stock at \$19.50 per share. Respondents' received an allocation of 23,200 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of CLD shares and the price paid for the 19,000 shares received in the offering was \$15,380.50. Respondents also improperly obtained a benefit of \$1,205.82 by purchasing the remaining 4,200 shares at a discount from CLD's market price. Thus, Respondents' participation in the CLD offering netted total profits of \$16,586.32.

11. On March 3, 2011, Respondents' sold short 1,500 shares of Continental Resources Inc. ("CLR") during the restricted period at a price of \$69.40 per share. On March 3, 2011, CLR announced the pricing of a follow-on offering of its common stock at \$68.00 per share. Respondents' received an allocation of 5,700 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of CLR shares and the price paid for the 1,500 shares received in the offering was \$2,100.00. Respondents also improperly obtained a benefit of \$656.46 by purchasing the remaining 4,200 shares at a discount from CLR's market price. Thus, Respondents' participation in the CLR offering netted total profits of \$2,756.46.

12. On December 9, 2010, Respondents' sold short 10,100 shares of CYS Investments Inc. ("CYS") during the restricted period at a price of \$12.52 per share. On December 10, 2010, CYS announced the pricing of a follow-on offering of its common stock at \$12.46 per share. Respondents' received an allocation of 36,300 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of CYS shares and the price paid for the 10,100 shares received in the offering was \$606. Respondents also improperly obtained a benefit of \$8,011.96 by purchasing the remaining 26,200 shares at a discount from CYS's market price. Thus, Respondents' participation in the CYS offering netted total profits of \$8,617.96.

13. On December 8, 2010, Respondents' sold short 12,300 shares of Dollar General Corp. ("DG") during the restricted period at a price of \$30.89 per share. On December 8, 2010, DG announced the pricing of a follow-on offering of its common stock at \$30.50 per share. Respondents' received an allocation of 6,250 shares in that offering. The difference between Respondents' proceeds from the restricted period short sales of DG shares and the price paid for 6,250 shares received in the offering was \$2,437.50. Thus, Respondents' participation in the DG offering netted total profits of \$2,437.50.

14. On March 1, 2011, Respondents' sold short 12,500 shares of EOG Resources Inc. ("EOG") during the restricted period at a price of \$107.94 per share. On March 1, 2011, EOG announced the pricing of a follow-on offering of its common stock at \$105.50 per share. Respondents' received an allocation of 20,200 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of EOG shares and the price paid for the 12,500 shares received in the offering was \$30,500.00. Respondents also improperly obtained a benefit of \$8,608.60 by purchasing the remaining 7,700 shares at a discount from EOG's market price. Thus, Respondents' participation in the EOG offering netted total profits of \$39,108.60.

15. On June 16, 2011, Respondents' sold short 1,500 shares of Evercore Partners Inc. ("EVR") during the restricted period at a price of \$33.01 per share. On June 16, 2011, EVR announced the pricing of a follow-on offering of its common stock at \$32.50 per share. Respondents' received an allocation of 1,200 shares in that offering. The difference between Respondents' proceeds from the restricted period short sales of EVR shares and the price paid for 1,200 shares received in the offering was 612.00. Thus, Respondents' participation in the EVR offering netted total profits of \$612.00.

16. On March 1, 2011, Respondents' sold short 7,500 shares of Health Care REIT Inc. ("HCN") during the restricted period at a price of \$50.85 per share. On March 1, 2011, HCN announced the pricing of a follow-on offering of its common stock at \$49.25 per share. Respondents' received an allocation of 8,500 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of HCN shares and the price paid for the 7,500 shares received in the offering was \$12,000.00. Respondents also improperly obtained a benefit of \$1,626.30 by purchasing the remaining 1,000 shares at a discount from

HCN's market price. Thus, Respondents' participation in the HCN offering netted total profits of \$13,626.30.

17. On March 21, 2011, Respondents' sold short 5,000 shares of Invesco Mortgage Capital Inc. ("IVR") during the restricted period at a price of \$21.54 per share. On March 22, 2011, IVR announced the pricing of a follow-on offering of its common stock at \$21.25 per share. Respondents' received an allocation of 29,000 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of IVR shares and the price paid for the 5,000 shares received in the offering was \$1,466.00. Thus, Respondents' participation in the IVR offering netted total profits of \$1,466.00.

18. On July 14, 2011, Respondents' sold short 3,000 shares of Spectrum Brands Holdings Inc. ("SPB") during the restricted period at a price of \$28.70 per share. On July 15, 2011, SPB announced the pricing of a follow-on offering of its common stock at \$28.00 per share. Respondents' received an allocation of 4,700 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of SPB shares and the price paid for the 3,000 shares received in the offering was \$2,097.00. Thus, Respondents' participation in the SPB offering netted total profits of \$2,097.00.

19. On February 9, 2011, Respondents' sold short 7,000 shares of Ternium S.A. ("TX") during the restricted period at a price of \$36.92 per share. On February 9, 2011, TX announced the pricing of a follow-on offering of its common stock at \$36.00 per share. Respondents' received an allocation of 9,000 shares in that offering. The difference between Respondents' proceeds from the restricted period short sales of TX shares and the price paid for the 7,000 shares received in the offering was \$6,460.30. Thus, Respondents' participation in the TX offering netted total profits of \$6,460.30.

20. On March 22, 2011, Respondents' sold short 3,000 shares of YPF S.A. ("YPF") during the restricted period at a price of \$42.93 per share. On March 23, 2011, YPF announced the pricing of a follow-on offering of its common stock at \$41.00 per share. Respondents' received an allocation of 7,300 shares in that offering. The difference between Respondents' proceeds received from the restricted period short sales of YPF shares and the price paid for the 3,000 shares received in the offering was \$5,779.50. Respondents also improperly obtained a benefit of \$1,490.81 by purchasing the remaining 4,300 shares at a discount from YPF's market price. Thus, Respondents' participation in the YPF offering netted total profits of \$7,270.31.

21. In total, Respondents' violations of Rule 105 resulted in profits of \$247,039.

Violations

22. As a result of the conduct described above, M.S. Junior, Swiss Capital, and Stango violated Rule 105 of Regulation M under the Exchange Act.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondents M.S. Junior, Swiss Capital, and Stango cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. M.S. Junior, Swiss Capital, and Stango, shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$247,039, prejudgment interest of \$15,565.77, and a civil money penalty in the amount of \$165,332 (the Respondents collectively owe \$427,937) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying M.S. Junior, Swiss Capital, and Stango as the Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary

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

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70413 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15487

In the Matter of

**WESTERN STANDARD,
LLC,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Western Standard, LLC ("Western Standard" or "Respondent").

II.

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

29 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Western Standard, a California-based registered investment adviser. 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. In March 2012, Western Standard bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$44,980.

Respondent

3. Western Standard, LLC is a California limited liability company with its principal place of business in Santa Monica, California. Western Standard, a registered investment adviser with the state of California since October 2008, manages two domestic funds and has over \$78 million in assets under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Western Standard's Violations of Rule 105 of Regulation M

6. From February 24, 2012 through March 1, 2012, Western Standard sold short 298,674 shares of NetSol Technologies Inc. ("NTWK") during the restricted period at an average price of \$0.5506 per share. On March 1, 2012, NTWK announced the pricing of a follow-on offering of its common stock at \$0.40 per share. Western Standard received an allocation of 310,000 shares in that offering. The difference between Western Standard's proceeds from the restricted period short sales of NTWK shares and the price paid for 298,674 shares received in the offering was \$44,980.30. Thus, Western Standard's participation in the NTWK offering netted total profits of \$44,980.30.

7. In total, Western Standard's violations of Rule 105 resulted in profits of \$44,980.30.

Violations

8. As a result of the conduct described above, Western Standard violated Rule 105 of Regulation M under the Exchange Act.

Western Standard's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Western Standard cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Western Standard shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$44,980.30, prejudgment interest of \$1,827.40, and a civil money penalty in the amount of \$65,000 (for a total of \$111,807.70) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Western Standard as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70408 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15485

In the Matter of

VOLLERO BEACH
CAPITAL PARTNERS LLC,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Vollero Beach Capital Partners LLC ("Vollero Beach Capital" or "Respondent").

II.

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

30 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Vollero Beach Capital, a registered investment adviser and hedge fund manager located in New York, New York. Rule 105 prohibits buying an equity security that is the subject of an 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. On two occasions, in October 2009 and October 2010, Vollero Beach Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of approximately \$594,292.

Respondent

3. Vollero Beach Capital is a limited liability company organized under Delaware law and located in New York, New York. During the relevant period, Vollero Beach Capital managed two hedge funds: Vollero Beach Capital Fund LP and Vollero Beach Capital Offshore Fund Ltd., as well as five separately managed accounts.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. The Commission adopted Rule 105 "to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity." Id. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale. Id.

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.

Vollero Beach Capital's Violations of Rule 105 of Regulation M

6. On October 27, 2009, Vollero Beach Capital sold short 26,353 shares of Superior Well Services, Inc. ("SWSI") at prices ranging between \$12.16 and \$12.53. On October 28, 2009, SWSI announced the pricing of a follow-on offering of 6 million shares of its common stock at \$10.50 per share. Vollero Beach Capital received an allocation of 25,000 shares in that offering. The difference between Vollero Beach Capital's proceeds from the restricted period short sales of SWSI shares and the price for 25,000 shares purchased in the offering was \$46,414. Thus, Vollero Beach Capital's participation in the SWSI offering resulted in profits of \$46,414.

7. During the period from October 26, 2010 through October 27, 2010, Vollero Beach Capital sold short a total of 480,100 shares of Energy XXI (Bermuda) Ltd. ("EXXI") at prices ranging between \$22.76 and \$23.49. On October 28, 2010, EXXI announced the pricing of a follow-on offering of 12 million shares of its common stock at \$20.75 per share. Vollero Beach Capital received an allocation of 254,000 shares in that offering. The difference between Vollero Beach Capital's proceeds from the restricted period short sales of EXXI shares and the price for the 254,000 shares purchased in the offering was \$547,878. Thus, Vollero Beach Capital's participation in the EXXI offering resulted in profits of \$547,878.

8. In total, Vollero Beach Capital's violations of Rule 105 resulted in profits of \$594,292.

9. In determining to accept the Offer, the Commission considered Vollero Beach Capital's reliance on counsel for its participation in the EXXI offering. Prior to its violation in connection with that offering, Vollero Beach Capital consulted its then-outside counsel and received erroneous advice that Rule 105 did not apply to the type of registration form on which the offering was filed with the Commission.

Violations

10. As a result of the conduct described above, Vollero Beach Capital violated Rule 105 of Regulation M under the Exchange Act.

Vollero Beach Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Respondent shall, within fourteen (14) days of the entry of this Order, pay disgorgement of \$594,292, a civil penalty of \$214,964 and prejudgment interest of \$55,171 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Vollero Beach Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary

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

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to option (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70406 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15484

In the Matter of

TALKOT CAPITAL LLC,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER AND CIVIL PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Talkot Capital LLC ("Talkot Capital" or "Respondent").

II.

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

31 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Talkot Capital, a California-based registered investment adviser. 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. In June 2010, Talkot Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. This violation resulted in profits of \$17,640.

Respondent

3. Talkot Capital LLC is a California limited liability company with its principal place of business in Sausalito, California. Talkot Capital LLC has been registered with the Commission as an investment adviser since July 11, 2013 and provides advisory services to two domestic funds and two offshore funds with total assets under management in excess of \$162 million.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

Talkot Capital's Violation of Rule 105 of Regulation M

6. On June 24, 2010, Talkot Capital sold short 50,000 shares of Cypress Sharpridge Investments Inc. ("CYS") during the restricted period at an average price of \$12.7320 per share. On June 24, 2010, CYS announced the pricing of a follow-on offering of its common stock at \$12.50 per share. Talkot Capital received an allocation of 250,000 shares in that offering. The difference between Talkot Capital's proceeds from the restricted period short sales of CYS shares and the price paid for the 50,000 shares received in the offering was \$11,600. Respondent also improperly obtained a benefit of \$6,040 by purchasing the remaining 200,000 shares at a discount from CYS's market price. Thus, Talkot Capital's participation in the CYS offering netted total profits of \$17,640.

7. In total, Talkot Capital's violation of Rule 105 resulted in profits of \$17,640.

Violations

8. As a result of the conduct described above, Talkot Capital violated Rule 105 of Regulation M under the Exchange Act.

Talkot Capital's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Talkot Capital cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Talkot Capital shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$17,640, prejudgment interest of \$1,897.68, and a civil money penalty in the amount of \$65,000 (for a total of \$84,537.68) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Talkot Capital as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

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. 70410 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15493

In the Matter of

PEAK6 CAPITAL
MANAGEMENT
LLC

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND CIVIL
PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against PEAK6 Capital Management LLC ("PEAK6" or "Respondent").

II.

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

32 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by PEAK6, a registered broker-dealer. 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. On two occasions, in June 2009, PEAK6 bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$58,321.

Respondent

3. PEAK6 Capital Management LLC is a Delaware limited liability company with its principal place of business in Chicago, Illinois. PEAK6 is a registered broker-dealer engaged in proprietary trading activities.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. "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, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

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.

PEAK6's Violations of Rule 105 of Regulation M

6. On June 3, 2009, PEAK6 sold short 1,000 shares of Valero Energy Corp. ("VLO") during the restricted period at an average price of \$18.5175 per share. On June 3, 2009, VLO announced the pricing of a follow-on offering of its common stock at \$18.00 per share. PEAK6 received an allocation of 25,000 shares in that offering. The difference between PEAK6's proceeds from the restricted period short sales of VLO shares and the price paid for the 1,000 shares received in the offering was \$517.50. Respondent also improperly obtained a benefit of \$12,960 by purchasing the remaining 24,000 shares at a discount from VLO's market price. Thus, PEAK6's participation in the VLO offering netted total profits of \$13,477.50.

7. From June 18, 2009 through June 23, 2009, PEAK6 sold short 25,100 shares of Petro Quest Energy Inc. ("PQ") during the restricted period at an average price of \$4.4295 per share. On June 24, 2009, PQ announced the pricing of a follow-on offering of its common stock at \$3.50 per share. PEAK6 received an allocation of 150,000 shares in that offering. The difference between PEAK6's proceeds from the restricted period short sales of PQ shares and the price paid for the 25,100 shares received in the offering was \$24,659.88. Respondent also improperly obtained a benefit of \$20,183.84 by purchasing the remaining 124,900 shares at a discount from PQ's market price. Thus, PEAK6's participation in the PQ offering netted total profits of \$44,843.72.

8. In total, PEAK6's violations of Rule 105 resulted in profits of \$58,321.

Violations

9. As a result of the conduct described above, PEAK6 violated Rule 105 of Regulation M under the Exchange Act.

PEAK6's Remedial Efforts

10. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent in 2009 and cooperation afforded to Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent PEAK6's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent PEAK6 cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. PEAK6 shall within fourteen (14) days of the entry of this Order, pay disgorgement of \$58,321, prejudgment interest of \$8,896.89, and a civil money penalty in the amount of \$65,000 (for a total of \$132,217.89) to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying PEAK6 as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

² The minimum threshold for transmission of payment electronically is \$1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-70414 / September 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15495

In the Matter of

G-2 Trading LLC,

Respondent.

**CORRECTED ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against G-2 Trading LLC ("G-2" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

Summary

1. These proceedings arise out of willful violations of Rule 105 of Regulation M of the Exchange Act by G-2, a registered broker-dealer. Rule 105 prohibits buying an equity security that is the subject of an 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. On three occasions, from November 2009 through August 2012, G-2 bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering

33 of 90

after having sold short the same security during the restricted period. These violations collectively resulted in profits of \$13,248.

Respondent

3. G-2 is a Delaware limited liability company and a registered broker-dealer based in New York, New York.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities from an underwriter, broker, or dealer participating in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule, absent an exception. 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 Exchange Act Form 1-A or Form 1-E and ending with pricing.

5. The Commission adopted Rule 105 “to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity.” *Id.* Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller’s intent in effecting the short sale. *Id.*

G-2’s Willful Violations of Rule 105 of Regulation M

6. On August 3, 2012, G-2 sold short 10,000 shares of American International Group, Inc. (“AIG”) during the restricted period at a price of \$30.8421 per share. On August 3, 2012, AIG announced the pricing of a follow-on offering of its common stock at \$30.50 per share. G-2 received an allocation of 1,600 shares in that offering. The difference between G-2’s proceeds from the restricted period short sales of AIG shares and the price paid for the 1,600 shares received in the offering was \$560. Thus, G-2’s participation in the AIG offering resulted in total profits of \$560.

7. On February 24 and February 25, 2010, G-2 sold short a total of 6,000 shares of Seabridge Gold, Inc. (“SA”) during the restricted period at an average price of \$22.6664 per share. On February 25, 2010, SA announced the pricing of a follow-on offering of its common stock at \$22.90 per share. G-2 received an allocation of 10,000 shares in that offering. The offering price exceeded the prices at which the firm had sold short. By purchasing the offered shares despite having shorted the stock during the restricted period, G-2 improperly obtained a discount from the stock’s market price and avoided losses of \$7,074. G-2 also improperly obtained a benefit of \$4,716 by purchasing the remaining 4,000 shares in the offering at a discount from SA’s market price. Thus, G-2’s participation in the SA offering resulted in total profits of \$11,790.

8. On November 6, 2009, G-2 sold short 3,000 shares of Standard Parking Corp. ("STAN") during the restricted period at an average price of \$16.8983 per share. On November 9, 2009, STAN announced the pricing of a follow-on offering of its common stock at \$16 per share. G-2 received an allocation of 1,000 shares in that offering. The difference between G-2's proceeds from the restricted period short sales of STAN shares and the price paid for the 1,000 shares received in the offering was \$898. Thus, G-2's participation in the STAN offering resulted in profits of \$898.

9. In total, G-2's violations of Rule 105 resulted in profits of \$13,248.

Violations

10. As a result of the conduct described above, G-2 willfully violated Rule 105 of Regulation M under the Exchange Act.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Chair White
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3671/ September 18, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30689/ September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15500

In the Matter of

SHADRON L. STASTNEY,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(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 Shadron L. Stastney ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement which the Commission has determined to accept. Soley for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which

34 of 90

the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 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 finds¹ that:

SUMMARY

1. Respondent Shadron Stastney, a principal of Vicis Capital LLC ("Vicis Capital"), a registered investment adviser, breached his fiduciary duty to the Vicis Capital Master Fund (the "Fund"), an advisory client, by failing to disclose a material conflict of interest to the Trustee of the Fund and engaging in an undisclosed principal transaction with the Fund. Stastney was the Chief Operating Officer and Head of Research at Vicis Capital, where he also was responsible for directing and managing illiquid investments for the Fund. In the fall of 2007, Stastney invited a friend and outside business partner to join Vicis Capital to help him manage illiquid investments. In January 2008, Stastney then arranged for Vicis Capital to purchase for the Fund a basket of illiquid securities for approximately \$7.5 million from his friend. Unbeknownst to the Fund, however, Stastney received over \$2.7 million of the sales proceeds without ever disclosing at the time to the Trustee of the Fund that he had a material financial interest in the transaction. Accordingly, Stastney unilaterally set the terms of the transaction and authorized it even though he had an undisclosed conflict of interest. By virtue of this conduct, Respondent willfully² violated Sections 206(2) and 206(3) of the Advisers Act.

RESPONDENT

2. **Shadron L. Stastney**, age 44, is a resident of Marlboro, New Jersey. Stastney is one of the founders and managing members of Vicis Capital, where he has served as its Chief Operating Officer and Head of Research since its inception in 2004. Stastney also has been responsible for directing, overseeing and managing illiquid investments for the Fund.

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

² 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).

RELEVANT ENTITIES

3. **Vicis Capital LLC**, a Delaware limited liability company, is an investment adviser registered with the Commission since 2006. Together with two partners, Stastney jointly founded Vicis Capital in 2004. Vicis Capital is a multi-strategy advisory firm based in New York, New York, whose largest client was the Fund. Vicis Capital currently is winding down its operations.

4. **Vicis Capital Master Fund**, a Cayman Islands unit trust, is Vicis Capital's flagship fund. The Fund is held by two feeder funds, the Vicis Capital Fund for non-tax exempt U.S. investors and the Vicis Capital Fund (International) for non-U.S. investors and tax-exempt U.S. investors. The Fund and the two feeder funds each represent separate classes of the Vicis Capital Master Series Trust, a Cayman Islands unit trust. Caledonian Bank & Trust Limited (the "Trustee"), a company incorporated under the laws of the Cayman Islands, serves as the Trustee of the Fund. The Fund currently is winding down its operations.

FACTS

Background On Vicis Capital And The Fund

5. The Fund was a multi-strategy hedge fund that primarily focused on equity volatility arbitrage and convertible bond arbitrage strategies. At its peak in October 2008, Vicis Capital managed over \$5 billion in net assets for the Fund. In November 2009, Vicis Capital decided to wind down the Fund after suffering substantial redemptions.

6. Partner 1 and Partner 2, Stastney's partners in Vicis Capital, were respectively responsible for directing, overseeing and managing the Fund's equity volatility and convertible bond strategies.

7. Beyond its core investment strategies, the Fund also invested in privately negotiated convertible debt, preferred equity, stock warrants and/or stock rights in microcap and private issuers, including through private investments in public equity or "PIPEs" transactions. Stastney was responsible for directing, managing and otherwise overseeing those illiquid investments for the Fund since its inception.

Stastney's Relationship With Person A

8. In the fall of 2007, Stastney decided to hire Person A to help him manage the illiquid investments. At the time, Person A was a partner in Broker-Dealer A, a Florida broker-dealer, which had served as the placement agent for many of the Fund's illiquid investments.

9. Stastney and Person A had known each other since 2001 when they both worked on behalf of a wealthy entrepreneur. They became friends and partners in a business venture called

Partnership LLC that they initially formed to invest in Florida real estate in 2003. Over the next several years, Stastney and Person A also worked together on investments that Broker-Dealer A underwrote for the Fund.

10. In February 2008, at Stastney's invitation, Person A joined Vicis Capital as a Managing Director.

The Conflict Transaction

11. Before joining Vicis Capital, Stastney required Person A to divest his personal securities holdings that overlapped with securities or issuers in which the Fund also was invested. Person A had acquired these "conflict" securities through his affiliation with Broker-Dealer A.

12. In late December 2007 through early January 2008, Stastney arranged with Person A to sell the conflict securities to the Fund for \$7,475,000 in the "conflict transaction." Person A informed Stastney at the time that Stastney had a financial interest in some of the conflict securities and that Stastney would receive a portion of the sales proceeds.

13. In January 2008, shortly before the conflict transaction, Stastney informed Partner 1 and Partner 2 of the contemplated transaction, but never disclosed to either of them that he had a personal financial interest in the transaction or the securities. Nor did Stastney disclose at the time to Person B, the Chief Financial Officer and Chief Compliance Officer at Vicis Capital, that he had a personal financial interest in the transaction or the securities. Stastney also never disclosed to anyone at Vicis Capital at the time that he was a partner in Partnership LLC.

14. On January 16, 2008, the Fund purchased some of the conflict securities. The Fund then purchased the remainder of the conflict securities on February 4, 2008.

15. On January 22, 2008, Stastney personally received \$2,732,095 from the conflict transaction. Person A wired the funds to Stastney's personal savings bank account that Stastney jointly held with his wife.

Stastney Breached His Fiduciary Duty To The Fund

16. As an investment adviser, Stastney owed a fiduciary duty to the Fund. Stastney breached his fiduciary duty to the Fund by failing to disclose that he had a material conflict of interest with respect to the conflict transaction.

17. More specifically, Stastney failed to disclose to the Trustee of the Fund that he personally would derive a material financial benefit from the conflict transaction by receiving a

share of the sales proceeds. Nor did Stastney disclose that information at the time to anyone at Vicis Capital, including Partner 1, Partner 2 or Person B.

18. Stastney also failed to disclose at the time to the Trustee of the Fund or anyone at Vicis Capital, including Partner 1, Partner 2 or Person B, that he owned an interest in Partnership LLC.

19. As a result of the foregoing conduct, Stastney deprived the Trustee of the Fund of the opportunity to determine whether the Fund should pursue the conflict transaction. Had the Trustee objected to the conflict transaction, Person A would have had to sell or otherwise transfer the conflict securities to an independent third party.

Stastney Engaged In An Undisclosed Principal Transaction

20. Based on the foregoing conduct, Stastney also engaged in a principal transaction (i) without disclosing in writing to the Trustee of the Fund before the completion of the transaction that he would be participating as a principal in the conflict transaction because he held a beneficial ownership interest in some of the conflict securities at the time of the conflict transaction and (ii) without obtaining consent from the Trustee of the Fund to engage in the conflict transaction.

VIOLATIONS

21. As a result of the conduct described above, Respondent Stastney willfully violated Section 206(2) of the Advisers Act which provides that it is unlawful for an investment adviser "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client."

22. As a result of the conduct described above, Respondent Stastney willfully violated Section 206(3) of the Advisers Act which provides that it is unlawful for an investment adviser, "acting as principal for his own account, knowingly to sell any security to or purchase any security from a client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

UNDERTAKINGS

Respondent Stastney has undertaken the following:

23. Independent Monitor.

- a. Within thirty (30) days of the date of this Order, Respondent Stastney shall cause Vicis Capital to engage, at his own expense, an independent Monitor which is not unacceptable to the Commission staff, to:
 - i. oversee Respondent's activities relating to the wind down of the Fund;
 - ii. submit to the Commission staff a quarterly report describing the status of the wind down, all the assets of the Fund and the operations of Vicis Capital; and
 - iii. report any potential irregularities at Vicis Capital or misconduct by Respondent to the Commission staff on an ongoing basis;
- b. Respondent Stastney shall provide the Monitor with five (5) days advance notice of contemplated transactions in connection with the wind down of the Fund;
- c. Respondent Stastney shall fully cooperate with the Monitor and shall cause Vicis Capital to provide the Monitor with access to any and all documentation, files and other materials that the Monitor requests for review in the course of its duties as set forth in Paragraph 23(a)(i)-(iii), including, but not limited to a quarterly status report on the wind down of the Fund, monthly trial balance reports, monthly balance sheets, monthly cash flow statements and monthly portfolio holdings reports; and
- d. Respondent Stastney shall cause Vicis Capital to retain the Monitor until such time as Respondent resigns as a managing member of Vicis Capital and divests his ownership interest in Vicis Capital immediately following the wind down of the Fund.

24. Compensation. Respondent Stastney shall not receive any compensation, including any salary, bonus or fees, from Vicis Capital.

25. Annual Audit. Respondent Stastney shall cause Vicis Capital to have prepared annual audited financial statements for the Fund.

26. Annual Appraisal. Respondent Stastney shall cause Vicis Capital to obtain an independent annual appraisal of the assets of the Fund.

27. Notice to Advisory Clients. Within thirty (30) days of the entry of this Order, Respondent shall cause Vicis Capital to provide a copy of the Order to the Fund and each of the investors in the Fund as of the entry of this Order by mail, e-mail or such other method as may be acceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.

28. Certifications of Compliance by Respondent. Respondent Stastney shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Julie M. Riewe, Co-Chief of the Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F. Street, NE, Washington, DC 20549, with a copy to the Office of Chief Counsel of the Division of Enforcement, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

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

Accordingly, pursuant to 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 Stastney shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(3) of the Advisers Act.
- B. Respondent Stastney be, and hereby is (i) barred from association with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent, and (ii) prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with the right to apply for reentry after eighteen (18) months to the appropriate self-regulatory organization, or if there is none, to the Commission; provided, however, that Respondent may continue to remain associated with Vicis Capital as a managing member solely for the purpose of engaging in activities and taking actions that are reasonably necessary to wind down the Fund, subject to the oversight of an independent Monitor, pursuant to the terms and

conditions set forth in Section III above, until such time as the completion of the wind down of the Fund, and at which time, Respondent immediately shall resign as a managing member of Vicis Capital and divest his ownership interest in Vicis Capital. In the event Respondent fails to comply with any of the undertakings set forth in Section III above, including the payment of the Monitor, Respondent shall no longer be permitted to remain associated with the Vicis Capital and be required immediately to resign as a managing member of Vicis Capital and divest his ownership interest in Vicis Capital, and the Commission staff may further seek to obtain an order from the Commission re-imposing the eighteen (18) month bar from the date of entry of that order and seek other remedies as may be appropriate.

- C. Any reapplication for association by the Respondent Stastney will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (i) any disgorgement ordered against Respondent Stastney, whether or not the Commission has fully or partially waived payment of such disgorgement; (ii) any arbitration award related to the conduct that served as the basis for the Commission order; (iii) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (iv) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.
- D. Respondent Stastney shall, within ten (10) days of the entry of this Order, pay disgorgement of \$2,033,710.46, and prejudgment interest of \$501,385.06 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Shadron L. Stastney as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Julie M. Riewe, Co-Chief of the Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F. Street, NE, Washington, DC 20549.

- E. Respondent Stastney shall, within ten (10) days of the entry of this Order, pay a civil monetary penalty in the amount of \$375,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Shadron L. Stastney as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Julie M. Riewe, Co-Chief of the Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F. Street, NE, Washington, DC 20549.

- F. Respondent Stastney shall comply with the undertakings enumerated in paragraphs 23 to 28 in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Pinowar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 18, 2013

In the Matter of

Patch International, Inc.,
QuadTech International, Inc.,
Strategic Resources, Ltd., and
Virtual Medical Centre, 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 Patch International, Inc. because it has not filed any periodic reports since the period ended May 31, 2008.

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Virtual Medical Centre, Inc. because it has not filed any periodic reports since the period ended March 31, 2011.

35 of 90

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 September 18, 2013, through 11:59 p.m. EDT on October 1, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Prower
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70438 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15499

In the Matter of

Patch International, Inc.,
QuadTech International, Inc.,
Strategic Resources, Ltd., and
Virtual Medical Centre, 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 Patch International, Inc., QuadTech International, Inc., Strategic Resources, Ltd., and Virtual Medical Centre, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Patch International, Inc. (CIK No. 1064481) is a Nevada corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Patch is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended May 31, 2008, which reported a net loss of over \$11.8 million for the prior twelve months. As of September 10, 2013, the company's stock (symbol "PTCHF") was quoted on OTC Link (previously "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).

36 of 90

2. QuadTech International, Inc. (CIK No. 1061316) is a permanently revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Quad Tech is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended April 30, 2008, which reported a net loss of \$8,167 for the prior six months. As of September 10, 2013, the company's stock (symbol "QTII") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Strategic Resources, Ltd. (CIK No. 1174259) is a revoked Nevada corporation located in Boulder, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Strategic Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of \$180,910 for the prior six months. As of September 10, 2013, the company's stock (symbol "SGCR") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Virtual Medical Centre, Inc. (CIK No. 1341995) is a Nevada corporation located in Osborne Park, Australia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Virtual Medical Centre 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, 2011, which reported a net loss of over \$1.77 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "VMCT") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Prower
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 18, 2013

In the Matter of

**Municipal Mortgage & Equity LLC,
Prolink Holdings Corp.,
RPM Technologies, Inc.,
SARS Corp.,
Secured Digital Storage Corp.,
Siboney Corp.,
SiriCOMM, Inc., and
Standard Management Corp.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Municipal Mortgage & Equity LLC because it has not filed any Forms 10-Q for the period ended June 30, 2006 through the period ended September 30, 2010, and it filed materially deficient Forms 10-K for the period ended December 31, 2006 through the period ended December 31, 2010.

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

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

37 of 90

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of SARS Corp. 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 Secured Digital Storage Corp. because it has not filed any periodic reports since the period ended September 30, 2008.

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Standard Management Corp. 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 September 18, 2013, through 11:59 p.m. EDT on October 1, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Frowar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70436 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15498

In the Matter of

Municipal Mortgage & Equity LLC,
Prolink Holdings Corp.,
RPM Technologies, Inc.,
SARS Corp.,
Secured Digital Storage Corp.,
Siboney Corp.,
SiriCOMM, Inc., and
Standard Management 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 Municipal Mortgage & Equity LLC, Prolink Holdings Corp., RPM Technologies, Inc., SARS Corp., Secured Digital Storage Corp., Siboney Corp., SiriCOMM, Inc., and Standard Management Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Municipal Mortgage & Equity, LLC (CIK No. 1003201) is a Delaware corporation located in Baltimore, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Municipal Mortgage is delinquent in its periodic filings with the Commission, having not filed any Forms 10-Q for the period ended June 30, 2006 through the period ended September 30, 2010, and having

38 of 90

filed materially deficient Forms 10-K for the period ended December 31, 2006 through the period ended December 31, 2010. The Forms 10-K were materially deficient because they were filed in a consolidated filing after Muncipal Mortgage was denied permission to do so by the Division of Corporation Finance, and because the company failed to make disclosures concerning its internal control over financial reporting and disclosure controls and procedures as required by Items 307 and 308T of Regulation S-B. As of September 10, 2013, the company's stock (symbol "MMAB") was quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had twenty-one market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Prolink Holdings Corp. (CIK No. 1072816) is a void Delaware corporation located in Chandler, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Prolink 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 \$3.7 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "PLKH") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. RPM Technologies, Inc. (CIK No. 1099150) is a void Delaware corporation located in Mokena, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RPM 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 over \$1.3 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "RPM") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. SARS Corp. (CIK No. 1070510) is a revoked Nevada corporation located in Washington, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SARS 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 \$10 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "SARO") 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. Secured Digital Storage Corp. (CIK No. 319040) is a New Mexico corporation located in Downers Grove, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Secured Digital 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 \$5 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "SDGS") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Siboney Corp. (CIK No. 90057) is a Maryland corporation located in St. Louis, Missouri with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Siboney 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 \$215,042 for the prior nine months. As of September 10, 2013, the company's stock (symbol "SBON") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. SiriCOMM, Inc. (CIK No. 851199) is a forfeited Delaware corporation located in Joplin, Missouri with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SiriCOMM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of over \$4 million for the prior nine months. On December 21, 2007, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Missouri, which was dismissed on September 29, 2008. As of September 10, 2013, the company's stock (symbol "SIRCQ") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Standard Management Corp. (CIK No. 853971) is a revoked Indiana corporation located in Indianapolis, Indiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Standard Management 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 \$2.5 million for the prior six months. As of September 10, 2013, the company's stock (symbol "SMAN") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

9. 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.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Prower
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 18, 2013

In the Matter of

**A.G. Volney Center, Inc. (f/k/a
Buddha Steel, Inc.),
China Green Material Technologies, Inc.,
China Tractor Holdings, Inc., and
Franklin Towers Enterprises, 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 A.G. Volney Center, Inc. (f/k/a Buddha Steel, Inc.) because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Green Material Technologies, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Tractor Holdings, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

39 of 90

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Franklin Towers Enterprises, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

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 September 18, 2013, through 11:59 p.m. EDT on October 1, 2013.

By the Commission:

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Pinowar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 70434 / September 18, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15497

In the Matter of

A.G. Volney Center, Inc. (f/k/a
Buddha Steel, Inc.),
China Green Material Technologies, Inc.,
China Tractor Holdings, Inc., and
Franklin Towers Enterprises, 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 A.G. Volney Center, Inc. (f/k/a Buddha Steel, Inc.), China Green Material Technologies, Inc., China Tractor Holdings, Inc., and Franklin Towers Enterprises, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. A.G. Volney Center, Inc. (f/k/a Buddha Steel, Inc.) (CIK No. 1367777) is a void Delaware corporation located in Hebei, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). A.G. Volney Center 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, 2010. As of September 10, 2013, the company's stock (symbol "AGVO") was quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had

40 of 90

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

2. China Green Material Technologies, Inc. (CIK No. 1082384) is a defaulted Nevada corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Green 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, 2011, which reported a net loss of over \$4.7 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "CAGM") 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. China Tractor Holdings, Inc. (CIK No. 1352884) is a forfeited Delaware corporation located in ChangChun City, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Tractor 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, 2010, which reported a net loss of over \$4 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "CTHL") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Franklin Towers Enterprises, Inc. (CIK No. 1365669) is a revoked Nevada corporation located in Chongqing, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Franklin Tower 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, 2010, which reported a net loss of over \$1.2 million for the prior nine months. As of September 10, 2013, the company's stock (symbol "FRTW") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Gallagher
Commissioner Prower
Disapproved*

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 249

Release Nos. 33-9452; 34-70443; File No. S7-07-13

RIN 3235-AL47

PAY RATIO DISCLOSURE

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to Item 402 of Regulation S-K to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 953(b) directs the Commission to amend Item 402 of Regulation S-K to require disclosure of the median of the annual total compensation of all employees of an issuer (excluding the chief executive officer), the annual total compensation of that issuer's chief executive officer and the ratio of the median of the annual total compensation of all employees to the annual total compensation of the chief executive officer. The proposed disclosure would be required in any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. The proposed disclosure requirements would not apply to emerging growth companies, smaller reporting companies or foreign private issuers.

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

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

Electronic Comments:

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

41 of 90

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-07-13 on the subject line; or
- Use the Federal Rulemaking ePortal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-07-13. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m.

All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christina L. Padden, Attorney Fellow in the Office of Rulemaking, at (202) 551-3430, in the Division of Corporation Finance; 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Item 402¹ of Regulation S-K² and a conforming amendment to Form 8-K³ under the Securities Exchange Act of 1934 (the “Exchange Act”).⁴

¹ 17 CFR 229.303.

² 17 CFR 229.10 et seq.

³ 17 CFR 249.220f.

⁴ 15 U.S.C. 78a et seq.

TABLE OF CONTENTS

- I. Background
 - A. Section 953(b) of the Dodd-Frank Act
 - B. Comments Received
- II. Discussion of the Proposed Amendments
 - A. Introduction
 - B. Scope of Section 953(b) of the Dodd-Frank Act
 - 1. Filings Subject to the Proposed Disclosure Requirements
 - 2. Registrants Subject to the Proposed Disclosure Requirements
 - C. Proposed Requirements for Pay Ratio Disclosure
 - 1. New Paragraph (u) of Item 402 (Pay Ratio Disclosure)
 - 2. Employees Included in the Identification of the Median
 - 3. Identifying the Median
 - 4. Determination of Total Compensation
 - 5. Disclosure of Methodology, Assumptions and Estimates
 - 6. Clarification of the Meaning of “Annual”
 - 7. Timing of Disclosure
 - 8. Status as “Filed” not “Furnished”
 - D. Transition Matters
 - 1. Proposed Compliance Date
 - 2. Proposed Transition for New Registrants
- III. General Request for Comment
- IV. Economic Analysis
- V. Paperwork Reduction Act
- VI. Small Business Regulatory Enforcement Fairness Act
- VII. Regulatory Flexibility Act Certification
- VIII. Statutory Authority and Text of Amendments

I. BACKGROUND

A. Section 953(b) of the Dodd-Frank Act

Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)⁵ directs the Commission to amend section 229.402 of title 17, Code of Federal Regulations, to require each issuer, other than an emerging growth company, as that term is defined in Section 3(a) of the Securities Exchange Act of 1934, to disclose in any filing of the issuer described in section 229.10(a) of title 17, Code of Federal Regulations (or any successor thereto) — the median of the annual total compensation of all employees of the issuer, except the chief executive officer (or any equivalent position) of the issuer; the annual total compensation of the chief executive officer (or any equivalent position) of the issuer; and the ratio of the median of the total compensation of all employees of the issuer to the annual total compensation of the chief executive officer of the issuer. Section 953(b) also requires that the total compensation of an employee of an issuer shall be determined in accordance with section 229.402(c)(2)(x) of title 17, Code of Federal Regulations, as in effect on the day before the date of enactment of the Dodd-Frank Act.⁶

We are proposing amendments to implement Section 953(b). We refer to this disclosure of the median of the annual total compensation of all employees of the issuer, the annual total compensation of the chief executive officer of the issuer and the ratio of the two amounts as “pay ratio” disclosure.

⁵ Public Law No. 111-203, 124 Stat. 1376 (2010), as amended by Public Law No. 112-106, 126 Stat. 306 (2012).

⁶ Public Law No. 111-203, sec. 953(b), 124 Stat. 1376, 1904 (2010), as amended by Public Law No. 112-106, sec. 102(a)(3), 126 Stat. 306, 309 (2012). Section 102(a)(3) of the Jumpstart Our Business Startups Act (the “JOBS Act”) amended Section 953(b) of the Dodd-Frank Act to provide an exemption for registrants that are emerging growth companies as that term is defined in Section 3(a) of the Exchange Act.

Section 953(b) of the Dodd-Frank Act does not amend the Securities Act of 1933 (“Securities Act”)⁷ or the Exchange Act. Instead, Section 953(b) directs the Commission to amend Item 402 of Regulation S-K (“Item 402”) to add the pay ratio disclosure requirements mandated by the Dodd-Frank Act. Although Section 953(b) defines some terms used in the provision, commenters have raised questions about the scope of the statutory requirements and the need for additional interpretive guidance.⁸

B. Comments Received

In connection with rulemakings implementing the Dodd-Frank Act, we have sought comment from the public before the issuance of a proposing release. With respect to Section 953(b) of the Dodd-Frank Act, as of September 15, 2013, we have received approximately 22,860 comment letters and a petition with approximately 84,700 signatories.⁹ We have considered these comments in proposing the rules described in this release.

Commenters were divided in their recommended approaches to Section 953(b) and the implementation issues it raises. Comments from industry groups, issuers, law firms and executive compensation professionals generally raised concerns about the complexity of the Section 953(b) requirements, the significant compliance costs that could be involved and the potential inability

⁷ 15 U.S.C. 77a *et seq.*

⁸ Comments submitted to the Commission in connection with Section 953(b) are discussed generally in Section I.B. and throughout this release as they relate to specific aspects of the proposals.

⁹ Comments related to the executive compensation provisions of the Dodd-Frank Act, including Section 953(b), are available at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml>. In connection with Section 953(b), the Commission received approximately 260 unique comment letters and approximately 22,600 form letters (posted on the website as Letter Type A) as of September 15, 2013. The Commission also received a petition (posted on the website as Letter Type B) with approximately 84,700 signatories. In this release, references to comment letters identify the commenter by the name of the organization or individual submitting the letter. Letters by commenters who submitted multiple letters are identified by date.

for many companies to verify the accuracy of their disclosure.¹⁰ These commenters generally asserted that this type of disclosure would not be material to investors or useful to an investment or voting decision, and they disputed the potential benefits cited by commenters who supported the provision.¹¹ Comments from individual and institutional investors and some public policy organizations generally outlined what they expected to be the benefits of the mandated information and urged the Commission to implement the provision in a way that would preserve those benefits.¹² Notwithstanding these differing viewpoints, several commenters supported a flexible approach to implementation that would retain the potential benefits of the mandated disclosure, while avoiding the additional compliance costs that a less flexible approach could impose.¹³

We discuss the concerns and recommendations from the commenters in more detail throughout this release. We agree with commenters that, depending on how Section 953(b) is implemented, the cost of compliance with these new disclosure requirements could be, at least for some registrants, substantial. The rules we are proposing are intended to address commenters'

¹⁰ See, e.g., letters from American Bar Association (“ABA”); Center on Executive Compensation dated September 10, 2010 (“COEC I”); Center on Executive Compensation dated November 11, 2011 (“COEC II”); Davis Polk & Wardwell LLP (“Davis Polk”); Business Roundtable *et al.*, (“Group of Trade Associations”); Society of Corporate Secretaries and Governance Professionals (“SCSGP”); Greta E. Cowart, Haynes & Boone LLP *et al.* (“Group of Exec. Comp. Lawyers”); Protective Life Corporation; Towers Watson; Brian Foley & Co.; and Pay Governance LLC. We discuss these costs in detail in Section IV of this release.

¹¹ See, e.g., COEC I and letters from Brian Foley & Co.; Group of Trade Associations; Meridian Compensation Partners, LLC; National Association of Corporate Directors (“NACD”); and Retail Industry Leaders Association (“RILA”).

¹² See, e.g., letters from AFL-CIO dated December 13, 2010 (“AFL-CIO I”) and AFL-CIO dated August 11, 2011 (“AFL-CIO II”); Americans for Financial Reform; Batirente *et al.* (“Group of International Investors”); J. Brown; K. Burgoyne; Calvert Investment Management; Community Action Commission; CtW Investment Group; Drucker Institute; Institute for Policy Studies; R. Landgraf; D. Miron; Social Investment Forum; S. Towns; Trillium Asset Management; UAW Retiree Medical Benefits Trust; and Walden Asset Management. See also Letter Type A. We discuss these benefits in detail in Section IV of this release.

¹³ See, e.g., AFL-CIO II and letters from ABA; American Benefits Council; COEC II; Protective Life Corporation; and Davis Polk.

concerns and are designed to lower the cost of compliance while remaining consistent with Section 953(b).

II. DISCUSSION OF THE PROPOSED AMENDMENTS

A. Introduction

Section 953(b) imposes a new requirement on registrants to disclose the median of the annual total compensation of all employees (excluding the chief executive officer), the annual total compensation of the chief executive officer and the ratio of the median disclosed to the annual total compensation of the chief executive officer. Section 953(b)(2) specifies that, for purposes of Section 953(b), the total compensation of an employee of an issuer shall be determined in accordance with Item 402(c)(2)(x) of Regulation S-K. The Commission's rules for compensation disclosure have traditionally focused on the compensation of executive officers and directors.¹⁴ Although registrants subject to Item 402 are required to provide extensive information about the compensation of the principal executive officer ("PEO") and other named executive officers identified pursuant to Item 402(a), current disclosure rules generally do not require registrants to disclose detailed compensation information for other employees in their

¹⁴ Initially, disclosure requirements for executive and director compensation were set forth in Schedule A to the Securities Act and Section 12(b) of the Exchange Act, which list the type of information to be included in Securities Act and Exchange Act registration statements. In 1938, the Commission promulgated its first executive and director compensation disclosure rules for proxy statements. See Amended Proxy Rules, Release No. 34-1823 (Aug. 11, 1938) [3 FR 1991].

From time to time thereafter, the Commission has amended its executive and director compensation disclosure requirements in light of changing trends in executive compensation and other issues, and, more recently, to comply with the mandates of the Dodd Frank Act. See, e.g., Solicitation of Proxies Under the Act, Release No. 34-3347 (Dec. 18, 1942) [7 FR 10655]; Solicitation of Proxies, Release No. 34-4775 (Dec. 11, 1952) [17 FR 11431]; Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33-6003 (Dec. 4, 1978) [43 FR 58181]; Disclosure of Executive Compensation, Release No. 33-6486 (Sept. 23, 1983) [48 FR 44467]; Executive Compensation Disclosure, Release No. 33-6962 (Oct. 16, 1992) [57 FR 48126]; Executive Compensation Disclosure; Securityholder Lists and Mailing Requests, Release No. 33-7032 (Nov. 22, 1993) [58 FR 63010]; Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] ("2006 Adopting Release"); Proxy Disclosure Enhancements, Release No. 33-9089A (Dec. 16, 2009) [74 FR 68334]; and Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 33-9178 (Jan. 25, 2011)[76 FR 6010].

filings with the Commission.¹⁵ Commenters have observed that, because of the complexity of the requirements of Item 402(c)(2)(x), registrants typically compile information required by Item 402(c) manually for the named executive officers, which they have stated takes significant time and resources.¹⁶ We do not expect that many registrants, if any, currently disclose or track total compensation as determined pursuant to Item 402 for their workforce.¹⁷ Registrants are required to present various elements of employee compensation, on an aggregate basis, in the relevant line items of their financial statements and related footnotes (such as accrued payroll and benefits amounts recorded in current liabilities on the balance sheet, or salary and bonus amounts included in selling and administrative expenses or cost of goods sold on the income statement).¹⁸ These amounts are calculated and presented in accordance with the comprehensive set of accounting principles that the registrant uses to prepare its primary financial statements. For example, under United States generally accepted accounting principles (“U.S. GAAP”), there are several

¹⁵ Although the group of covered individuals for whom disclosure is required has changed over time, the rules generally have sought to require compensation disclosure for “persons who, in fact, function as key, policy-making members of management.” Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33-5950 (July 28, 1978) [43 FR 34415], at 34416.

¹⁶ See letter from Davis Polk. See also letter from R. Morrison.

¹⁷ See letter from Protective Life (noting that “very few employers routinely determine certain items of compensation for individual ‘rank and file’ employees, notably the values of stock and stock option awards and the aggregate change in the actuarial present value of defined benefit pension plan accruals. For most employers, determining these amounts will require, for the first time, calculations for all (or a large subset) of their employees”). See also COEC I (“No public company currently calculates each employee’s total compensation as it calculates total pay on the Summary Compensation Table for the named executive officers, because disclosure of executive pay has a different purpose than internal accounting.”); and letter from R. Morrison (“Collecting, organizing, and analyzing this kind of data for all employees in order to develop a median comp figure would be extremely complex, time-consuming, and burdensome, assuming this is even possible.”).

¹⁸ “Total compensation” as determined pursuant to Item 402 is not an amount that is reported or calculated in connection with a registrant’s financial statements.

accounting standards that relate to compensation,¹⁹ and these standards are distinct from the Commission's executive compensation disclosure rules. In addition, the Commission's executive compensation disclosure rules differ from tax accounting and reporting standards.²⁰ Therefore, Section 953(b) requires registrants to disclose specific information about non-executive employee compensation that is not currently required for disclosure, accounting or tax purposes.

Many commenters raised concerns about the significant compliance costs that could result from requiring the use of "total compensation" as defined in Item 402(c)(2)(x) to calculate employee pay and requiring registrants to identify the median instead of the average.²¹ According to these commenters, the primary driver of the significant compliance costs is that many registrants, whether large multinationals or companies of modest revenue size and market

¹⁹ See, e.g., FASB ASC 710, Compensation — General; ASC 715, Retirement Benefits Compensation; ASC 960, Defined Benefit Pension Plans; ASC 962, Defined Contribution Pension Plans; ASC 965, Health and Welfare Benefit Plans; and ASC 718, Compensation— Stock Compensation.

²⁰ For example, registrants that are subject to the United States Internal Revenue Code [26 U.S.C. 1 et seq.] are required to report certain compensation information for each employee to the Internal Revenue Service, typically on Form W-2. The elements of compensation that are required to be calculated and reported on Form W-2 are not the same as those covered by Item 402 requirements, and the reported amounts relate to the relevant calendar year for tax purposes, rather than the registrant's fiscal year.

Additionally, the compensation required to be disclosed under Item 402 reflects the compensation that was awarded to, earned by or paid to the executive officer during the fiscal year in contrast to compensation reported on Form W-2, which reflects only compensation that was includible in income for income tax purposes during the calendar year regardless of when that compensation was earned. For example, under Item 402, the value of stock options, deferred salary and bonuses would be included in compensation in the period they were awarded or earned. In contrast, for purposes of Form W-2, income from stock options is generally included in income at the time of exercise, and income relating to deferred salary and bonuses is included only when those amounts are actually paid, which could be in a future year.

²¹ See, e.g., letters from Davis Polk (noting that compliance will be "highly costly and burdensome, with tremendous uncertainty as to accuracy. Companies are justifiably concerned about the costs and burdens to accomplish the formidable data collection and calculation tasks for employees worldwide between the end of the year and the first required filing."); Frederick W. Cook & Co., Inc. (stating, "the calculation of median total pay for all employees other than the CEO is problematic, burdensome and perhaps impossible for many issuers") and Protective Life Corporation ("It is difficult to overemphasize how burdensome this requirement could be for large employers. Calculating annual total compensation is much more complicated than simply adding up numbers that companies already have available.... Since many large companies use outside accounting, actuarial and compensation and pension administration firms to perform these calculations, the costs of disclosure will increase accordingly."). See also letters from ABA; COEC I; Group of Exec. Comp. Lawyers; Group of Trade Associations; Meridian Compensation Partners, LLC; NACD; and R. Morrison.

capitalization, maintain multiple and complex payroll, benefits and pension systems (including systems maintained by third party administrators) that are not structured to easily accumulate and analyze all the types of data that would be required to calculate the annual total compensation for all employees in accordance with Item 402(c)(2)(x). Thus, in order to compile such disclosure, registrants would either need to integrate these data systems or consolidate the data manually, which, in both cases, would be, according to these commenters, highly costly and time consuming.²²

The proposed rules to implement Section 953(b) are designed to comply with the statutory mandate and to address commenters' concerns regarding the potential costs of complying with the disclosure requirement. Where we have exercised discretion in implementing the statutory requirements, we are proposing alternatives that we believe will reduce costs and burdens, while preserving what we believe to be the potential benefits, as articulated by commenters, of the disclosure requirement mandated by the Dodd-Frank Act. We note, however, that neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision.²³ Commenters supporting Section 953(b) have emphasized that potential benefits

²² See, e.g., letter from Group of Trade Associations ("There is a widespread misconception that this information is readily available at the touch of a button.") See also COEC II and letters from Group of Exec. Comp. Lawyers; Meridian Compensation Partners, LLC; and R. Morrison.

²³ The requirements imposed by Section 953(b) originated in the Senate. A provision identical to Section 953(b) was first included in S. 3049, the "Corporate Executive Accountability Act of 2010," which was sponsored by Senator Menendez and introduced on February 26, 2010. In that bill, the provision accompanied a say-on-pay provision. A provision identical to Section 953(b) next appeared in S. 3217, the "Restoring American Financial Stability Act of 2010" sponsored by Senator Dodd and introduced on April 15, 2010, which served as the basis for the Senate's amendments to H.R. 4173. The legislative record includes only a few brief references to the pay ratio disclosure requirements, each opposing the provision. See 156 Con. Rec. S3121 (daily ed. May 5, 2010) (statement of Sen. Gregg) and 156 Cong. Rec. S4075 (daily ed. May 20, 2010) (statement of Sen. Shelby). The April 30, 2010 report issued by the Senate Committee on Banking, Housing and Urban Affairs does not mention the pay ratio requirements other than a short statement by the minority. See Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 3217 ("the Senate Report"), S. Rep. No. 111-176, at 245.

could arise from adding pay ratio-type information to the total mix of executive compensation information.²⁴ We have considered the statutory mandate of Section 953(b) in the context of other executive compensation disclosure under Item 402, and, where practicable, we have sought to make the mandated disclosure of Section 953(b) work with the existing executive compensation disclosure regime.

In light of the significant potential costs articulated by commenters,²⁵ we believe that it is appropriate for the proposed rules to allow registrants flexibility in developing the disclosure required by the statute. The proposal seeks to implement Section 953(b) without imposing additional prescriptive requirements that are not mandated by the Dodd-Frank Act and reflects our consideration of the relative costs and benefits of this approach as opposed to a more prescriptive one. For example, registrants would be able to choose from several options in order to provide the disclosure. Registrants may choose to identify the median using their full employee population or by using statistical sampling or another reasonable method. In doing so, the proposed requirements would allow registrants to choose a statistical method to identify the

The requirements of Section 953(b) were not discussed during the conference committee's deliberations on the legislation. Similarly, the Joint Explanatory Statement of the Committee of Conference does not mention the pay ratio requirements in its summary of Title IX, Subtitle E. See Conference Report on H.R. 4173, H. Rep. No. 111-517, at 872.

²⁴ See, e.g., letters from Americans for Financial Reform ("Existing requirements mandate disclosure of top executive compensation only, encouraging companies to focus unduly on peer to peer comparisons when setting CEO pay...Disclosure of CEO-to-worker pay ratios will encourage Boards of Directors to also consider vertical pay equity within firms."); Calvert Investment Management ("The disclosure required by Section 953(b) will help investors understand how issuers are distributing compensation dollars throughout the firm in ways that may help improve employee morale and productivity."); CtW Investment Group ("The new disclosure offers an insight into compensation within the entire organization, and provides a different way for boards and shareholders to evaluate the relative worth of a CEO."); and UAW Retiree Medical Benefits Trust ("[W]e view Section 953(b) as an essential tool that will increase corporate board accountability to investors...a comparison between CEO and employee pay may help shareholders identify the board's strengths and weaknesses, and may provide insight into [the board's] relationship with the CEO.").

²⁵ The potential costs arising from the requirements of Section 953(b), as well as the potential costs relating to the proposed rules, are discussed in detail below in Section IV of this release.

median that is appropriate to the size and structure of their own businesses and the way in which they compensate employees, rather than prescribing a particular methodology or specific computation parameters. Registrants may calculate the annual total compensation for each employee included in the calculation (whether the entire population or a statistical sample) and the PEO using Item 402(c)(2)(x) and to identify the median using this method. As an alternative, registrants may identify the median employee based on any consistently applied compensation measure and then calculate the annual total compensation for that median employee in accordance with Item 402(c)(2)(x). The proposed requirements also would permit registrants to use reasonable estimates in calculating the annual total compensation for employees other than the PEO, including when disclosing the annual total compensation of the median employee identified using a consistently applied compensation measure. We believe that this flexible approach is consistent with Section 953(b) and could ease commenters' concerns about the potential burdens of complying with the disclosure requirement. We do not believe that a one-size-fits-all approach would be prudent, given the wide range of registrants and the disparate burdens on registrants based on factors such as their type of business and the complexity of their payroll systems. We seek comment on whether the proposed rules address sufficiently the practical difficulties of data collection and whether there are other alternative approaches consistent with Section 953(b) that could provide the potential benefits of pay ratio information at a lower cost. We also seek comment on whether the flexible approach proposed in this release appropriately implements Section 953(b).

The details of the proposal are set forth in the sections below. First, we interpret the scope of Section 953(b) with respect to the filings and the registrants that are subject to the proposed requirements. Next, we set forth the proposed new pay ratio disclosure requirement in Item 402,

to be designated paragraph (u), and provide details on a variety of technical and interpretive issues, including:

- the employees that are to be included in the identification of the median;
- identifying the median;
- determining “total compensation;”
- disclosure of the methodology, assumptions and estimates used;
- the meaning of “annual” in the context of “annual total compensation;”
- various timing matters that arise in connection with the proposed requirements; and
- the status of the disclosure as “filed” rather than “furnished.”

Finally, we address transition matters, including the proposed compliance date for registrants that would be subject to the rules, and proposed transition provisions for new registrants.

B. Scope of Section 953(b) of the Dodd-Frank Act

1. Filings Subject to the Proposed Disclosure Requirements

In accordance with Section 953(b) of the Dodd-Frank Act, we are proposing to require registrants to include pay ratio disclosure in any filing described in Item 10(a) of Regulation S-K that requires executive compensation disclosure under Item 402 of Regulation S-K. Therefore, the proposed pay ratio disclosure would be required in annual reports on Form 10-K,²⁶ registration statements under the Securities Act and Exchange Act, and proxy and information statements, to the same extent that the requirements of these forms require compliance with Item

²⁶ 17 CFR 249.310.

402.²⁷ We are not proposing changes to the requirements of these forms relating to Item 402. Section 953(b) does not direct the Commission to amend any of its forms to add the pay ratio disclosure requirements to filings that do not already require disclosure of Item 402 information, and we are not proposing to do so.

Although some commenters suggested that Section 953(b)(1) requires pay ratio disclosure in every Commission filing,²⁸ other commenters suggested that the statute, by referring to filings described in Item 10(a) of Regulation S-K, is intended to apply only to those filings for which the applicable form requires Item 402 disclosure.²⁹ We agree with the latter reading of Section 953(b). We believe that reading Section 953(b) to require pay ratio disclosure in filings that do not contain other executive compensation information would not present this information in a meaningful context. Because some commenters have asserted that the pay ratio disclosure would provide another metric to evaluate executive compensation disclosure,³⁰ we believe that the proposed pay ratio disclosure should be placed in context with other executive compensation disclosure, such as the summary compensation table required by Item 402(c) and the

²⁷ Registrants would follow the instructions in each form to determine whether Item 402 information is required, including any instructions that allow for the omission of Item 402 information in certain circumstances, such as General Instructions I(2)(c) and J(1)(m) to Form 10-K containing special provisions for the omission of Item 402 information by wholly-owned subsidiaries and asset-backed issuers.

As described below in Section II.C.7., the proposed requirements do not require a registrant to update its pay ratio disclosure for the most recently completed fiscal year until it files its annual report on Form 10-K, or, if later, its proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of such a meeting).

In addition, we are proposing a transition period for compliance by new registrants that are subject to Section 953(b), so that the pay ratio requirement is not required in a registration statement on Form S-1 [17 CFR 239.11] or Form S-11 [17 CFR 239.18] for an initial public offering or registration statement on Form 10 [17 CFR 249.210]. See Section II.D.2. of this release.

²⁸ See, e.g., COEC I and letters from American Benefits Council; Compensia, Inc.; Davis Polk; SCSGP; and Towers Watson.

²⁹ See, e.g., letters from ABA and RILA.

³⁰ See, e.g., AFL-CIO I, House Letter and Senate Letter; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

compensation discussion and analysis required by Item 402(b), rather than provided on a stand-alone basis. Therefore, we believe it is appropriate to read Section 953(b) as requiring pay ratio disclosure in only those filings that are required to include other Item 402 information.

Request for Comment

1. Should we require the pay ratio disclosure only in filings in which Item 402 disclosure is required, as proposed? Should we require the pay ratio disclosure in Commission forms that do not currently require Item 402 disclosure? If so, which forms, and why? Would disclosure be meaningful to investors where no other executive compensation disclosures are required?
2. Do registrants need any additional guidance about which filings would require the proposed pay ratio disclosure? Are there circumstances where the requirements of a particular form call for Item 402 information in certain circumstances, but the applicability of the proposed pay ratio disclosure requirements may not be clear? If so, please provide details about what should be clarified and what guidance is recommended.

2. Registrants Subject to the Proposed Disclosure Requirements

The proposed pay ratio disclosure requirements would apply to only those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c). We recognize that the reference to “each issuer” in Section 953(b) could be read to apply to all issuers that are not emerging growth companies, including smaller reporting companies and foreign private issuers. As a result of the specific reference in Section 953(b) to the definition of total compensation contained in Item 402(c)(2)(x), and the absence of direction to apply this requirement to companies not previously subject to Item 402(c) requirements, we propose to limit the pay ratio disclosure requirement to registrants that are subject to Item 402(c) requirements, as described in more detail below.

a. Emerging Growth Companies Are Not Covered

Under JOBS Act Section 102(a)(3), registrants that qualify as emerging growth companies, as that term is defined in Section 3(a) of the Exchange Act,³¹ are not subject to Section 953(b). To give effect to the statutory exemption, we are proposing an instruction to Item 402(u) that provides that a registrant that is an emerging growth company is not required to comply with Item 402(u).³²

b. Smaller Reporting Companies Are Not Covered

Section 953(b) requires total compensation to be calculated in accordance with Item 402(c)(2)(x). Smaller reporting companies (as defined in Item 10(f)(1) of Regulation S-K)³³ are permitted to follow the scaled disclosure requirements set forth in Items 402(m)-(r) instead of complying with the disclosure requirements set forth in Items 402(a)-(k) and (s),³⁴ and therefore are not required to calculate compensation in accordance with Item 402(c)(2)(x). The requirement set forth in Item 402(n) for disclosure of summary compensation table information, which includes disclosure of “total compensation,” does not require smaller reporting companies to include all of the same types of compensation required to be included in total compensation for other registrants under Item 402(c)(2).³⁵ We believe that by requiring the use of Item 402(c)(2)(x)

³¹ 15 U.S.C. 78c(a).

³² See proposed Instruction 6 to Item 402(u).

³³ 17 CFR 229.10(f)(1).

³⁴ See Item 402(l). Smaller reporting companies are permitted to choose compliance with either the scaled disclosure requirements or the larger company disclosure requirements on an “a la carte” basis. As discussed in the scaled disclosure adopting release, the staff evaluates compliance by smaller reporting companies with only the Regulation S-K requirements applicable to smaller reporting companies, even if the company chooses to comply with the larger company requirements. See Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934], at 941.

³⁵ Specifically, under Item 402(n)(2)(viii), smaller reporting companies are not required to include the aggregate change in the actuarial present value of pension benefits that is required for companies subject to Item 402(c)(2)(viii).

to calculate total compensation (without mention of Item 402(n)(2)(x)), Congress intended to exclude smaller reporting companies from the scope of Section 953(b). In addition, requiring smaller reporting companies to provide the pay ratio disclosure consistent with the requirement for other registrants would require smaller reporting companies to collect data and calculate compensation for the PEO in a manner they otherwise would not be required to calculate compensation. Thus, we do not believe this is the intent of the provision.

Therefore, as proposed, the pay ratio disclosure requirements would not apply to smaller reporting companies. To make this clear, we are proposing a technical amendment to paragraph (l) of Item 402, to add proposed paragraph (u) to the list of items that are not required for smaller reporting companies.

c. Foreign Private Issuers and MJDS Filers Are Not Covered

Foreign private issuers that file annual reports and registration statements on Form 20-F and MJDS filers that file annual reports and registration statements on Form 40-F would not be required to provide the proposed pay ratio disclosure, because those forms do not require Item 402 disclosure.³⁶ We do not read Section 953(b) as requiring the Commission to expand the scope of Item 402 to apply to companies that are not currently subject to the executive compensation disclosure requirements set forth in Item 402. Accordingly, we are not proposing to amend Form 20-F or Form 40-F, and the proposed pay ratio disclosure requirements would not be applicable to foreign private issuers or MJDS filers. In addition, we are not proposing any

³⁶

The term “MJDS filers” refers to registrants that file reports and registration statements with the Commission in accordance with the requirements of the U.S.- Canadian Multijurisdictional Disclosure System (the “MJDS”). The definition for “foreign private issuer” is contained in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)]. A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that, as of the last business day of its most recent fiscal year, has more than 50% of its outstanding voting securities held of record by United States 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.

changes to existing Item 402(a)(1), which provides for the treatment of foreign private issuers. Accordingly, foreign private issuers that file annual reports on Form 10-K will continue to be able to satisfy Item 402 requirements by following the requirements of Items 6.B and 6.E.2 of Form 20-F and would not be required to make the pay ratio disclosure mandated by Section 953(b). In addition, requiring foreign private issuers and MJDS filers to provide the pay ratio disclosure consistent with the requirement for other registrants would require these registrants to collect data and calculate compensation for the PEO in a manner they otherwise would not be required to calculate compensation. Thus, we do not believe this is the intent of the provision.

Request for Comment

3. Should the pay ratio disclosure requirements, as proposed, apply only to those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c)? If not, to which registrants should pay ratio disclosure requirements apply?
4. Should we revise the proposal so that smaller reporting companies would be subject to the proposed pay ratio disclosure requirements? If so, why? If so, also discuss how smaller reporting companies should calculate total compensation for employees and the PEO. For example, should they be required to calculate total compensation in accordance with Item 402(c)(2)(x) instead of the scaled disclosure requirements? In the alternative, should smaller reporting companies be required to provide a modified version of the pay ratio disclosure? If so, why, and what should that modified version entail? Should it be based on the compensation amounts required under the scaled disclosure requirements applicable to smaller reporting companies, such as a ratio where the PEO compensation and other employee compensation are calculated in accordance with Item 402(n)(2)(x)? Please provide information as to particular concerns that smaller reporting companies may

have. Please discuss whether the disclosure would be useful to investors in smaller reporting companies.

5. Should we amend either Form 20-F or Form 40-F to include disclosure that is similar to the proposed pay ratio disclosure requirements? If so, why? Assuming we would not otherwise subject foreign private issuers to the executive compensation disclosure rules, what modifications would be needed to address the different reporting requirements that foreign private issuers and MJDS filers have for executive compensation disclosure in order to require pay ratio disclosure? In particular, how should these registrants calculate total compensation (for the PEO and for employees) for purposes of such a requirement? Please provide information as to particular concerns that foreign private issuers or MJDS filers may have if they were required to comply with such a requirement. Please discuss whether the disclosure would be useful to investors, particularly in the absence of the executive compensation disclosure that would accompany disclosure of the ratio for registrants subject to Item 402 disclosure.

C. Proposed Requirements for Pay Ratio Disclosure

1. New Paragraph (u) of Item 402 (Pay Ratio Disclosure)

We are proposing new paragraph (u) of Item 402 that would require disclosure of:

- (A) the median of the annual total compensation of all employees of the registrant, except the principal executive officer of the registrant;
- (B) the annual total compensation of the principal executive officer of the registrant; and
- (C) the ratio of the amount in (A) to the amount in (B), presented as a ratio in which the amount in (A) equals one or, alternatively, expressed narratively in terms of the multiple that the amount in (B) bears to the amount in (A).

For consistency with existing Item 402 requirements, the proposed requirements would use the defined term “PEO” (principal executive officer), instead of the term “chief executive officer” used in Section 953(b).³⁷ PEO is defined in Item 402(a)(3) as an “individual serving as the registrant’s principal executive officer or acting in a similar capacity during the last completed fiscal year.” We believe that this consistency would simplify compliance for registrants and would clarify how the pay ratio disclosure relates to the PEO’s total compensation figure disclosed in the summary compensation table. We also believe that this change in terminology is consistent with Section 953(b).

Section 953(b) specifies that registrants must disclose the ratio of the median of the annual total compensation of all employees to the PEO’s annual total compensation. We note that three commenters raised concerns about the presentation of the pay ratio in the order set forth in Section 953(b).³⁸ These commenters noted that the customary manner of presenting similar types of ratios would include the PEO’s annual total compensation in the numerator and the median of the annual total compensation of all employees in the denominator and would typically be expressed in terms of the multiple that the PEO amount bears to the median amount (such as “PEO pay is X times the median employee pay”). These commenters recommended that we allow registrants to present the ratio in this more customary manner.

³⁷ The term chief executive officer in the executive compensation rules was replaced by the term “principal executive officer” as part of the 2006 amendments to Item 402 of Regulation S-K in order to maintain consistency with the nomenclature used in Item 5.02 of Form 8-K. See 2006 Adopting Release, *supra* note 14, at n. 326.

³⁸ See letters from Compensia, Inc. (“For example, if the annual total compensation of a company’s chief executive officer was \$3,750,000 and the median of the annual total compensation of all employees was \$75,000, then as currently formulated, the required disclosure would be 0.02 to 1, rather than the commonly understood calculation of 50 to 1.”); Frederick W. Cook & Co., Inc.; and Group of Exec. Comp. Lawyers (“For example, if CEO pay were 2 million and the median annual compensation of all employees were \$25,000, the statute literally requires a disclosure that the median annual compensation of all employees is 1/80 of the CEO’s pay.”).

Although Section 953(b) calls for a ratio showing the median of the annual total compensation of all employees to the PEO's annual total compensation, it does not specify how the ratio should be expressed. In order to promote consistent presentation and address the potential for confusion, the proposed pay ratio disclosure requirements specify that the ratio must be expressed as a ratio in which the median of the annual total compensation of all employees is equal to one, or, alternatively, expressed narratively in terms of the multiple that the PEO total compensation amount bears to the median of the annual total compensation amount. For example, if the median of the annual total compensation of all employees of a registrant is \$45,790,³⁹ and the annual total compensation of a registrant's PEO is \$12,260,000,⁴⁰ then the pay ratio disclosed would be "1 to 268" (which could also be expressed narratively as "the PEO's annual total compensation is 268 times that of the median of the annual total compensation of all employees").

We believe that the proposed requirements for the expression of the ratio would help to address the concerns of commenters and are consistent with the statute. It does not appear that the order of the ratio specified in Section 953(b) would impact investor understanding or the usefulness, as expressed by some commenters,⁴¹ to investors of the proposed pay ratio disclosure.

³⁹ Average salary for all occupations, U.S. Bureau of Labor Statistics, May 2012 National Occupational Employment and Wage Estimates United States, available at http://www.bls.gov/oes/current/oes_nat.htm#00-0000.

⁴⁰ Derived from 2012 Average CEO at S&P 500 Index Companies, AFL-CIO, Trends in CEO Pay, available at <http://www.aflcio.org/Corporate-Watch/CEO-Pay-and-the-99/Trends-in-CEO-Pay>.

⁴¹ The commenters asserting that Section 953(b) disclosure would be useful to investors did not raise the order of the ratio components as a factor that would diminish the meaningfulness of the information. These commenters are listed at notes 155 through 165, infra.

Request for Comment

6. Are there any other presentation issues that companies need guidance on or that should be clarified in the pay ratio disclosure requirements? If so, please provide details about such issues and any recommended guidance that should be provided.

2. Employees Included in the Identification of the Median

a. All Employees

Section 953(b) expressly requires disclosure of the median of the annual total compensation of “all employees.” Consistent with that mandate, the proposed requirements state that “employee” or “employee of the registrant” includes any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries⁴² (including officers other than the PEO).⁴³ Therefore, under the proposed requirements, “all employees” covers all such individuals. In contrast, workers who are not employed by the registrant or its subsidiaries, such as independent contractors or “leased” workers or other temporary workers who are employed by a third party, would not be covered.⁴⁴

⁴² By directing the Commission to amend Item 402, we believe that Section 953(b) is intended to cover employees on an enterprise-wide basis, including both the registrant and its subsidiaries, which is the same approach as that taken for other Item 402 information. See Item 402(a)(2) and Instruction 2 to Item 402(a)(3). Because this issue was not addressed by commenters, we specifically request comment below on this approach.

In the context of Item 402 disclosure, a subsidiary of a registrant is an affiliate controlled by the registrant directly or indirectly through one or more intermediaries, as set forth in the definition of “subsidiary” under both Securities Act Rule 405 and Exchange Act Rule 12b-2. Therefore, for purposes of the proposed pay ratio disclosure, an employee would be covered by the disclosure requirements if he or she is employed by the registrant or a subsidiary of the registrant as defined in Rule 405 and Rule 12b-2.

⁴³ Rule 405 under the Securities Act states that the term “employee” does not include a director, trustee or officer. The parenthetical “(including officers other than the PEO)” in Item 402(u)(3) of the proposed rules is intended to clarify that officers, as that term is defined under Rule 405, are not excluded from the definition of employee for purposes of the proposed pay ratio disclosure requirements.

⁴⁴ For example, if a registrant pays a fee to another company (such as a management company or an employee leasing agency) that supplies workers to the registrant, and those workers receive compensation from that other company, those workers would not be counted as employees of the registrant for purposes of the proposed rules.

We note that commenters were split in their support for a rule that would include all employees of the issuer,⁴⁵ rather than only covering full-time U.S. workers.⁴⁶ Many commenters raised concerns that the inclusion of workers located outside the United States, as well as employees that are not permanent, full-time employees, would render the comparison to the PEO less meaningful, while at the same time imposing significant costs on registrants that have global operations.⁴⁷ According to these commenters, the international variation in compensation arrangements and benefits, in addition to cost-of-living differences and currency fluctuations, could distort the comparability of employee compensation to that of a PEO based in the United States.⁴⁸ In addition, these commenters noted that the types of compensation that are recorded in payroll and benefits systems outside the United States may vary from those recorded as compensation in the United States due to local accounting standards and tax regulations. Because of these variations, they further suggest that requiring registrants to recompute or adjust the output of payroll systems to include non-payroll items that would be reportable as compensation under Item 402 has the potential to impose significant compliance costs.⁴⁹

In contrast, one commenter asserted that the provision was intended to cover all employees of the issuer, including full-time, part-time, U.S. and non-U.S. employees.⁵⁰ Some

⁴⁵ See AFL-CIO I and letters from Americans for Financial Reform; CtW Investment Group; Group of International Investors; Senator Menendez; Social Investment Forum; Trillium Asset Management; UAW Medical Benefits Trust; and Walden Asset Management.

⁴⁶ See COEC I and letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; NACD; Protective Life Corporation; RILA; SCSGP; and Towers Watson.

⁴⁷ See COEC I and letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; NACD; Protective Life Corporation; RILA; SCSGP; and Towers Watson.

⁴⁸ See, e.g., letter from Group of Exec. Comp. Lawyers.

⁴⁹ Id.

⁵⁰ See letter from Senator Menendez, the sponsor of Section 953(b) (“Specifically, I want to clarify that when I wrote ‘all’ employees of the issuer, I really did mean all employees of the issuer. I intended that to mean

commenters asserted that the exclusion of non-U.S. and non-full-time employees would diminish the meaningfulness of the pay ratio disclosure to investors.⁵¹ Some of these commenters suggested allowing companies to present separate pay ratios covering U.S. and non-U.S. employees, which they believed could mitigate concerns that the comparison of the PEO to workers located outside of the United States could distort the disclosure.⁵²

We acknowledge the concerns of commenters that the inclusion of non-U.S. employees raises compliance costs for multinational companies, introduces cross-border compliance issues, and could raise concerns about the impact of non-U.S. pay structures on the comparability of the data to companies without off-shore operations. We also recognize that differences in relative compliance costs may have an adverse impact on competition. We have weighed these considerations and are proposing that the requirement cover all employees without carve-outs for specific categories of employees. Although we believe that the inclusion of non-U.S. employees in the calculation of the median is consistent with the statute, we have considered ways to address the costs of compliance that commenters attribute to the provision's coverage of a registrant's global workforce.

both full-time and part-time employees, not just full-time employees. I also intended that to mean all foreign employees of the company, not just U.S. employees.”).

⁵¹ See AFL-CIO I and letters from Americans for Financial Reform; CtW Investment Group; Group of International Investors; Institute for Policy Studies; and UAW Medical Benefits Trust. But see letter from Social Investment Forum (“[W]e acknowledge that a comparison of a U.S. CEO’s pay to the median for U.S. employees is the most useful comparison as a factor for the compensation committee in establishing executive pay packages.”) and letter from Walden Asset Management (“[F]or the purposes of analyzing trends in executive pay for U.S. executives, statistics comparing compensation of NEOs to the median U.S. employee [are] most useful.”).

⁵² See AFL-CIO I and letters from Americans for Financial Reform; Walden Asset Management; and Social Investment Forum (“We recommend that the SEC require two statistics, one on pay disparity with only U.S. workers and another for non-U.S. workers so that investors can better study pay disparity trends and inherent risks.”).

In particular, we are cognizant that data privacy laws in various jurisdictions could have an impact on gathering and verifying the data needed to identify the median of the annual total compensation of all employees. Commenters have asserted that, in some cases, data privacy laws could prohibit a registrant's collection and transfer of personally identifiable compensation data that would be needed to identify the median.⁵³ We also understand that in many cases, the collection or transfer of the underlying data is made burdensome by local data privacy laws, but is not prohibited.

For example, we acknowledge that multinational companies based in the United States may need to ensure compliance with data privacy regulations in transmitting personally identifiable human resources data ("personal data") of European Union ("EU") persons onto global human resource information system networks in the United States, sending personal data in hard copy from the European Union to the United States, as well as personal data "onward transfers" to third-party payroll, pension and benefits processors outside of the European Union.⁵⁴ In some EU Member States, employee consent is required, while in others, consent may not be sufficient.⁵⁵ Commenters also have asserted that other jurisdictions, such as Peru, Argentina, Canada and Japan also have data privacy laws that could be implicated by the gathering of data for purposes of the proposed pay ratio disclosure.⁵⁶

⁵³ See COEC II and letters from Davis Polk; Group of Exec. Comp. Lawyers; and SCSGP.

⁵⁴ The EU Directive 95/46/EC, 1995 O.J. L 281 (European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data) sets forth the regulatory framework governing the transfer of personal data from an EU Member State to a non-EU country.

⁵⁵ See letter from Group of Exec. Comp. Lawyers.

⁵⁶ Id.

Although we are not proposing any additional accommodation to address this concern, we believe that the flexibility afforded to all registrants under the proposed rules could permit registrants to manage any potential costs arising from applicable data privacy laws. For example, consistent with the proposed requirements, registrants in this situation would be permitted to estimate the compensation of affected employees. We request comment below on whether the proposed flexibility afforded to registrants in selecting a method to identify the median, such as the use of statistical sampling or other reasonable estimation techniques and the use of consistently applied compensation measures to identify the median employee, could enable registrants to better manage any potential costs and burdens arising from local data privacy regulations or if there are other alternatives that would be consistent with Section 953(b).

Commenters did not provide us with information about applicable data privacy laws sufficient to analyze how the flexibility allowed to all registrants under the proposed requirements could impact the potential costs arising from such laws, and we request information about the specific impact these matters would have on collecting or transferring data needed to comply with the proposed requirements.

Request for Comment

7. Are there alternative ways to fulfill the statutory mandate of covering “all employees” that could reduce the compliance costs and cross-border issues raised by commenters? For example, would it be consistent with the statute to permit registrants to exclude non-U.S. employees from the calculation of the median? Would it be consistent with the statute to permit registrants to exclude non-full-time employees from the calculation of the median? If not, could these alternatives be implemented in a way that would be consistent with the statute?

8. Should registrants be allowed to disclose two separate pay ratios covering U.S. employees and non-U.S. employees in lieu of the pay ratio covering all U.S. and non-U.S. employees? Why or why not? Should we require registrants to provide two separate pay ratios, as requested by some commenters?⁵⁷ What should the separate ratios cover (e.g., should there be one for U.S. employees and one for non-U.S. employees, or should there be one for U.S. employees and one covering all employees)? If separate ratios are required, should this be in addition to, or in lieu of, the pay ratio covering all U.S. and non-U.S. employees? Would such a requirement increase costs for registrants? Would it increase the usefulness to investors of the disclosure?
9. Please identify the applicable data privacy laws or regulations that could impact the collection or transfer of the data needed to comply with the proposed pay ratio requirement. Please also identify whether there are exclusions, exemptions or safe harbors that could be used to collect or transfer such data. Please quantify, to the extent practicable, the impact of such laws on registrants subject to Section 953(b), such as an estimate of the number of registrants affected or the average percentage of employees affected. How would the proposed flexibility afforded to all registrants (i.e., selecting a method to identify the median, the use of statistical sampling or other reasonable estimation techniques and the use of consistently applied compensation measures to identify the median employee) impact any potential costs and burdens arising from local data privacy laws? In particular, would a registrant be able to make a reasonable estimation of the total compensation for affected employees? Would a registrant be able

⁵⁷

See AFL-CIO I and letters from Americans for Financial Reform; Walden Asset Management; and Social Investment Forum.

to select a consistent compensation measure that is not subject to local data privacy laws?

If not, are there alternative ways to meet the statutory mandate of Section 953(b) that would reduce the costs and burdens arising from local data privacy laws?

10. Are there applicable local data privacy laws that would prohibit the collection or transfer of data necessary to calculate the annual total compensation of an employee or group of employees or the identification of a median employee using a consistent compensation measure? In that situation, would a registrant be able to reasonably estimate compensation? If not, are there alternatives to the proposed rule that would address such a situation while still being consistent with Section 953(b)? Should any such alternatives be permitted? If an alternative should be permitted, what limitations or conditions should be imposed on using the alternative? For example, should registrants be required to disclose the approximate number of employees affected and identify the law that prohibits the collection or transfer of data? Please discuss whether any such alternatives would significantly impact the pay ratio disclosure.
11. Should the rule cover employees of a registrant's subsidiaries as defined in Rule 405 and Rule 12b-2, as proposed? Are there any situations where an entity meets the subsidiary definition but its employees should not be included for purposes of the proposed requirement? For example, should the rule be limited to subsidiaries that consolidate their financial statements with those of the registrant? Should the rule not apply to subsidiaries of certain types of registrants, such as the portfolio companies of business development companies? Please provide details of any recommended limitations.
12. Alternatively, should the requirements be limited to employees that are employed directly by the registrant (i.e., excluding employees of its subsidiaries)? Would such a limitation

be consistent with Section 953(b)? How would such a limitation affect the potential benefits of the disclosure? Would such a limitation have other impacts, such as incentivizing registrants to alter their corporate structure, and, if so, are there alternative ways that the rule could address those impacts?

13. Should Section 953(b) be read to apply to “leased” workers or other temporary workers employed by a third party? Does the proposed approach to such workers raise costs or other compliance issues for registrants, or impact potential benefits to investors, that we have not identified? Do registrants need guidance or instructions for determining how to treat employees of partially-owned subsidiaries or joint ventures? If so, what should such guidance or instructions entail?
14. Is it likely that registrants would alter their corporate structure or employment arrangements to reduce the number of employees covered by the proposed requirements? How should we tailor the proposed requirements to address such an impact?
15. Does the proposed inclusion of all employees raise competition concerns? If so, are there some industries or types of registrants that would be more affected than others? How should we tailor the proposed requirements to address such concerns?

b. Calculation Date for Determining Who is An Employee

The proposed requirement defines “employee” as an individual employed as of the last day of the registrant’s last completed fiscal year.⁵⁸ This calculation date for determining who is an employee would be consistent with the one used for the determination of the three most highly

⁵⁸ Proposed Item 402(u)(3).

compensated executive officers under Item 402(a)(3)(iii). Two commenters expressly supported this approach.⁵⁹

Additionally, two commenters suggested that only employees that have been employed for the entire annual period (and as of the last day of the fiscal year) should be covered.⁶⁰ The composition of a company's workforce typically changes throughout the fiscal year, and in some industries and businesses, it can change constantly. Although Section 953(b) requires the median calculation to cover all employees, it does not prescribe a particular calculation date for the determination of who should be treated as an employee for that purpose. We believe that a bright line calculation date for determining who is an employee would ease compliance for registrants by eliminating the need to monitor changing workforce composition during the year, while still providing a recent snapshot of the entire workforce.⁶¹ We agree with the commenters who suggest that the most appropriate calculation date is one that is consistent with the calculation date for determining the named executive officers under current Item 402 requirements.

In proposing this approach, we have assumed that the potential benefits of the disclosure mandated by Section 953(b) would not be significantly diminished by covering only individuals employed on a specific date at year-end, rather than covering every individual who was employed at any time during the year. Although we believe that this approach could help contain

⁵⁹ See letters from RILA ("For consistency with the requirements of Item 402, we believe the best option is to determine the median total annual salary of the issuer's employees as of the close of the most recently completed fiscal year.") and Towers Watson ("[I]t will be necessary to fix the employee group as of a particular date... The last day of the prior year would seem an obvious choice.").

⁶⁰ See letters from ABA and RILA. One of these commenters suggested that the use of the word "annual" in Section 953(b) could be interpreted as limiting the scope of the provision to only those employees that have been employed for the full fiscal year. See letter from ABA.

⁶¹ We note that a requirement to track which employees have been continuously employed for the entire annual period could increase costs for registrants, although, as discussed below, we are permitting registrants to annualize the compensation of certain employees.

compliance costs for registrants, we acknowledge that it could have other costs. For example, this approach would not capture seasonal or temporary employees that are not employed at year-end. This would enable a registrant with a significant amount of such workers to calculate a median that does not fully reflect the workforce that is required to run its business. It could also cause the proposed requirements to be costlier for, and thereby have an anti-competitive impact on, registrants whose temporary or seasonal workers are employed at year-end as opposed to other times during the year. Finally, it is possible, although commenters have asserted that it is remote, that registrants could try to structure their employment arrangements to reduce the number of workers employed on the calculation date.⁶²

Request for Comment

16. Is the proposed calculation date workable for registrants? If not, what date should be used (e.g., the last day of the registrant's second (or third) fiscal quarter) and why?
17. In the alternative, should registrants be permitted the flexibility to choose a calculation date for this purpose? Why or why not? If so, should we require the registrant to disclose why a particular date was chosen? Should such flexibility be limited to certain circumstances? If so, what principles should apply in identifying those circumstances?
18. Is it appropriate to limit the scope of covered employees to those who were employed on the last day of the registrant's fiscal year, as proposed? Why or why not? Is consistency with other Item 402 disclosure important in this context? Would this approach ease compliance costs for registrants? What impact would this calculation date have on registrants that employ seasonal workers and would the exclusion of seasonal workers not

⁶² See AFL-CIO I ("The disclosure of compensation data under Section 953(b) will not have unintended consequences on public company employment decisions.").

employed on the calculation date likely have an impact on the median or the ratio? Please provide data, such as an estimate of the number of registrants that employ seasonal workers and the average percentage of seasonal employees that would likely be excluded. Is it likely that registrants might structure their employment arrangements to reduce the number of workers employed on the calculation date? Are there other costs that would be incurred using this approach that we should consider? Would the proposed calculation date have a meaningful impact on the potential usefulness of the disclosure for investors? Are there other ways to deal with defining the scope of covered employees that are more effective at reducing costs and providing meaningful disclosure?

19. Should registrants be required to include any individual who was employed at any time during the year, or for some minimum amount of time (and if so, what amount of time) during the year?
20. Should the rule only apply to employees employed for the full fiscal year? Why or why not?

c. Adjustments for Certain Employees

Some commenters raised questions about how to treat employees who were not employed during the entire fiscal year and recommended that companies be permitted to annualize the compensation for these employees in order to more accurately reflect the employment relationship.⁶³ We agree that in instances where the employment relationship is permanent, and not temporary or seasonal, registrants should be permitted to annualize the total compensation for

⁶³ See, e.g., letters from Davis Polk; Frederick W. Cook & Co.; Social Investment Forum; RILA, Walden Asset Management; and Trillium Asset Management.

an employee who did not work for the entire year, such as a new hire or an employee who took an unpaid leave of absence during the period.⁶⁴

Accordingly, the proposed requirements include an instruction that states that total compensation may be annualized for all permanent employees (other than those in temporary or seasonal positions) who were employed for less than the full fiscal year.⁶⁵ We are not proposing to require registrants to perform this type of adjustment, however, because we do not believe that the costs of requiring companies to make an extra calculation would be justified.

The proposed instruction is limited to permanent employees. In addition, as proposed, the instruction would not permit a registrant to annualize some eligible employees and not others. As discussed below, this instruction also would not permit adjustments that would cause the ratio to not reflect the actual composition of the workforce, such as annualizing the compensation of seasonal or temporary workers. Depending on the facts and circumstances, it could be appropriate for a registrant to annualize the compensation for a permanent part-time worker who has only worked a portion of the year (such as an employee who is permanently employed for three days a week and who took an unpaid leave of absence under the Family and Medical Leave Act). In such a case, the adjustment should reflect compensation for the employee's part-time schedule over the entire year, but should not adjust the part-time schedule to a full-time equivalent schedule.

In proposing this approach, we have assumed that this annualizing adjustment would not significantly diminish the potential usefulness of the disclosure mandated by Section 953(b). For

⁶⁴ RILA noted employees on leave under the Family and Medical Leave Act of 1993 [29 U.S.C. 2601 *et seq.*] and employees called for active military duty as common examples.

⁶⁵ By use of the term "employee," this proposed instruction would apply to individuals who were employed on the last day of the fiscal year (the calculation date).

example, we would not expect that annualizing the salary of a permanent new hire would impact the potential ability of an investor to use the pay ratio disclosure as an indicator of employee morale or to gain an understanding of a registrant's investment in human capital, which some commenters have identified as potential benefits of the disclosure under Section 953(b).⁶⁶ We also note that some of the commenters that support Section 953(b) disclosure were also supportive of allowing annualizing adjustments for employees employed for less than the full year.⁶⁷

By permitting but not requiring registrants to annualize compensation for these employees, the comparability of disclosure across companies could be reduced. As discussed elsewhere in this release,⁶⁸ we do not believe that precise comparability or conformity of disclosure from registrant to registrant is necessarily achievable due to the variety of factors that could cause the ratio to differ, and, accordingly, we do not believe that the costs associated with attempting to promote precise comparability in this respect would be justified.

Although we are proposing to permit the annualizing adjustments described above, we believe that some of the assumptions or adjustments suggested by commenters for calculating the annual total compensation of employees might present a distorted picture of the actual composition of a registrant's workforce or compensation practices. We believe that certain adjustments or assumptions, such as full-time equivalent adjustments for part-time workers, annualizing adjustments for temporary or seasonal employees, and cost-of-living adjustments for

⁶⁶ See AFL-CIO I and letters from; Calvert Investment Management; CtW Investment Group; Group of International Investors; Americans for Financial Reform; Drucker Institute; Institute for Policy Studies; Social Investment Forum; Trillium Asset Management; and UAW Retiree Medical Benefits Trust.

⁶⁷ See letters from Social Investment Forum and Trillium Asset Management.

⁶⁸ See Section IV of this release.

non-U.S. workers, would cause the median to not be reasonably representative of the registrant's actual employment and compensation arrangements for its workforce during the period and could, therefore, diminish the potential usefulness of the disclosure. Therefore, the proposed disclosure requirements would not permit such adjustments.

For example, under the proposed rules, a retailer that hires a seasonal worker at minimum wage for three months during the holiday season would need to calculate annual total compensation for that employee as three months at \$7.25/hour (\$3,480) and could not "annualize" the wages as if the seasonal worker was paid for a full 12 months of work (\$13,920). In this example, if the seasonal worker was not still employed by the registrant on the last day of the registrant's fiscal year, the registrant would exclude that worker from the calculation of the median.⁶⁹

We understand that some commenters believe that these types of adjustments could allow for a more meaningful comparison between the compensation of the PEO and that of the registrant's employees, especially where those employees are not full-time, U.S. employees.⁷⁰ We are concerned, however, that adjusting for these variables could distort an understanding of the registrant's compensation practices. For example, if a registrant with a workforce primarily located in jurisdictions with a lower cost of living than the United States adjusted the annual total compensation of those employees using purchasing power parity statistics, the median of the annual total compensation of all its employees would likely increase. Likewise, if a registrant with a workforce that is primarily part-time or seasonal adjusted the annual total compensation of

⁶⁹ See proposed Item 402(u)(3).

⁷⁰ See letters from American Benefits Council; Americans for Financial Reform; Davis Polk; Frederick W. Cook & Co., Inc.; RILA; Social Investment Forum; Trillium Asset Management; and Walden Asset Management.

those employees using full-time equivalent adjustments, the median of the annual total compensation of all its employees would likely increase. In these scenarios, the registrant's pay ratio would show less of a disparity in compensation levels, while its labor costs would appear to be higher than they actually were. We believe that, rather than making the disclosure more meaningful, such a result could diminish the potential usefulness of the disclosure because the ratio would show a less accurate reflection of actual workforce compensation and could permit a registrant to alter the reported ratio to achieve a particular objective with the ratio disclosure.

Request for Comment

21. Is it appropriate to allow registrants to annualize the compensation for non-seasonal, non-temporary employees that have only worked part of the year, as proposed? Why or why not? Would allowing annualizing the compensation for these employees likely impact the median or the pay ratio?
22. In the alternative, should registrants be required to annualize the compensation for these employees? Why or why not?
23. Should we require all registrants that rely on the proposed instruction to annualize compensation for these employees to disclose that they have done so (or only when the adjustment is material, as would be required under the proposed instruction for disclosure of material assumptions, adjustments and estimates)? Why or why not? If so, what should the disclosure entail? For example, should the registrant only be required to state that it has relied on the instruction, or should it also be required to discuss the number or percentage of employees for which compensation was annualized?

24. Should we allow full-time equivalent adjustments for part-time employees and temporary or seasonal employees, as recommended by some commenters?⁷¹ Should we allow cost-of-living adjustments for non-U.S. employees as recommended by some commenters?⁷² If so in either case, please explain why. In particular, please address the potential concern that these kinds of adjustments could cause the ratio to be a less accurate reflection of actual workforce compensation. Is there an alternative way to mitigate this concern?

3. Identifying the Median

Commenters have suggested that a potential purpose of the pay ratio disclosure is to allow investors to evaluate the annual total compensation of the PEO within the context of the registrant's internal compensation practices.⁷³ We note that Congress specifically chose "median" as the point of comparison for Section 953(b), rather than the average,⁷⁴ and, therefore, the proposed pay ratio requirements also require the median to be used.

Section 953(b) does not expressly set forth a methodology that must be used to identify the median, nor does it mandate that the Commission must do so in its rules. In order to allow the greatest degree of flexibility while remaining consistent with the statutory provision, the proposed requirements do not specify any required calculation methodologies for identifying the median.

⁷¹ See letters from Americans for Financial Reform; Frederick W. Cook & Co., Inc.; and RILA.

⁷² See generally letter from CtW Investment Group.

⁷³ See letter from Senator Menendez ("I wrote this provision so that investors and the general public know whether public companies' pay practices are fair to their average employees, especially compared to their highly compensated CEOs.").

See also Representative Keith Ellison, et al. ("House Letter") and Senator Robert Menendez et al. ("Senate Letter") (noting that Section 953(b) "requires disclosure by public companies of the ratio between the compensation of their CEO and the typical worker at that company...and while comprehensive data will not be available until this provision takes effect, there is no question that CEO pay is soaring compared to that of average workers.").

⁷⁴ Some commenters raised the possibility of using an average rather than a median, which they believed would reduce the costs of compliance. See, e.g., letters from American Benefits Council and Brian Foley & Co.

Instead, we are providing instructions and guidance designed to allow registrants to choose from several alternative methods to identify the median, so that they may use the method that works best for their own facts and circumstances. As discussed in detail below, we believe that even a registrant with a large number of employees should be able to provide the proposed disclosure in a relatively cost-efficient manner based on statistical sampling, estimates and the use of any consistently applied compensation measure to identify the median. For instance, an employer with a large number of employees could take a random sample of employees (as discussed further below, the size of the sample needed would typically depend on the overall distribution of compensation across employees) and determine the annual cash compensation, or any other consistently applied compensation measure, for those employees. Identifying the median employee would not necessarily require a determination of exact compensation amounts for each employee in the sample. The registrant could exclude the employees in the sample that have extremely low or extremely high pay because they would fall on either end of the spectrum of pay and, therefore, not be the median employee. Once the registrant identifies the median employee based on the selected compensation measure applied to each remaining employee in the sample, the registrant would calculate that employee's annual total compensation in accordance with Item 402(c)(2)(x) and disclose that amount as part of the pay ratio disclosure.

We believe that allowing a registrant to choose a method that works best for its particular facts and circumstances should help registrants to comply with the disclosure requirements in a relatively cost-efficient manner while still achieving the purpose of Section 953(b). As such, the proposed requirements permit registrants to identify the median by using a number of different methods, such as calculating total compensation for each employee using Item 402(c)(2)(x), using

reasonable estimates, and/or statistical sampling.⁷⁵ We are not prescribing what a reasonable estimate would entail because we believe that would necessarily depend on the registrant's particular facts and circumstances. In addition, the proposed rules do not prescribe specific estimation techniques or confidence levels for an estimated median because we believe that companies would be in the best position to determine what is reasonable in light of their own employee population and access to compensation data. As discussed in Section II.C.5. below, we are proposing to require that the methodology and any material assumptions, adjustments or estimates used to identify the median be briefly disclosed and consistently used, and any estimated amounts be clearly identified as such. We are proposing this approach because we believe that the appropriate and most cost effective methodology would necessarily depend on a registrant's particular facts and circumstances, including, among others, such variables as:

- the size and nature of the workforce;
- the complexity of the organization;
- the stratification of pay levels across the workforce;
- the types of compensation the employees receive;
- the extent that different currencies are involved;
- the number of tax and accounting regimes involved;
- the number of payroll systems the registrant has and the degree of difficulty involved in integrating payroll systems to readily compile total compensation information for all employees.

⁷⁵ We discuss the specific recommendations of commenters regarding the use of statistical sampling techniques below in this section.

We believe that these likely are the same factors that would cause substantial variation in the costs of compliance. By not prescribing specific methodologies that must be used, the proposed requirements would allow registrants to choose a method for identifying the median that is appropriate to the size, structure and compensation practices of their own businesses, including identifying the median employee based on any consistently applied compensation measure. In addition, this flexibility could enable registrants to manage compliance costs more effectively. We also believe that, by allowing registrants to better manage costs, a flexible approach could mitigate, to some extent, any potential negative effects on competition arising from the mandated requirements.⁷⁶ We recognize, however, that a flexible approach could increase uncertainty for registrants that prefer more specificity on how to comply with the proposed rules, particularly for those registrants that do not use statistical analysis in the ordinary course of managing their businesses.

We acknowledge that commenters provided a variety of recommendations for identifying the median aimed at reducing compliance costs or providing a roadmap for registrants to use to ensure compliance. For example, one commenter suggested that the Commission should establish safe harbor methodologies that authorize registrants to identify the median using a sampling method that is reasonably representative of its workforce, that could be certified by an independent expert or that exceeds a minimum number or percentage of the issuer's total employees.⁷⁷ Another commenter suggested that the Commission prescribe a "menu of alternatives" from which a registrant may select the calculation method that works best in its situation to facilitate disclosure that is meaningful while minimizing data collection costs;

⁷⁶ See the discussion in Section IV of this release.

⁷⁷ See American Benefits Council.

registrants would then be required to explain the method and assumptions used.⁷⁸ Several commenters recommended that registrants be permitted to use reasonable estimation techniques to identify median compensation for all employees and to determine all forms of compensation, including annual changes in pension value.⁷⁹ In considering these alternatives, we favored the recommendations that did not call for prescriptive requirements in order to avoid the additional costs that a less flexible approach could impose. In particular, we believe that the use of reasonable estimates could afford registrants flexibility without imposing prescriptive requirements that may not be workable for all types of registrants. In addition, we highlight below two alternatives recommended by commenters that would be permitted under the proposal.

Use of Statistical Sampling. Two commenters suggested that companies should be permitted to identify the median through a sampling technique or other statistically reasonable method.⁸⁰ Two other commenters also provided views on statistical sampling. One commenter, based on a survey of 95 registrants, disagreed that statistical sampling methodology would reduce the compliance burden for companies because of the wide variability in pay practices and recordkeeping and asserted that requiring statistical sampling would introduce further complexity.⁸¹ Another commenter supported the use of statistical sampling and described a

⁷⁸ See letter from Group of Exec. Comp. Lawyers.

⁷⁹ See COEC I and letters from Meridian Compensation Partners, LLC and SCSGP.

⁸⁰ See AFL-CIO II (“The SEC can minimize issuer compliance costs by permitting the use of random statistical sampling to calculate the median. . . . Because the median is a statistical term that is frequently used to describe a set of observations randomly drawn from a larger population, it is reasonable for the SEC to permit issuers to sample their employee populations to calculate the median.”) and letter from Davis Polk (“We recommend that the Commission permit companies to identify a single employee, via a sampling technique or other statistically reasonable method, among its employee base as the representative for median compensation.”).

⁸¹ See COEC II (noting that sampling “would introduce additional complexity by requiring the development of a methodology to determine the appropriate stratification of the sample population, develop and assess the appropriate confidence intervals to enhance the reliability of the data collected and ensure that comparable

random sampling technique that could yield an accurate and unbiased estimate of a registrant's actual median compensation using a relatively small sample size.⁸² This commenter asserted that more complicated procedures, such as stratified sampling, would be unnecessary, regardless of company size, how many countries it operates in or how many subsidiaries it has.⁸³

As we discuss in more detail in the economic analysis section of this release, the variance of underlying compensation distributions (that is, how widely employee compensation is spread out or distributed around the mean) can materially affect the sample size needed for reasonable statistical sampling.⁸⁴ Variation in the types of employees at a registrant across business units and geographical regions can also add complexity to the sampling procedure. While we generally agree that a relatively small sample size would be appropriate in certain situations, a reasonable determination of sample size would ultimately depend on the underlying distribution of compensation data.⁸⁵ As a result, compliance costs would vary across registrants according to the

forms of compensation are included across the varying pay practices that are common in different regions of the world.”).

82 See letter from M. Ohlogge.

83 The commenter assumed that any compensation distribution is lognormal and that the variance of compensation distribution within a company is given as a constant number. We believe, however, that this may not be a practical assumption because, as described in detail in Section IV of this release, each registrant would have a company-specific compensation variance, which is impossible to be generally assumed. In addition, registrants that have multiple business or geographical segments may not necessarily have lognormal distribution of wages.

84 Our analysis, further discussed in Section IV of this release, uses mean and median wage estimates from the Bureau of Labor Statistics (BLS) at the 4-digit NAICS industry level (290 industries) and assumes a lognormal wage distribution, a 95% confidence interval with 0.5% margin of error. The analysis focuses on the registrants that have a single business or geographical unit. The analysis also assumes that when the sampling is implemented, the sampling method would be a true random sampling, *i.e.*, it would not be biased by region, occupation, rank, or other factor. In our analysis, the appropriate sample size for the registrants with a single business or geographical unit varies between 81 and 1,065 across industries, with the average estimated sample size close to 560.

85 We believe that reasonable estimates of the median for registrants with multiple business lines or geographical units could be arrived at through more than one statistical sampling approach. All approaches, however, require drawing observations from each business or geographical unit with a reasonable assumption on each unit's compensation distribution and inferring the registrant's overall median based on

characteristics of their compensation distributions. Nevertheless, we believe that permitting registrants to use statistical sampling may lead to a reduction in compliance costs as compared to other methods of identifying the median.

We note that the identification of a median employee does not necessarily require a determination of exact compensation amounts for every single employee included in the sample. A registrant could, rather than calculating exact compensation, identify the employees in the sample that have extremely low or extremely high pay and that would therefore fall on either end of the spectrum of pay. Since identifying the median involves finding the employee in the middle, it may not be necessary to determine the exact compensation amounts for every employee paid more or less than that employee in the middle. Instead, just noting that the employees are above or below the median would be sufficient for finding the employee in the middle of the pay spectrum.

Use of a Consistently Applied Compensation Measure. Several commenters raised concerns about expected compliance costs arising from the complexity of the “total compensation” calculation under Item 402(c)(2)(x) and, in particular, the determination of total compensation in accordance with Item 402(c)(2)(x) for employees when identifying the median.⁸⁶ To address these concerns, several commenters recommended allowing companies to use total direct compensation (such as annual salary, hourly wages and any other performance-based pay) or cash compensation to first identify a median employee and then calculate that median

the observations drawn. Certain cases may not easily generate confidence intervals around the estimates or prescribe the appropriate minimum sample size. See Section IV of this release for further discussion.

⁸⁶

See, e.g., COEC I and II and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

employee's annual total compensation in accordance with Item 402(c)(2)(x).⁸⁷ We agree that this approach would provide a workable identification of the median for many registrants, and we expect that the costs of compliance would be reduced if registrants were permitted to identify the median using a less complex, more readily available figure, such as salary and wages, rather than total compensation as determined in accordance with Item 402(c)(2)(x). This approach could also help reduce costs for registrants that are not able to reduce costs using statistical sampling techniques.⁸⁸ Because some commenters have indicated that using cash compensation could be just as burdensome to calculate for registrants with multiple payroll systems in various countries,⁸⁹ we are not proposing to require companies to use a specific compensation measure, like cash compensation or total direct compensation, when they are identifying the median employee. Instead, we believe that registrants would be in the best position to select a compensation measure that is appropriate to their own facts and circumstances and that a consistently applied compensation measure would result in a reasonable estimate of a median employee at a substantially reduced cost. Therefore, the proposed instructions would permit a registrant to identify a median employee based on any consistently applied compensation measure, such as compensation amounts reported in its payroll or tax records, as long as the registrant briefly discloses the measure that it used (e.g. "We found the median using salary,

⁸⁷ See AFL-CIO II and letters from ABA; American Benefits Council; Americans for Financial Reform; CtW Investment Group; Protective Life Corporation; RILA; and SCSGP.

⁸⁸ Registrants would be permitted to use a consistently-applied compensation measure to identify the median employee regardless of whether they use statistical sampling.

⁸⁹ See COEC II (asserting that cash compensation is not an appropriate substitute since non-cash remuneration makes up a substantial part of compensation in certain parts of the world, and cash compensation would still need to be gathered manually for many registrants due to variances in payroll systems and tax regimes).

wages and tips as reported to the U.S. Internal Revenue Service on Form W-2 and the equivalent for our non-U.S. employees.”).⁹⁰

We also understand from commenters that the annual period used for payroll or tax recordkeeping can sometimes differ from the registrant’s fiscal year, and, therefore, for purposes of determining the annual compensation amounts when using a consistently applied compensation measure, the proposed instructions also permit the registrant to use the same annual period that is used in the payroll or tax records from which the compensation amounts are derived. We are not proposing to define or limit what would qualify as payroll or tax records. We note, however, that this proposed accommodation is intended to be construed broadly enough to allow registrants to use information that they already track and compile for payroll or tax purposes. We are persuaded by commenters who asserted that permitting companies to use compensation information in the form that it is maintained in their own books and records would reduce compliance costs without appreciably affecting the quality of the disclosure.

Two commenters suggested that registrants should be permitted to calculate the ratio using employee earnings estimates available through the U.S. Department of Labor’s Bureau of Labor Statistics (“BLS”), which they believed would reduce costs for registrants and promote comparability across companies.⁹¹ Although we agree that such an approach would greatly reduce the compliance burden for registrants, we do not believe it would be consistent with Section 953(b). In addition, we do not believe it would be useful for the Commission to require

⁹⁰ As discussed in Section II.C.4 below, a registrant using a consistently applied compensation measure for purposes of identifying the median would be required to calculate and disclose the annual total compensation for that median employee using the definition of total compensation in Item 402(c)(2)(x).

⁹¹ See COEC II and letter from Group of Exec. Comp. Lawyers. One of these commenters asserts that using BLS statistics would likely result in ratio with a higher disparity than comparing PEO compensation to median employee compensation, and, “if a company decides to avoid the cost and other burdens of an actual median computation by publishing a statistic that shows a higher disparity, it should be allowed to do so.” See letter from Group of Exec. Comp. Lawyers.

registrants to compile and disclose information that investors are already able to calculate using publicly available information.

Although the proposed flexible approach could reduce the comparability of disclosure across registrants, we do not believe that precise conformity or comparability of the ratio across companies is necessary. Some commenters believe that a primary benefit of the pay ratio disclosure would be providing a company-specific metric that investors could use to evaluate the PEO's compensation within the context of his or her own company,⁹² rather than a benchmark for compensation arrangements across companies. Accordingly, we do not believe that improving the comparability of the disclosure across companies by mandating a specific method for identifying the median would be justified in light of the costs that would be imposed on registrants by a more prescriptive rule. We do not believe that mandating a particular methodology would necessarily improve the comparability across companies because of the numerous other factors that could also cause the ratios to be less meaningful for company-to-company comparison.⁹³ We believe that greater comparability across companies could increase the likelihood that a registrant's competitors could infer proprietary or sensitive information about the registrant's business,⁹⁴ which could increase the costs to registrants of the proposed requirements.

⁹² See, e.g., Senate Letter; House Letter; and AFL-CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

⁹³ These factors could include, among others, variations in the way companies organize their workforces to accomplish similar tasks; variations in pay between companies for identical tasks; differences in the geographical distribution of employees (domestic or international, as well as in high- or low-cost areas); degree of vertical integration; reliance on contract and outsourced workers; ownership structure; and differences in industry and business type.

⁹⁴ Where pay ratio information is more "precisely" comparable between companies in the same industry, information about median pay could allow inferences about the business, such as how a company and its workforce is structured, what its compensation practices are, its labor costs and use of outsourcing.

Finally, we recognize that allowing registrants to select a methodology for identifying the median, including identifying the median employee based on any consistently applied compensation measure and allowing the use of reasonable estimates, rather than prescribing a methodology or set of methodologies, could permit a registrant to alter the reported ratio to achieve a particular objective with the ratio disclosure, thereby potentially reducing the usefulness of the information. We believe that requiring the use of a consistently applied compensation measure should lessen this concern. We request comment on whether the flexibility of the proposed requirements would allow a registrant to distort its pay ratio in material respects.

Request for Comment

25. Should registrants be permitted, as proposed, to choose a method to identify the median that is workable for the company based on its particular facts and circumstances? Will registrants be able to use the proposed approach to identify the median? Do registrants need additional guidance or instructions to be able to use the proposed approach to identify the median? If so, what additional guidance is needed?
26. Do registrants need further guidance on the permitted use of reasonable estimates in identifying the median? If so, what should that guidance be? In the alternative, should the proposed requirement expressly disallow the use of reasonable estimates? Please explain how the usefulness of the pay ratio disclosure would be affected by the use of reasonable estimates. Should the rule specify requirements for statistical sampling or any other estimation methods, such as appropriate sample sizes for reasonable estimates or requiring the results to meet specified confidence levels? Why or why not? If so, what should the requirements be? For example, should the estimate have at least a 90% (or 85%, or some other percentage) confidence level?

27. Are registrants likely to use statistical sampling to identify the median? How would registrants conduct the sampling? Would it be outsourced or conducted by internal personnel? How much would statistical sampling cost? Would the use of statistical sampling address costs relating to the inclusion of non-U.S. employees in the calculation?
28. Should registrants be permitted, as proposed, to identify the median employee using a consistently applied compensation measure? Why or why not? How would this impact compliance costs? Would this address costs arising from having employees in multiple jurisdictions and payroll systems? Should there be any limitations on the types of compensation measures that can be used? What compensation measure would registrants likely use for this purpose? How would that measure compare to total compensation calculated under Item 402(c)(2)(x)? How would the use of that measure affect the median (e.g. would it likely generate a median that is a reasonable approximation of the median of Item 402(c)(2)(x) total compensation)? What impact, if any, would the use of a consistently applied compensation measure have on the usefulness of the pay ratio disclosure? How could the proposed rules be changed to address any such impact? Are there any circumstances where it would be inappropriate to permit a registrant to use a consistently applied compensation measure to identify the median employee?
29. Should we, as proposed, permit registrants to use the time period that is used for payroll or tax recordkeeping when identifying the median employee based on consistently applied compensation measures, whether or not the time periods correspond with the last completed fiscal year or the tax year? Why or why not? Are there any parameters that should be set, such as requiring the period to end within a designated amount of time before the filing of the proxy or information statement relating to the annual meeting of

shareholders or written consents in lieu of such meeting or annual report, as applicable, in which updated pay ratio information is required (such as 3 months, 6 months, 9 months or 12 months) or, alternatively, a period ending no more than 9 months (or 12 months or another amount of time) following the last annual meeting of shareholders? Should such flexibility only be permitted where the registrant's fiscal year-end is different from calendar year-end? Are we correct that this accommodation would decrease costs for registrants? Would the use of different time periods for different employees have an adverse impact on the disclosure? Would such flexibility meaningfully reduce the comparability of the median of the annual total compensation of all employees to the annual total compensation of the PEO, or otherwise impair the potential usefulness to investors of the pay ratio disclosure?

30. Could the flexibility of the proposed requirements allow a registrant to distort its pay ratio in material respects? If so, explain how.
31. Is our belief correct that allowing flexibility in identifying the median could minimize the potential anti-competitive impact of the costs of compliance? Would the proposed flexibility address other impacts on competition that could arise from the proposed requirements? Could a registrant's competitors infer proprietary or sensitive information about a company's business operations, strategy or labor cost-structure from the disclosure of the median of the annual total compensation of all employees? If so, how can this impact be addressed?
32. Are there alternative ways to satisfy the statutory mandate? Please be specific.

4. Determination of Total Compensation

As mandated by Section 953(b), the proposed requirements would define "total compensation" by reference to Item 402(c)(2)(x). We note that Section 953(b) refers to Item

402(c)(2)(x) as in effect on the day before the date of enactment of the Dodd-Frank Act, or July 20, 2010. No substantive amendments have been made to Item 402(c) since that date.⁹⁵

Therefore, the proposed requirements would refer to Item 402(c)(2)(x), without reference to the rules in effect on July 20, 2010. We expect to address the impact on the proposed rules of any future amendments to Item 402(c)(2)(x) if and when such future amendments are considered.

Commenters have observed that, because of the complexity of the requirements of Item 402(c)(2)(x), registrants typically compile information required by Item 402(c) manually for the named executive officers, which they have stated takes significant time and resources.⁹⁶ To address this issue, some of these commenters made various recommendations to simplify the total compensation definition, such as including only cash compensation, only cash compensation and equity-based compensation, or only compensation that is reported to the U.S. Internal Revenue Service on Form W-2.⁹⁷ As discussed above, we are proposing to allow registrants to identify the median in a variety of ways, including by identifying the median employee using any consistently applied compensation measure and then determining and disclosing the Item 402(c)(2)(x) total compensation for that median employee. As proposed, a registrant would be permitted to calculate total compensation for all employees in accordance with Item 402(c)(2)(x), but would only be required to calculate and disclose such information for the median employee.⁹⁸ Because

⁹⁵ There have been technical amendments since that date. In August 2011, certain references to U.S. GAAP requirements in the instructions to Item 402 were updated to reflect the FASB's Accounting Standards Codification. See Technical Amendments to Commission Rules and Forms Related to the FASB's Accounting Standards Codification, Release No. 33-9250 (Aug. 8, 2011) [76 FR 50117].

⁹⁶ See letter from Davis Polk. See also letter from R. Morrison.

⁹⁷ See COEC I and letters from American Benefits Council; Brian Foley; Group of Exec. Comp. Lawyers; Protective Life Corporation; SCSGP; and Towers Watson.

⁹⁸ Given the specificity of the definition used in Section 953(b), the proposed requirements incorporate the Item 402(c)(2)(x) definition of total compensation as it is set forth in Section 953(b) for purposes of disclosing the median of the annual total compensation of employees and the pay ratio.

the total compensation calculation using Item 402(c)(2)(x) would only be required for one additional employee (the median employee), we are not proposing to simplify the total compensation definition that is required to be used to disclose the median employee compensation and the ratio.

Some commenters have recommended that registrants be permitted to use reasonable estimates to determine the value of the various elements of total compensation for employees in accordance with Item 402(c)(2)(x).⁹⁹ We believe that the use of reasonable estimates would not diminish the potential usefulness of the pay ratio disclosure as a general point of comparison of PEO pay to employee pay within a company, and we believe that the use of reasonable estimates would be consistent with Section 953(b). Furthermore, we expect that requirements that allow registrants to use reasonable estimates in these calculations would impose lower compliance costs than requirements that prohibit the use of estimates. Accordingly, the proposed pay ratio requirements permit the use of reasonable estimates in determining any elements of total compensation of employees other than the PEO under Item 402(c)(2)(x), including when disclosing the annual total compensation of the median employee identified using a consistently applied compensation measure. If a registrant uses estimates, instructions to the proposed rule require that the resulting disclosure would need to be clearly identified as an estimated amount and include a brief description of the estimation methods used by the registrant.¹⁰⁰ In using an estimate for annual total compensation (or for a particular element of total compensation), a registrant should have a reasonable basis to conclude that the estimate approximates the actual amount of compensation under Item 402(c)(2)(x) (or for a particular element of compensation

⁹⁹ See COEC I and letters from ABA and SCSGP.

¹⁰⁰ See proposed Instruction 2 to Item 402(u).

under Item 402(c)(2)(iv)-(ix)) awarded to, earned by or paid to those employees. We are not prescribing what a reasonable basis would entail because we believe that would necessarily depend on the registrant's particular facts and circumstances.

Because the requirements of Item 402(c)(2)(x) were promulgated to address executive officer compensation, rather than compensation for all employees, we have considered the difficulties that registrants could face in applying the requirements of Item 402(c)(2)(x) to employees that are not executive officers.¹⁰¹ First, to assist registrants in applying the definition of "total compensation" to an employee that is not an executive officer, the proposed requirements state that, in determining the total compensation of employees in accordance with Item 402(c)(2)(x), references to "named executive officer" in Item 402 and the related instructions may be deemed to refer instead, as applicable, to "employee." Also, the proposed requirements clarify that, for non-salaried employees, references to "base salary" and "salary" in Item 402 may be deemed to refer instead, as applicable, to "wages plus overtime."¹⁰²

In addition, we understand that certain elements of total compensation may raise particular valuation issues that do not typically arise in the context of compensation for named executive officers. For example, in the case of pension benefits provided to union members in connection

¹⁰¹ See letter from RILA ("From a practical prospective, Item 402 raises a host of complexities when applied to an issuer's overall employee population for purposes of calculating the [pay ratio].").

One commenter drew an analogy to the U.S. Treasury regulations [31 CFR Part 30] that required TARP recipients to identify their 100 most highly compensated employees using the definition of total compensation under Item 402; however, the Treasury regulations notably permitted the exclusion of actuarial increases in pension plans and above market earnings on deferred compensation. See letter from ABA ("In our experience, TARP companies found that calculating 'total compensation' to identify their 100 highest paid employees required weeks of work, and presented numerous interpretive issues that do not typically arise when calculating total compensation of executive officers.").

¹⁰² Letter from RILA (noting "'salary' and 'bonus' presumably would translate into total hourly wages plus overtime for non-salaried employees").

with a multi-employer defined benefit pension plan,¹⁰³ commenters have noted that the participating employers typically do not have access to information (or do not have access in the timeframe needed to compile pay ratio disclosure) from the plan administrator that would be needed to calculate the aggregate change in actuarial present value of the accumulated benefit of a particular individual under the plan.¹⁰⁴ In such circumstances, we believe it would be appropriate for a registrant to use reasonable estimates as described above in determining an amount that reasonably approximates the aggregate change in actuarial present value of an employee's defined pension benefit for purposes of Item 402(c)(2)(viii).

Commenters have also mentioned that interpretive questions will likely arise for registrants with non-U.S. employees in terms of how to value certain unique types of employee compensation given only in certain countries,¹⁰⁵ including personal benefits such as housing. Because we understand that compensation arrangements vary significantly both in the United States and globally, we do not believe it would be practicable for purposes of the proposed requirements to provide detailed, prescriptive rules on valuing particular types of employee compensation. We note, however, that the instructions to Item 402(c)(2)(ix) would permit the exclusion of personal benefits as long as the total value for the employee is less than \$10,000 and

¹⁰³ See letter from RILA (noting "in cases involving multi-employer plans for union employees, the availability of the required information may be a significant issue when the plan is not required to provide such data on each beneficiary"). See also, J. Goldstein, Cost Benefit Analysis of Pay Disparity Disclosure, Oct. 16, 2010, available at <http://blogs.law.harvard.edu/corpgov/2010/10/16/cost-benefit-analysis-of-pay-disparity-disclosure/>.

¹⁰⁴ Section 101(k) and related regulations under the Employee Retirement Income Security Act of 1974, as amended [21 U.S.C. 1021(k)], govern the requirements for plan administrators to provide actuarial reports relating to the plan. Under the rules, a plan administrator has thirty days to respond to a request for an actuarial report, and it is not required to provide access to any reports that have not been its possession for more than thirty days. In addition, the rules prohibit the disclosure of reports that include information that the plan administrator reasonably determines to be "personally identifiable information regarding a plan participant, beneficiary...or contributing employer." See 29 CFR 2520.101-6.

¹⁰⁵ See letters from SCSGP and Group of Exec. Comp. Lawyers. We discuss comments relating to non-U.S. employees in more detail in Section II.C.2 of this release.

that personal benefits should be valued on the basis of the aggregate incremental cost to the registrant.¹⁰⁶ In calculating any such amounts for purposes of determining the total compensation of employees other than the PEO, we are proposing that a registrant could use reasonable estimates in the manner described above.

In addition, questions have been raised involving the valuation of government-mandated pension plans,¹⁰⁷ and at least one commenter has noted that the valuation of these plans can be difficult.¹⁰⁸ Another commenter has noted that cross-border differences in government-mandated pension plans raise additional complexity for registrants calculating total compensation for employees located outside the United States.¹⁰⁹ In light of these comments, we acknowledge that some registrants may need clarity as to how to treat government-mandated pension plans for purposes of calculating an employee's total compensation and, specifically, for purposes of determining the aggregate change in actuarial present value of defined pension benefits under Item 402(c)(2)(viii).

In most cases, amounts relating to a government-mandated pension plan would not be included in an employee's total compensation, just as these amounts would not be included under

¹⁰⁶ See Instruction 4 to Item 402(c)(2)(ix). This instruction applies to perquisites and personal benefits. Accordingly, perquisites provided to executive officers who are included in the identification of the median should be treated as set forth in Instruction 4. For this purpose, however, benefits that are provided to all employees or all salaried employees would not be considered "perquisites."

¹⁰⁷ See J. Goldstein, *supra* note 103.

¹⁰⁸ See letter from Group of Exec. Comp. Lawyers. This commenter raised the issue in the context of a discussion of cross-border differences in the availability of government-mandated retirement benefits, which this commenter believed would cause comparisons of employees across jurisdictions to be distorted. This commenter further suggested that the difficulty in valuing government-mandated pension benefits for individual employees would make it difficult for registrants to adjust the ratio for these differences. As described above in Section II.C.3., we believe that such an adjustment would not comply with the proposed requirements.

¹⁰⁹ See letter from Davis Polk ("The information for non-U.S. employees is complicated by local severance benefits and pension rights and related accounting outside the U.S.").

current rules applicable to named executive officers. We note, in particular, that Item 402(c)(2)(viii) applies to a defined benefit plan, which, as explained in the 2006 Adopting Release, is a retirement plan in which the company pays the executive specified amounts at retirement that are not tied to the investment performance of the contributions that fund the plan.¹¹⁰ The 2006 Adopting Release states that the disclosure required by Item 402(c)(2)(viii) is intended to permit a full understanding of the company's compensation obligations to named executive officers, given that defined benefit plans guarantee what can be a lifetime stream of payments and allocate risk of investment performance to the company and its shareholders.¹¹¹ In contrast, under many government-mandated pension plans, the employee ultimately receives the pension benefit payment from the government, not the employer, and the purpose of the mandated pension benefit is not to provide compensation to the employee from the employer.¹¹² Notwithstanding any amounts that an employer may be obligated to pay (typically as a tax) to the government in respect of an employee or amounts the employee may be obligated to have withheld from wages and paid to the government,¹¹³ where the pension benefit is being provided to the employee from the government and not by the registrant, a government-mandated defined

¹¹⁰ See 2006 Adopting Release, *supra* note 14, at 53175. This definition serves to distinguish defined benefit pension plans from defined contribution plans, in which the amount payable at retirement is tied to the performance of the contributions that fund the plan.

¹¹¹ *Id.*

¹¹² Although Item 402(a)(2) includes in compensation transactions between a registrant and a third party where the purpose of the transaction is to furnish compensation to the employee, we generally would not consider a government-mandated pension plan to be such a transaction.

¹¹³ As under current rules, amounts an employer pays to the government in respect of an employee are obligations of the registrant to that government and would not be "compensation" for purposes of Item 402(c)(2)(x).

Note, however, pursuant to Item 402(c)(2)(ix), tax gross-ups are included in total compensation. Therefore, if a registrant pays an employee's required contribution to the government (*i.e.*, the registrant satisfies the employee's obligation to the government), the amount of the employee's contribution that is paid by the registrant would be includable in total compensation as a tax gross-up.

benefit pension plan would not be considered a “defined benefit plan” for purposes of Item 402(c)(2)(viii) and any accrued pension benefit under such a plan would not be considered compensation for purposes of Item 402(c)(2)(x).

Finally, we acknowledge the concern from some commenters that the application of the definition of total compensation under Item 402(c)(2)(x) to employees that are not executive officers could understate the overall compensation paid to such employees.¹¹⁴ One of these commenters explains that “[b]y design, Item 402 captures all of the various compensation components received by a named executive officer, excluding certain limited items like benefits under non-discriminatory plans (e.g., healthcare) and perquisites and personal benefits that aggregate less than \$10,000....Applied to an average worker, however, these rules will work in the opposite direction. By excluding certain benefit plans and perquisites (e.g., employee discounts, transportation/parking benefits, education assistance) that do not exceed the \$10,000 threshold, the rules understate the average employee’s real total compensation. Relative to wages, benefits like healthcare and employee discounts both add significant economic value for an employee and are a prime motivator for the average employee when applying for and maintaining employment.”¹¹⁵ From this perspective, the omission of these components from the annual total compensation of employees, could render the ratio less meaningful, particularly for the purpose, suggested by some commenters, of evaluating employee morale. We note, however, that these exclusions are permissive, rather than mandatory.¹¹⁶ Therefore, registrants would be permitted, at their discretion, to include personal benefits (and perquisites in the case of employees that are

¹¹⁴ See letters from RILA and Protective Life Corporation.

¹¹⁵ See letter from RILA; however, as discussed above, by definition, benefits provided on a non-discriminatory basis to all employees would not be considered perquisites.

¹¹⁶ See Item 402(c)(ix)(A) and Item 402(a)(6)(ii).

executive officers) that aggregate less than \$10,000 and compensation under non-discriminatory benefit plans in calculating the annual total compensation of employees. In order to be consistent, the PEO total compensation used in the related pay ratio disclosure would also need to reflect the same approach to these items as is used for employees, and the registrant should explain any difference between the PEO total compensation used in the pay ratio disclosure and the total compensation amounts reflected in the summary compensation table.

Request for Comment

33. Are there other alternatives to calculating total compensation in accordance with Item 402(c)(2)(x) that would be consistent with Section 953(b)?
34. Should the requirements provide instructions or should we provide additional guidance about how to apply the definition of total compensation under Item 402(c)(2)(x) (or any particular elements of total compensation under Item 402(c)(2)) to employees that are not executive officers? If so, what specific instructions or guidance would be useful to registrants? Please also address whether specific instructions or guidance would limit flexibility and thereby raise costs for registrants.
35. Do registrants need further guidance on the permitted use of reasonable estimates in determining total compensation (or specific elements of total compensation) for employees other than the PEO in accordance with Item 402(c)(2)(x)? If so, what should that guidance entail? Would the use of reasonable estimates ever be inappropriate? Please also address whether specific instructions or guidance would limit flexibility and thereby raise costs for registrants.
36. Instead of allowing the use of reasonable estimates in determining total compensation (or any elements of total compensation) as described in this proposal, should the rules prohibit

the use of reasonable estimates for that purpose? If so, why? Please include an explanation of how the potential usefulness of the pay ratio disclosure would be affected by a registrant's use of reasonable estimates in this context. Are there alternative ways to address this impact, such as requiring an explanation describing the use of estimates, rather than prohibiting the use of estimates?

37. Is it likely that the proposed requirements would affect the types of compensation that registrants provide to employees, and if so, what would that impact be? For example, one commenter suggested that registrants could decide to discontinue pension and incentive plans for employees or eliminate 401(k) plan matching contributions in order to facilitate their calculation of the pay ratio.¹¹⁷ If so, how should the proposed requirements address that impact?

5. Disclosure of Methodology, Assumptions and Estimates

We are proposing instructions for the disclosure of the methodology and material assumptions, adjustments and estimates used in the calculation of the median or the annual total compensation of employees.¹¹⁸ The proposed instruction provides that registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount as such. Registrants' disclosure of the methodology and material assumptions, adjustments and estimates used should provide sufficient information for a reader to be able to

¹¹⁷ See letter from RILA.

¹¹⁸ We note that other Commission rules require such disclosures, particularly where registrants are given the flexibility to choose a methodology. See, e.g., Instructions to Item 402(h)(2), requiring registrants to disclose the valuation method and all material assumptions applied in quantifying the present value of accrued pension benefits for purposes of the Pension Benefit Table.

evaluate the appropriateness of the estimates. For example, when statistical sampling is used, registrants should disclose the size of both the sample and the estimated whole population, any material assumptions used in determining the sample size, which sampling method (or methods) is used, and, if applicable, how the sampling method deals with separate payrolls such as geographically separated employee populations or other issues arising from multiple business or geographic segments. In order to promote comparability from year to year, the instruction also provides that, if a registrant changes methodology or material assumptions, adjustments or estimates from those used in the previous period, and if the effects of any such change are material, the registrant must briefly describe the change, the reasons for the change, and must provide an estimate of the impact of the change on the median and the ratio.

Because we are concerned that disclosure about methodology, assumptions, adjustments and estimates could become dense and overly technical, the instruction asks for a brief overview and makes clear that it is not necessary to provide technical analyses or formulas. In addition, we do not believe that a detailed, technical discussion (such as statistical formulas, confidence levels or the steps used in data analysis) would enhance the potential usefulness, as suggested by some commenters,¹¹⁹ of the ratio as a metric to evaluate the level of PEO compensation. We expect that a succinct description of the methodology and material assumptions, adjustments or estimates would not be overly burdensome for registrants and would be more informative for investors. We expect that the costs of the additional disclosure on registrants would be marginal, as these additional disclosures are intended to simply describe what has already been done or assumed in the calculations and, therefore, will not require additional actions for registrants. It is likely that

¹¹⁹ See, e.g., Senate Letter; House Letter; and AFL-CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

some costs may be incurred in developing and reviewing the appropriate language to describe the approach taken.

The instruction also provides that the methodology and any material assumptions, adjustments and estimates should be consistently applied by the registrant in identifying the median. Likewise, where a registrant uses estimates in calculating the annual total compensation (or elements thereof) of employees, the methodology and any material assumptions, adjustments and estimates used in the calculation (such as currency translations¹²⁰ or annualizing newly hired, non-temporary employees) should be used consistently by a registrant. Similarly, when using a compensation measure to identify the median employee, that compensation measure should be consistently applied to each employee included in the calculation. We believe that requiring consistent use of methodology, and particularly material assumptions, adjustments and estimates, could reduce incentives for registrants to use methodology to affect the outcome of the identification of the median or the ratio.

Several commenters recommended that registrants be required to describe the methodology, assumptions and estimates used in identifying the median.¹²¹ Some commenters further suggested that a narrative discussion of the ratio and its components (including methodology and assumptions used), together with supplemental information about employee compensation structures and policies, be required, in order to provide additional context for the

¹²⁰ Some commenters requested guidance on converting wages to U.S. dollars for purposes of pay ratio disclosure. Instruction 2 to Item 402(c) requires registrants to identify by footnote the currency, exchange rate and conversion methodology used in connection with compensation that is paid to or received by an executive officer in a different currency than U.S. dollars. In connection with the proposed requirements, registrants generally would not be required to disclose the currencies, exchange rates and conversion methodologies used in determining the annual total compensation of employees, but, where applicable, the rates and conversion methodologies used should be consistent with those used for the named executive officers in the summary compensation table.

¹²¹ See AFL-CIO II and COEC I; and letters from ABA; Group of Exec. Comp. Lawyers; Meridian Compensation Partners, LLC; and SCSGP.

ratio.¹²² Other than the brief description of methodology described above, the proposed requirements do not include a specific requirement for narrative discussion of the ratio, the median or any supplemental information. Section 953(b) requires disclosure of the pay ratio, but it does not require any additional information to provide context for or to explain the ratio or its components, therefore, we are not proposing to require additional information. We are sensitive to the costs of the mandated disclosure, and we believe that additional narrative disclosure about the ratio would not, for many registrants, provide useful information for investors that would justify the costs associated with providing that additional disclosure. The types of additional information that may be relevant to further understanding the ratio in a particular period would necessarily vary from company to company and could also vary from time to time as a registrant's business evolves or due to external factors, such as changes in the global economic environment or the labor marketplace. While some investors and other market participants could find supplemental information about a registrant's employment practices, the composition of its workforce and similar topics (such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies) useful or informative, we do not believe that the cost of prescribing additional disclosure would be justified. Therefore, we are not proposing requirements for a narrative discussion beyond the proposed brief description of the calculation methodology where estimation techniques have been used.

Finally, one commenter suggested that the rule expressly permit additional disclosure to accompany the pay ratio.¹²³ Although we do not believe that it is necessary to include

¹²² See AFL-CIO I (recommending a required discussion and analysis "including their use of outsourcing and off-shoring strategies, use of part-time and temporary employees, and use of efficiency wages to boost productivity") and letter from Americans for Financial Reform.

¹²³ See letter from Towers Watson.

instructions in the proposed requirements for this purpose, we emphasize that, as with other mandated disclosure under our rules, registrants would be permitted to supplement the required disclosure with a narrative discussion if they choose to do so. Likewise, we note that registrants may, at their discretion, present additional ratios to supplement the required ratio. As with other disclosure under our rules, however, any additional ratios should be clearly identified and not misleading, and should not be presented with greater prominence than the required ratio.¹²⁴

Request for Comment

38. Should we require registrants to disclose information about the methodology and material assumptions, adjustments or estimates used in identifying the median or calculating annual total compensation for employees, as proposed? Why or why not? Would this information assist investors in understanding the pay ratio? Are there changes we could make to the requirement to avoid boilerplate disclosure? Should we require a more technical discussion, such as requiring the disclosure of statistical formulas, confidence levels or the steps used in the data analysis?
39. Should we require disclosure when a registrant changes its methodology (or material assumptions, adjustments or estimates) from previous periods, where such change has a material effect, as proposed? Should registrants be required to describe the reasons for the change, as proposed? Should registrants be required to provide an estimate of the impact of the change on the median and the ratio, as proposed? Is the proposed information useful? Is there other information that should be required?

¹²⁴ See, e.g., Exchange Act Rule 12b-20; and Commission's Guidance Regarding Management's Discussion and Analysis or Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056], at 75060.

40. Should we require registrants to disclose additional narrative information about the pay ratio or its components, or factors that give context for the median, such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies? If so, what additional information should be required? Please be specific as to how this information would assist investors in understanding the pay ratio or in using the pay ratio disclosure. Please also be specific about the costs of providing such disclosure. How could such a requirement be designed to avoid boilerplate disclosure? Would such a requirement raise competition concerns?
41. Should we require registrants to disclose additional metrics about the total compensation of all employees (or of the statistical sample if one is used), such as the mean and the standard deviation, as a supplement to the required disclosure? Would additional metrics be useful to investors? We assume that these metrics could be provided without additional cost or at a low cost once the median has been identified. Is this assumption correct? If not, please identify the costs and benefits of such additional disclosure. Would such a requirement raise competition concerns?

6. Clarification of the Meaning of “Annual”

In order to provide clarity, the proposed requirement defines “annual total compensation” to mean total compensation for the last completed fiscal year, consistent with the time period used for the other Item 402 disclosure requirements. This clarification is intended to address questions from commenters about the need to update the pay ratio disclosure throughout the year and make

clear that the disclosure does not need to be updated more than once a year.¹²⁵ One commenter expressly supported this approach.¹²⁶

Two commenters suggested other possible alternatives for the calculation of “annual” total compensation. One of these commenters recommended that registrants should have flexibility to select a time period for calculating the annual total compensation of employees, noting that registrants without a calendar year fiscal year-end might benefit from the flexibility to use the calendar year period since that would be consistent with the registrant’s tax reporting obligations.¹²⁷ Another commenter suggested two timing rules that would grant registrants further flexibility to use the 12-month time periods that their payroll systems use.¹²⁸ We understand that these suggestions are intended to reduce compliance costs for registrants by giving registrants the ability to use information in the form that it is currently compiled for other purposes, such as tax and payroll recordkeeping. We believe, however, that it is appropriate for the time period for the pay ratio disclosure to be the same as the time period used for the registrant’s other executive compensation disclosures, and, therefore, a registrant would be required to calculate the total compensation for the median employee for the last completed fiscal year. As discussed above, for purposes of estimating the median employee, we propose to allow a registrant to use compensation amounts derived from its payroll or tax records for the same

¹²⁵ See, e.g., letters from American Benefits Council and ABA.

¹²⁶ See letter from RILA (noting “we recommend that the Compensation Ratio be based on the issuer’s last completed fiscal year, which would make it consistent with the executive compensation disclosure under Item 402 and reduce the compliance costs and burdens at least in so far as the information required for the Summary Compensation Table could be used for purposes of the Compensation Ratio as well.”).

¹²⁷ See letter from American Benefits Council.

¹²⁸ See letter from Group of Exec. Comp. Lawyers (recommending: “Rule One — the registrant can select any date as of which to calculate median compensation, provided the date is within 12 months of the proxy filing, and is the most recent practicable date, and Rule Two — if different payroll systems are involved, the 12-month period for computing compensation data for each payroll system’s data will be acceptable so long as the period ends within 12 months of the date chosen under Rule One.”).

annual period that is used in the payroll or tax records. We believe that permitting companies to identify the median employee using compensation information in the form that it is maintained in their own books and records would reduce compliance costs and that the proposed flexibility in estimating the median employee could address the concerns raised by these commenters.

Registrants using payroll or tax records to identify the median employee would be required to calculate the Item 402(c)(2)(x) total compensation for that median employee for the last completed fiscal year, rather than the annual period used in the payroll or tax records.

Request for Comment

42. For purposes of the disclosure of the median of the annual total compensation of employees and the pay ratio, should we, as proposed, require total compensation to be calculated for the last completed fiscal year, rather than some other annual period? Why or why not? How does this impact the ability of a registrant to compile the disclosure in time to include it in a proxy or information statement relating to an annual meeting of shareholders (or written consents in lieu of such meeting)?

7. Timing of Disclosure

a. Updating Pay Ratio Disclosure for the Last Completed Fiscal Year

We are proposing instructions to clarify the timing for updating pay ratio disclosure after the end of a registrant's fiscal year.¹²⁹ As discussed above, proposed Item 402(u) would require annual total compensation amounts used in the ratio to be calculated for the registrant's last completed fiscal year. In addition, pay ratio disclosure would be required in any filing by the registrant that requires Item 402 disclosure. Accordingly, without the proposed instructions, a

¹²⁹ See letter from ABA (noting "the Commission should clarify when information for the most recently completed fiscal year is required to first be disclosed").

registrant could be required to include pay ratio disclosure in an annual report or registration statement filed after the end of the fiscal year, but before it has compiled the executive compensation information for that fiscal year for inclusion in its proxy statement relating to its annual meeting of shareholders,¹³⁰ which could raise additional incremental costs for registrants that elect to provide executive compensation disclosure in their annual proxy statement rather than their annual report and for registrants that are conducting registered offerings at the beginning of their fiscal year.

To address this issue, some commenters recommended that pay ratio disclosure not be required to be updated for the most recently completed fiscal year until the registrant files its proxy statement for its annual meeting of shareholders.¹³¹ We agree with this suggested approach, and we believe that such an approach would not diminish the potential usefulness of the disclosure. At least one commenter who supported Section 953(b) disclosure also recommended a similar approach.¹³² We also believe that this approach could hold down additional costs for registrants in connection with filings made or required to be made before the filing of the proxy or information statement for the annual meeting of shareholders (or written consents in lieu of such a meeting) that would typically contain the registrant's other Item 402 disclosure covering the most recently completed fiscal year. For example, under the proposed approach, updating the pay ratio disclosure would not be an additional hurdle for a registrant that requests effectiveness of a registration statement after the end of its fiscal year and before the filing of the proxy statement

¹³⁰ Many registrants typically satisfy their disclosure obligations under Part III of Form 10-K (which includes Item 402 requirements) by incorporating the required information by reference from their proxy or information statement that is filed after their annual report on Form 10-K. See General Instruction G(3). We discuss the mechanics of General Instruction G(3) in more detail below.

¹³¹ See letters from ABA and Compensia, Inc.

¹³² See AFL-CIO II (asserting that pay ratio disclosure will be useful to investors and recommending that the disclosure be limited to annual proxy statements).

for its annual meeting of shareholders. We believe that the proposed instruction would provide certainty to registrants as to when the updated information is required and would allow sufficient time after the end of the fiscal year to identify the median.

Although we agree with the recommendation of commenters to not require updated annual pay ratio disclosure until a registrant files its annual proxy or information statement, we note that not all registrants that would be subject to the proposed pay ratio disclosure file proxy or information statements in connection with annual meetings of shareholders. For example, reporting companies that do not have securities registered under Section 12 of the Exchange Act are not required to file proxy or information statements for their annual meeting of shareholders and therefore typically provide Item 402 information updated for the most recently completed fiscal year in their annual report on Form 10-K. In addition, some registrants are not required to file annual proxy or information statements because they are not required to hold annual meetings (such as registrants that are organized as master limited partnerships) or because the securities that are registered under Section 12 of the Exchange Act have limited voting rights (such as common units representing limited liability company interests). Accordingly, we are proposing a modified version of the recommendation of commenters in order to provide a similar accommodation for registrants that do not file annual proxy statements and to align the proposed requirement to the timing rules for providing Item 402 disclosure in annual reports and proxy and information statements.

As noted above, registrants typically disclose Item 402 information for the most recently completed fiscal year in their proxy or information statement relating to their annual meeting of shareholders, in reliance on General Instruction G(3) of Form 10-K. This instruction allows the information required by Part III of Form 10-K (including Item 402 information) to be

incorporated by reference from the registrant's definitive proxy statement (filed or required to be filed pursuant to Regulation 14A) or definitive information statement (filed or required to be filed pursuant to Regulation 14C) if that statement involves the election of directors and is filed not later than 120 days after the end of the fiscal year covered by the annual report. If a definitive proxy statement or information statement is not filed in the 120-day period (or is not required to be filed by virtue of Rule 3a12-3(b) under the Exchange Act), the Part III information must be filed as part of the Form 10-K, or as an amendment to the Form 10-K, not later than the end of the 120-day period.

In order to align with this timeframe, the proposed instruction would state that a registrant is not required to include pay ratio disclosure with respect to its last completed fiscal year until the filing of its annual report for that last completed fiscal year or the filing of a definitive proxy or information statement relating to an annual meeting of shareholders (or written consents in lieu of such a meeting), provided that updated pay ratio information must, in any event, be filed as provided in General Instruction G(3) of Form 10-K not later than 120 days after the end of such fiscal year. As an example, a registrant would not be required to disclose pay ratio information relating to compensation for fiscal year 2014 until its definitive proxy or information statement for its 2015 annual meeting of shareholders.¹³³ Consistent with the treatment of other information required by Part III of Form 10-K, if that registrant does not file its definitive proxy or information statement within 120 days of the end of 2014 (*i.e.*, April 30, 2015), it would need to file updated pay ratio disclosure in its Form 10-K for 2014 or an amendment to that Form 10-K.

In contrast, a registrant that is not subject to the proxy rules or does not file a proxy or

¹³³ Consistent with the proposed instructions, we note that a registration statement that incorporates by reference a Form 10-K (or amended Form 10-K) containing all Part III information other than updated pay ratio information could be declared effective before the registrant's definitive proxy or information statement containing updated pay ratio information is filed in accordance with General Instruction G(3).

information statement in connection with an annual meeting of shareholders would be required to update its pay ratio disclosure for fiscal year 2014 in its annual report on Form 10-K for that year.

In order to provide guidance to registrants in connection with filings made before the annual update is triggered, the proposed instruction would also state that, in any filing made by a registrant after the end of its last completed fiscal year and before the filing of such Form 10-K or proxy or information statement, as applicable, a registrant must include or incorporate by reference its pay ratio disclosure (if such disclosure had been required) for the fiscal year prior to the last completed fiscal year.

Although the annual update is not required to be disclosed until the filing of an annual report for the last completed fiscal year, or if later, the filing of a definitive proxy statement or information statement relating to the registrant's annual meeting of shareholders, this updating provision does not alter the requirements for Item 402 disclosure under Item 8 of Schedule 14A in other proxy or information statement filings. For example, if a registrant files a proxy statement (other than the definitive proxy statement for its annual meeting) that requires Item 402 information pursuant to Item 8 of Schedule 14A, the registrant would be required to include or incorporate by reference pay ratio disclosure for the most recent period that had been filed in its Form 10-K or definitive proxy statement for its annual meeting.

Request for Comment

43. Should we, as proposed, require the pay ratio disclosure to be updated no earlier than the filing of a registrant's annual report on Form 10-K or, if later, the filing of a proxy or information statement for the registrant's annual meeting of shareholders (or written consents in lieu of such a meeting), and in any event not later than 120 days after the end of its fiscal year? Are we correct that the proposed timing rule would not affect the

potential usefulness of the pay ratio disclosure for investors? If not, how should the requirements be changed to address that impact? Are we correct that the proposed timing rule would help to keep costs down for registrants by providing certainty as to the timing for annual updates and by allowing registrants to compile the disclosure at the same time as other executive compensation disclosure under Item 402? Are we correct that the proposed timing rule would help keep down costs for registrants that request effectiveness of registration statements after the end of the last fiscal year but before the filing of their annual proxy statement?

44. Is the proposed timing workable for registrants? Does it provide enough time after the end of the fiscal year for companies to identify the median of the total compensation of all employees for that year? We note that one commenter asserted that it could take registrants three months or more each year to calculate pay ratio disclosure, and, accordingly, that the disclosure would not be available in time to be included in the annual proxy statement or annual report.¹³⁴ Would the ability to use reasonable estimates, consistently applied compensation measures, or statistical sampling be sufficient to alleviate this issue? For example, if a registrant is unable to calculate its employees' incentive compensation before such time, would it be able to reasonably estimate such compensation? Instead, should the proposed rules provide an accommodation for a company that cannot compile compensation information in time to be included in its proxy statement for the annual meeting of shareholders or Form 10-K, as applicable? For example, should registrants be permitted to delay the pay ratio disclosure until it is

134

See COEC II.

calculable and then file the disclosure under Item 5.02(f) of Form 8-K?¹³⁵ If so, under what circumstances should registrants be permitted to do so? Or, if we were to allow for such a delay, should we specify when the disclosure should be required to be made? If so, what deadline should we impose? Would such a delay impact the usefulness to investors of the disclosure, particularly if the disclosure would not be available in time for inclusion in proxy or information statements for the annual meeting of shareholders?

b. Proposed Instruction for Pay Ratio Disclosure When the Registrant Omits Salary or Bonus Information for the PEO in Reliance on Instruction 1 to Item 402(c)(2)(iii) and (iv), and Proposed Technical Amendment to Item 5.02(f) of Form 8-K

In accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv) of Regulation S-K, a registrant is permitted to omit disclosure in the summary compensation table of the salary or bonus of a named executive officer if it is not calculable as of the latest practicable date. In that circumstance, a registrant must include a footnote disclosing that fact and providing the date that the amount is expected to be determined, and the amount must be disclosed at that time by filing a Form 8-K. Item 5.02(f) of Form 8-K sets forth the requirements for the filing of information that was omitted from Item 402 disclosure in accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv), including the requirement to include a new total compensation figure for the named executive officer.

In cases where a registrant is relying on this instruction because the salary or bonus of the PEO is not calculable until a later date, we believe that it is also appropriate for a registrant to omit pay ratio disclosure until those elements of the PEO's total compensation are determined and

¹³⁵ Item 5.02(f) of Form 8-K sets forth the requirements for the filing of information that was omitted from Item 402 disclosure in accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv). These are described in more detail in the next subsection of this release.

provide its pay ratio disclosure in the same filing under Item 5.02(f) of Form 8-K in which the PEO's salary or bonus is disclosed. Accordingly, the proposed rule would include an instruction that provides that a registrant relying on Instruction 1 to Items 402(c)(2)(iii) and (iv) with respect to the salary or bonus of the PEO would be required to disclose that the pay ratio disclosure is being omitted because the PEO's total compensation is not available and to disclose the expected date that the total compensation for the PEO will be determined.¹³⁶ The instruction would then require the registrant to include its pay ratio disclosure in the filing on Form 8-K that includes the omitted salary or bonus information as contemplated by Instruction 1 to Items 402(c)(2)(iii) and (iv). We are also proposing a conforming amendment to Item 5.02(f) of Form 8-K to reflect the addition of this pay ratio disclosure requirement. In addition, although a filing is triggered under Item 5.02(f) when the omitted salary or bonus becomes calculable in whole or in part, under the proposed amendments to Form 8-K, the pay ratio information would be required only when the salary or bonus becomes calculable in whole, which would avoid the need for multiple updates to the pay ratio disclosure until the final total compensation amount for the PEO is known.

In proposing this instruction, we have assumed that the potential benefits of the disclosure could be diminished if the pay ratio were to be calculated using less than the entire amount of the PEO's total compensation for the period and that these potential benefits could justify the potential costs to investors of a delay in the timing of the disclosure. For example, in some cases, the amount of compensation that is omitted under Instruction 1 to Items 402(c)(2)(iii) and (iv) could be significant, and, therefore, the pay ratio would be lower if it were presented using that incomplete compensation amount. Based on the number of registrants that have historically

¹³⁶ See Proposed Instruction 4 to Item 402(u).

relied on Instruction 1 to Items 402(c)(2)(iii) and (iv),¹³⁷ we do not expect that the proposed instruction would impact a significant number of registrants each year.

Request for Comment

45. Is the proposed instruction appropriate in instances where registrants are relying on Instruction 1 to Items 402(c)(2)(iii) and (iv) with respect to the salary or bonus of the PEO?
46. Instead of the proposed approach, should these registrants be required to calculate pay ratio disclosure using only the amounts of total compensation of the PEO that are available at the time of the filing, or in the alternative, make a reasonable estimate of the omitted total compensation amounts? Would such disclosure be useful or meaningful? In that case, should the registrant be required to update (by Form 8-K or otherwise) its pay ratio disclosure to reflect the PEO's recalculated total compensation?
47. Is the proposed instruction clear? If not, what changes should be made to clarify it?
48. Should we require any additional or supplemental disclosure when a registrant relies on the proposed instruction? If so, what would that disclosure entail? For example, should the proposed instruction require registrants to report the median annual total compensation of employees, even if the PEO total compensation and pay ratio are not available? Should registrants relying on the proposed instruction be required to disclose the pay ratio for the prior year in the Form 10-K or proxy or information statement?
49. Would the proposed instruction cause registrants to change their compensation practices? Alternatively, would the proposed instruction have an adverse impact on the usefulness to

¹³⁷ For example, based on a review of EDGAR filings in 2012, only 22 registrants relied on Instruction 1 to Items 402(c)(2)(iii) and (iv) in connection with the total compensation of their PEO.

investors of the proposed pay ratio disclosure? How should we change the proposed requirements to address such impacts?

8. Status as “Filed” not “Furnished”

Some commenters suggested that pay ratio information be deemed “furnished” and not “filed” for purposes of the Securities Act and Exchange Act.¹³⁸ We note that Section 953(b) refers to the pay ratio information being disclosed in the registrant’s “filings” with the Commission. We believe that the use of the word “filing” in Section 953(b) is consistent with the disclosure being filed and not furnished. Accordingly, we are not proposing to permit the pay ratio information to be deemed “furnished.” Like other Item 402 information, the pay ratio disclosure would be considered “filed” for purposes of the Securities Act and Exchange Act and, accordingly, would be subject to potential liabilities thereunder.

We note that one of the reasons that commenters recommended treating the information as furnished and not filed is because of the difficulty that some companies may have in determining and verifying the information, which must be covered by the certifications required for Exchange Act filings under the Sarbanes-Oxley Act of 2002.¹³⁹ We also recognize that some registrants could have more difficulty in gathering and verifying the information than others. Nevertheless, we believe that the flexibility afforded to registrants in connection with identifying the median could reduce some of the difficulties of compiling the required information, because registrants would be able to tailor the methodology to reflect their own facts and circumstances. The ability to use reasonable estimates in connection with the calculation of annual total compensation for employees other than the PEO could also alleviate some of these concerns. In addition, we

¹³⁸ See COEC I and letters from ABA; Protective Life Corporation; and RILA. In contrast, no commenters have asserted that the disclosure should be filed.

¹³⁹ See, e.g., COEC I.

believe that the proposed transition periods discussed below, which are designed to give registrants sufficient time to develop and implement compliance procedures, could mitigate some concerns about compiling and verifying the information.

Request for Comment

50. Should the Section 953(b) information be filed rather than furnished? What weight should we give to the use of the word "filing" in the statute?
51. Are there other ways to address commenters' concerns about the ability to compile and verify the pay ratio information that still fulfills the statutory mandate?

D. Transition Matters

1. Proposed Compliance Date

Section 953(b) does not specify a date when registrants must begin to comply with the requirements that we implement. We are proposing to require that a registrant must begin to comply with proposed Item 402(u) with respect to compensation for the registrant's first fiscal year commencing on or after the effective date of the rule, and, as proposed, a registrant would be permitted to omit this initial pay ratio disclosure from its filings until the filing of its annual report on Form 10-K for that fiscal year or, if later, the filing of a proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such year. Similar to the proposed instructions for updating pay ratio disclosure, this initial pay ratio disclosure would be required, in any event, to be filed as provided in connection with General Instruction G(3) of Form 10-K not later than 120 days after the end of such fiscal year. Thus, if the final requirements were to become effective in 2014, a registrant with a fiscal year ending on December 31 would be first required to include pay ratio information relating to compensation for fiscal year 2015 in its proxy or information statement for its 2016 annual meeting of shareholders (or written consents in lieu of such a meeting). Consistent with the

treatment of other information required by Part III of Form 10-K, if that registrant does not file its proxy or information statement within 120 days of the end of 2015 (i.e., April 30, 2016), it would need to file its initial pay ratio disclosure in its Form 10-K for 2015 or an amendment to that Form 10-K. Similarly, a registrant with a fiscal year ending on December 31 that is not subject to the proxy rules or does not file a proxy or information statement in connection with an annual meeting of shareholders would be required to include pay ratio information relating to compensation for fiscal year 2015 in its Form 10-K covering fiscal year 2015, which would be due in the first quarter of 2016. Registrants would be permitted to begin compliance earlier on a voluntary basis.

Several commenters noted that companies will need a long transition period before they can implement systems to compile the disclosure and verify its accuracy.¹⁴⁰ We understand that this time would likely be needed by large, multinational registrants and any registrants that currently do not have a centralized, consolidated payroll, benefits and pension system that captures the information necessary to identify the median.¹⁴¹ We expect that it will take registrants one full reporting cycle to implement and test any necessary systems,¹⁴² and we believe that the proposal provides that time for transition and implementation.

We believe it is appropriate to allow a registrant to omit its initial pay ratio disclosure from filings that would otherwise require Item 402 information for its first fiscal year commencing on or after the effective date of the final rule until the filing of its annual report on

¹⁴⁰ See letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

¹⁴¹ See letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

¹⁴² See, e.g., letters from American Benefits Council and Group of Exec. Comp. Lawyers.

Form 10-K or, if later, a proxy or information statement relating to its next annual meeting of shareholders (and in any event not later than 120 days after the end of such fiscal year), for the same reasons described in Section II.C.7.a. above.

Request for Comment

52. Should the proposed requirements have a transition period, as proposed? Is the period too long? Too short? If so, how long should the transition period be and why? Please be specific (for example, instead of the proposed period, should compliance be delayed until the first fiscal year beginning on or after six months following the effective date of the final rules?).
53. In the alternative, should the transition periods be different for different types of registrants? If so, what transition periods should apply to which registrants? For example, should registrants with a workforce below a certain size (e.g., fewer than 1,000 employees) have a shorter phase-in period than others? Should there be a longer phase-in for multinational registrants? Please provide specific information about how to define the categories of registrants that should be subject to any recommended phase-in.
54. Are there any other accommodations that we should consider for particular types of companies or circumstances (other than the proposed transition period for new registrants described below in this release)?
- Should we provide a transition period for business combinations? If so, what should the transition be? For example, should a registrant be permitted to omit the employees of a newly acquired entity until a period of time (e.g., six months, 12 months) has passed following the closing of the business combination transaction? Instead of a specific transition period,

would guidance about when the employees of a newly acquired entity need to be covered in the pay ratio provide sufficient direction for registrants?

What should that guidance entail?

- Should we permit a registrant that is not subject to the proxy rules to amend its Form 10-K no later than 120 days after the end of the fiscal year covered by the report to provide the pay ratio disclosure? Should we permit such a registrant to provide the disclosure by filing a Form 8-K instead of an amendment to Form 10-K?
- Should we provide a transition period for registrants that cease to be smaller reporting companies? If so, what should the transition be?
- Does the fact that Title I of the JOBS Act provides transition periods for provisions other than Section 953(b) for registrants that cease to be emerging growth companies suggest that we should not provide a transition period for such registrants? Should we provide a transition for registrants that cease to be emerging growth companies? If so, what should the transition be? If not, would these registrants have the information available to compile the disclosure in time for their first proxy statement or annual report, as applicable, following the date they exit emerging growth company status? Should a transition period depend on the disqualifying event that occurs, on the basis that the registrant may have more advance notice of the occurrence for some types of events?¹⁴³ For example, should

¹⁴³

The definition of emerging growth company provides that an issuer continues to be deemed an emerging growth company until the earliest of: (1) the last day of the fiscal year during which it had total annual gross revenues of \$1 billion; (2) the last day of the fiscal year following the fifth anniversary of the first sale of its

a company that exits emerging growth company status because it reaches the fifth anniversary of its first sale of common equity be required to first disclose pay ratio information relating to the fiscal year in which its fifth anniversary occurred? Alternatively, should the amount of transition time provided depend on how long a company has enjoyed emerging growth company status, such as a longer transition for registrants that lose that status after one year or less?

2. Proposed Transition for New Registrants

New registrants that do not qualify as emerging growth companies are not exempted from the application of Section 953(b). The proposed requirements include instructions that would permit new registrants to delay compliance, so that pay ratio disclosure would not be required in a registration statement on Form S-1 or S-11 for an initial public offering or a registration statement on Form 10.¹⁴⁴ Instead, such a registrant would be required to first comply with proposed Item 402(u) with respect to compensation for the first fiscal year commencing on or after the date the registrant becomes subject to the requirements of Section 13(a) or Section 15(d) of the Exchange Act, and, as proposed, the registrant would be permitted to omit this initial pay ratio disclosure from its filings until the filing of its Form 10-K for such fiscal year or, if later, the filing of a proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such fiscal year. Similar to the proposed instructions for updating pay ratio disclosure, these proposed instructions also require that this initial pay ratio

common equity securities; (3) the date on which it has issued more than \$1 billion in non-convertible debt during the previous three years; or (4) the date on which it is deemed a large accelerated filer. See Exchange Act Section 3(a)(80)[15 U.S.C. 78c(a)(80)] and Securities Act Section 2(a)(19)[15 U.S.C. 77b(a)(19)].

144

See proposed Instruction 5 to paragraph (u).

disclosure must, in any event, be filed as provided in connection with General Instruction G(3) of Form 10-K not later than 120 days after the end of such fiscal year.

For example, assuming the proposed requirements become effective in 2014, a company with a fiscal year ending on December 31 that completes its initial public offering in October 2016 would not be required to include any pay ratio information in its registration statement on Form S-1. The company would then not be required to include pay ratio disclosure in any filing until it files its definitive proxy or information statement for its 2018 annual meeting of shareholders (or written consents in lieu of such a meeting), which would include pay ratio disclosure relating to 2017 compensation amounts. Consistent with the treatment of other information required by Part III of Form 10-K, if the company does not file its definitive proxy or information statement within 120 days of the end of its fiscal year (i.e., April 30, 2018), it would need to file its initial pay ratio disclosure in its Form 10-K for 2017 or an amendment to that Form 10-K. If that company were not required to file a proxy statement relating to its annual meeting of shareholders, the first filing that would be required to include pay ratio disclosure would be its Form 10-K covering fiscal year 2017, which would include pay ratio disclosure relating to 2017 compensation amounts.

Commenters did not address the impact of pay ratio disclosure requirements on newly public companies. Although investors might benefit from pay ratio information in connection with an initial public offering or Exchange Act registration, we believe it is appropriate to give companies time to develop any needed systems to compile the disclosure and verify its accuracy. The transition period for new registrants is similar to the proposed time frame provided for other registrants to comply with pay ratio disclosure requirements following the effective date of the final rules. The proposed approach is also similar to the current phase-in for newly public

companies in connection with Item 308 of Regulation S-K, for management's report on the registrant's internal control over financial reporting.¹⁴⁵

We are sensitive to the impact that the proposed rules could have on capital formation. We note that the requirements of Section 953(b), as amended by the JOBS Act, distinguish between certain newly public companies and all other issuers by providing an exemption for emerging growth companies. We note that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial public offering, which could have a negative impact on capital formation. In this regard, we assume that, in order to be disqualified for emerging growth company status, these companies are likely to be businesses with more extensive operations or a greater number of employees than many emerging growth companies, which could increase the initial efforts needed to comply with the proposed requirements. We believe that providing a transition period for these newly public companies could mitigate this potential impact on capital formation.

Request for Comment

55. Instead of the proposed transition period, should we require new registrants that are not emerging growth companies to comply with pay ratio disclosure requirements in registration statements on Form S-1, Form S-11 or Form 10? Are we correct that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial public offering? What costs would be imposed on these companies if we did not provide the transition? Does the potential importance of the information to investors justify the burden on these companies of complying with the requirements in their Form S-1, Form S-11 or Form 10?

¹⁴⁵ See Instruction 1 to Item 308 of Regulation S-K.

56. Does the proposed transition period for compliance by new registrants provide sufficient time (or, alternatively, too much time) for these companies to be able to comply? Why or why not?
57. Are there any alternatives to the proposed transition period that we should consider? For example, should we permit new registrants to omit pay ratio disclosure from Form S-1 and Form 10 (as proposed), but require them to comply with the proposed pay ratio disclosure requirements in their first proxy statement or annual report, as applicable?
58. Are there other accommodations we should consider for new registrants?

III. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments on any aspect of the proposals, other matters that might have an impact on the amendments and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits, and by alternatives to the proposals where appropriate. Where alternatives to the proposals are suggested, please include information as to the costs and benefits of those alternatives.

59. Have we struck the appropriate balance between prescribing rules to satisfy the mandate of Section 953(b) and allowing a registrant flexibility to identify the median in a manner that is appropriate to its own facts and circumstances?
60. Are there alternatives to the proposals we should consider that would satisfy the requirements of Section 953(b) of the Dodd-Frank Act?

IV. ECONOMIC ANALYSIS

A. Background

As discussed in detail above, Section 953(b) directs the Commission to amend Item 402 of Regulation S-K to add the pay ratio disclosure requirements prescribed by the Dodd-Frank Act. Section 953(b) imposes a new requirement on registrants to disclose the median of the annual total compensation of all employees and the ratio of that median to the annual total compensation of the chief executive officer. In doing so, Section 953(b) requires registrants to determine total compensation in accordance with Item 402(c)(2)(x). The Commission's rules for compensation disclosure have traditionally focused on compensation matters that relate to executive officers and directors. Although registrants subject to Item 402 are required to provide extensive information about the compensation of the principal executive officer and other named executive officers identified pursuant to Item 402(a), current disclosure rules generally do not require registrants to disclose detailed compensation information for other employees in their filings with the Commission. In addition, the Commission's executive compensation disclosure rules differ from tax accounting and reporting standards.¹⁴⁶ Therefore, Section 953(b) requires registrants to disclose specific information about non-executive employee compensation that is not currently required for disclosure, accounting or tax purposes. We do not expect that many registrants, if any, currently disclose or track total compensation as determined pursuant to Item 402 for their workforce.¹⁴⁷

¹⁴⁶ "Total compensation" as determined pursuant to Item 402 is not an amount that is reported or calculated in connection with a registrant's financial statements. The elements of compensation that are required to be calculated and reported for U.S. tax purposes are not the same as those covered by Item 402 requirements, and the reported amounts relate to the relevant calendar year for tax purposes, rather than the registrant's fiscal year.

¹⁴⁷ See *supra* note 17.

We are proposing these amendments to Item 402 in order to satisfy the statutory mandate of Section 953(b). We note that neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision or a specific market failure, if any, that is intended to be remedied;¹⁴⁸ however, commenters supporting Section 953(b) have emphasized that potential benefits could arise from adding pay ratio-type information to the total mix of executive compensation information.¹⁴⁹

As discussed throughout this release, in proposing amendments to implement Section 953(b), we have considered the statutory language and exercised our discretion to develop rules designed to lower the cost of compliance while remaining consistent with Section 953(b). In doing so, we have considered a variety of issues, including, among others, the specificity of the statute, whether the rules should specify a methodology for determining the median, the use of estimates and assumptions, whether and how to define certain terminology used in the statute, the form of the disclosure, how often the disclosure should be updated in the required filings, and compliance and transition matters.

We are sensitive to the costs and benefits imposed by the statutory requirements and the proposed pay ratio disclosure requirements, and our analysis of these costs and benefits is discussed below. Some of the costs and benefits stem directly from the statutory mandate in Section 953(b), while others are affected by the discretion we exercise in implementing that mandate. Our economic analysis of the proposed pay ratio disclosure requirements addresses both the costs and benefits that stem directly from Section 953(b) and those arising from the policy choices under the Commission's discretion, recognizing that it may be difficult to separate

¹⁴⁸ See supra note 23.

¹⁴⁹ See supra note 24.

the discretionary aspects of the rules from those elements required by statute. The economic analysis that follows focuses first on the benefits and costs arising from the new mandatory disclosure requirements prescribed by the Dodd-Frank Act and then focuses on those that arise from the choices we have made in exercising our discretion.

We request comment throughout this release on alternative means of meeting the statutory mandate of Section 953(b) and on all aspects of the costs and benefits of the proposals and possible alternatives. We also request comment on any effect the proposed pay ratio disclosure requirements may have on efficiency, competition and capital formation.¹⁵⁰ We particularly appreciate comments that distinguish between costs and benefits that are attributed to the statute and costs and benefits that are a result of policy choices made by the Commission in implementing the statutory requirements, as well as comments that include both qualitative information and data quantifying the costs and the benefits identified.

B. Baseline

To assess the economic impact of the proposed rules, we are using as our baseline the current state of the market without a requirement for registrants to disclose pay ratio information. At present, the registrants subject to Item 402(c)(2)(x) already provide disclosure of their executive officer compensation as Section 953(b) requires. Other registrants, such as emerging growth companies, smaller reporting companies and foreign private issuers, are not required to

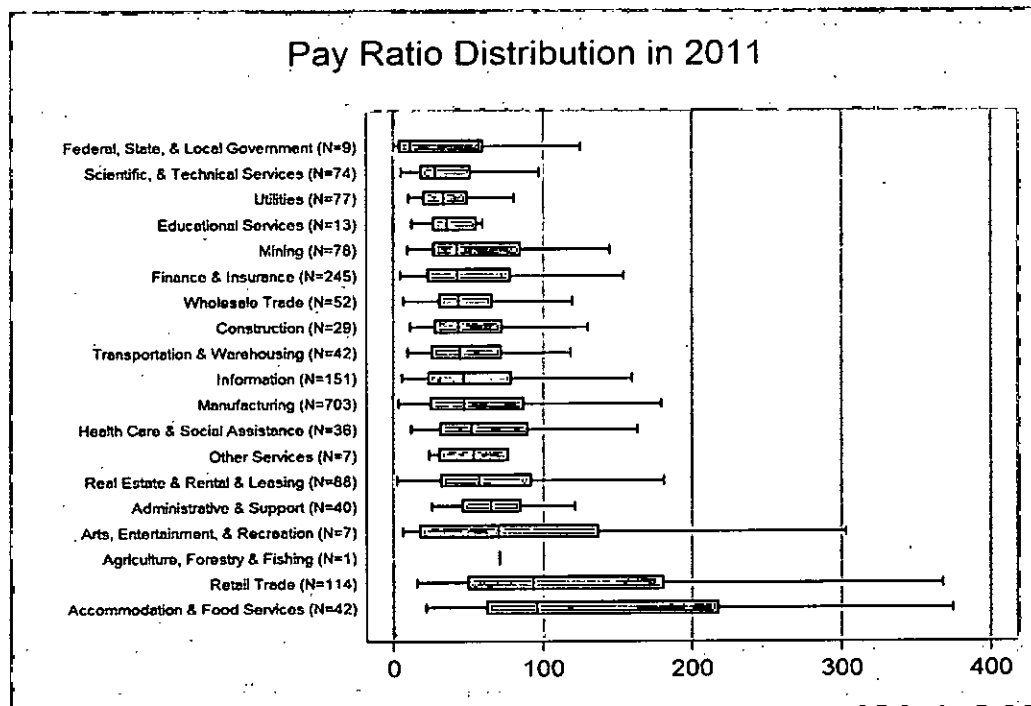
¹⁵⁰ Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)] require us, when engaging in rulemaking under those Acts where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

comply with to Item 402(c)(2)(x) and provide disclosure of executive compensation different from Item 402(c)(2)(x). We do not expect that many registrants, if any, currently maintain payroll and information systems that track total compensation as determined pursuant to Item 402 for their employees, or make that information publicly available. Therefore, investors cannot calculate registrant-specific median employee compensation because there are no existing or publicly available sources for this data. Correspondingly, they cannot currently calculate the annual pay ratio in accordance with Section 953(b). Statistics on the earnings of U.S. workers in various “industries” are publicly available from the Bureau of Labor Statistics. Therefore, investors may be able to approximate the ratio using the industry median employee compensation and the information about PEO compensation for the registrants subject to Item 402(c). For example, the distribution of the ratios of PEO to industry median employee compensation for a sample of large reporting companies is reported by North American Industry Classification System (“NAICS”) industry sectors in the figure below for fiscal year 2011.¹⁵¹

¹⁵¹ The ratios in the figure are calculated for each registrant with executive total compensation data from the Standard and Poor’s Compustat Executive Compensation database which tracks compensation for the companies currently or previously in the S&P 1500 index and industry median employee wage information at each 3-digit NAICS level from the U.S. Department of Labor’s Bureau of Labor Statistics ([available at http://www.bls.gov/bls/wages.htm](http://www.bls.gov/bls/wages.htm)). The distribution of the registrant-level ratios within each NAICS industry sector (2-digit) is represented using horizontal box plots that show the minimum and maximum, and 25th, 50th (median) and 75th percentiles.

Figure 1. Pay ratio distribution using industry median compensation.



The pay ratio compiled with currently available information as in the above example is different from the ratio that Section 953(b) requires issuers to disclose; the above example uses the median wage information of U.S. workers within the same 3-digit NAICS industries, while Section 953(b) mandates registrants to use company-specific information about median employee compensation for “all employees” which would include employees in workplaces outside the United States. Also, the example is based on only wages and does not consider other forms of compensation for employees other than PEOs because the Bureau of Labor Statistics does not report those components. In contrast, Section 953(b) requires registrants to present the ratio using total compensation including all forms of compensation in Item 402(c)(2)(x).

Although the ratio described in the above example does not represent the ratio mandated by Section 953(b), it shows that there is considerable disparity in the compensation differentials between industries. It is not clear how the distribution of ratios by industry would change if

company-specific median employee wage and other compensation components for employees were used. In the example above, the variation in ratios within the same industry group at the 3-digit NAICS level is determined only by the variation in PEO pay between companies. The Section 953(b) disclosure of median pay at the company level would introduce an additional factor for the variation, which is the company-specific median employee compensation. This could widen or narrow the distribution of ratios depending on how median pay corresponds to PEO pay at each company.

To assess the effects of the proposed rule, we consider the impact of the rule on investors, registrants subject to the pay ratio disclosure and all their employees including executive officers. The proposed disclosure requirement would apply to all registrants that are not emerging growth companies, smaller reporting companies and foreign private issuers, which we estimate to be approximately 3,830 registrants.¹⁵² We estimate that there are approximately 900 emerging growth companies, approximately 3,750 smaller reporting companies, approximately 750 foreign private issuers filing on Form 20-F and approximately 144 MJDS filers.¹⁵³

An important factor to consider when analyzing the competitive effects of the proposed pay ratio disclosure requirements on the affected registrants is the difference in size and nature of

¹⁵² Based on a review of EDGAR filings in 2011, we estimate that of the approximately 8,870 annual reports on Form 10-K filed in that year, approximately 3,750 annual reports were filed by smaller reporting companies, approximately 290 were filed by ABS issuers and approximately 100 were filed by wholly-owned subsidiaries of other registrants. We have also reduced the total number affected registrants by 900 to reflect the approximate number of emerging growth companies that have identified themselves as such in their EDGAR filings as of May 2013.

¹⁵³ We estimate that approximately 900 SEC registrants have identified themselves as emerging growth companies in their EDGAR filings as of May 2013. The estimates for smaller reporting companies and foreign private issuers including MJDS filers are based on a review of EDGAR filings for calendar year 2011. Based on a review of EDGAR filings in 2012, there approximately 8,154 registrants filing on Form-10-K, approximately 3,640 smaller reporting companies, approximately 715 foreign private issuers filing on Form 20-F and approximately 152 MJDS filers. Registrants can fall into multiple categories among emerging growth companies, smaller reporting companies and foreign private issuers.

the workforce, complexity of the organization and the degree of integration of payroll systems that are likely to exist among these registrants. The average number of business and geographical segments and employees of each segment disclosed by some of the potentially affected registrants in the calendar year 2011 are reported in the table below.¹⁵⁴

Table 1. Registrants with multiple business or geographical segments.

	Average	Min	Median	Max	No. of Registrants
No. of Geographic Segments	2.92	1	2	28	2,691
No. of Business Segments	2.36	1	1	11	2,947
Total Assets (\$ millions)	10,472	0	1,287	3,211,484	2,691
Geographic Segment Assets (\$ millions)	8,833	0	905	3,211,484	1,411
No. of Employees per Registrant	12,681	0	2,300	2,100,000	2,652
No. of Employees per Geographic Segment	7,096	0	1,155	338,000	1,433

The above table shows that the average number of segments among potentially affected registrants was about three in 2011. Also, the approximate number of average employees per registrant and per geographic segment was 13,000 and 7,000 respectively. Although we do not have information on how the registrants maintained their payroll systems across the multiple segments, the number of segments for the registrants serves as one indication of the potential complexity of trying to comply with the proposed rules (whether by sampling at each segment and aggregating the samples across the segments, or aggregating the payroll observations and sampling from the aggregated pool).

Another important factor in analyzing the competitive effects of the proposed disclosure requirement is the current level of competition in the labor market for PEOs. Unfortunately, we

¹⁵⁴

The corporate segments data used in the table come from the Standard and Poor's Compustat Segment database and the information is self-reported by the companies. As such, it is not based on standardized definitions of lines-of-business and geographic areas. Segment information of approximately 65% of the potentially affected registrants is available from the database.

do not have data that would allow us to assess the degree of competitiveness of the current market for PEOs.

C. Discussion of Benefits and Costs Arising from the Mandated Disclosure Requirements

1. Benefits

We have considered the impact that the requirements prescribed by Section 953(b) could have on the efficiency of the U.S. capital markets, particularly the informational efficiency. The following discussions of potential informational benefits are mainly intended to address benefits of the mandated disclosure to investors and shareholders and the employees (other than executive officers) of the registrants that are subject to Section 953(b).

As noted above, there is limited legislative history to inform our understanding of the legislative intent behind Section 953(b) or the specific benefits the provision is intended to secure. In particular, the lack of a specific market failure identified as motivating the enactment of this provision poses significant challenges in quantifying potential economic benefits, if any, from the pay ratio disclosure. Some commenters have noted that there is an information gap between registrants and investors with regard to internal pay parity at companies.¹⁵⁵ Although investors are able to compare compensation arrangements for the PEO across companies, registrants are not required to provide, and investors may not have access to, information that would allow them to assess the level of a PEO's compensation as it compares to that of employees at the same

¹⁵⁵

See letter from Social Investment Forum (noting "a number of investors, including several of our members, have been active in submitting shareholder resolutions in recent years supporting corporate disclosure of similar pay disparity data."). See generally House Letter and Senate Letter; and letters from Americans for Financial Reform; Group of International Investors; Calvert Investment Management; K. Burgoyne; Institute for Policy Studies; and Trillium Asset Management. See also Form Letter A.

company.¹⁵⁶ Some investors have suggested that this type of comparison would assist in their ability to evaluate the PEO's compensation in the context of the company's overall business,¹⁵⁷ and could provide insight into the effectiveness of board oversight.¹⁵⁸ Other commenters have suggested that a comparison of PEO compensation to employee compensation could be used by investors to approximate employee morale and productivity,¹⁵⁹ or analyzed as a measure of a particular company's investment in human capital.¹⁶⁰

These commenters did not quantify the magnitude or value of these potential benefits. Statistics on the average earnings of U.S. workers in various industries are already publicly available to investors.¹⁶¹ Company-specific information about median employee pay would be new information generated pursuant to the Section 953(b) requirements, and thus the potential incremental benefits identified by commenters primarily derive from this company-specific information. Commenters have not specified whether this type of company-specific information would be equally useful in connection with all types of companies or whether the potential benefits are more relevant to certain types of businesses, industries, business structure or size of

¹⁵⁶ See, e.g., Senate Letter; House Letter; and AFL-CIO I (noting "few companies provide meaningful disclosure of how employee compensation is allocated over their workforce").

¹⁵⁷ See, e.g., letter from UAW Retiree Medical Benefits Trust ("Disclosure of internal pay equity, whether the ratio between median employee wages and those of the CEO or the ratio between compensation awarded to the CEO and to other top executives, will ultimately help investors evaluate executive pay practices by better contextualizing the information provided to the shareholders through the proxy statement and other corporate filings.") and letter from CtW Investment Group ("The new [pay ratio] disclosure offers an insight into compensation within the entire organization, and provides a different way for boards and shareholders to evaluate the relative worth of a CEO.").

¹⁵⁸ See letter from CtW Investment Group (noting that "compensation disclosure is important, not only in its own right, but the ability it offers shareholders to evaluate and hold accountable board members"); and letter from UAW Retiree Medical Benefits Trust (noting "we view Section 953(b) as an essential tool that will increase corporate board accountability to investors").

¹⁵⁹ See AFL-CIO I and letters from Americans for Financial Reform; Calvert Investment Management; Drucker Institute; and Institute for Policy Studies. See also Form Letter A.

¹⁶⁰ See AFL-CIO I and letter from CtW Investment Group.

¹⁶¹ See U.S. Department of Labor's Bureau of Labor Statistics, available at <http://www.bls.gov/bls/wages.htm>.

registrant. One commenter asserted that the impact of pay disparity on employee performance and morale is “particularly strong in industries based on technology, creativity and innovation,”¹⁶² which suggests that a measure of employee morale could be more potentially useful in evaluating those businesses or that this pay ratio may be a more sensitive indicator of that effect in those industries.

Furthermore, commenters have not specified what an optimal pay ratio is or what a proper benchmark should be. They also have not specified what effect a pay ratio has on employee morale and productivity relative to other environment-specific and company-specific factors. To the extent that factors exist that could cause the ratios to differ, precise comparability across companies may not be relevant and could generate potentially misleading interpretations or conclusions. In particular, the ratio may significantly depend on how a company structures its business. For example, one company might outsource the labor-related (manufacturing) aspects of its business to a third-party to focus on product innovation, while another company competing in the same industry might choose to retain the labor aspect of its business. To the extent that product innovation requires higher pay than manufacturing, the outsourcing company will have a lower pay ratio for the same PEO pay. If pay ratio parity between these two companies were pursued, and a lower ratio sought, this could create incentive for the manufacturing company to outsource jobs. Therefore, the potential value of this disclosure for assessing issues related to employee morale, productivity and investment in human capital may be diminished by the indirect costs of creating incentives for registrants to change their business structure.

¹⁶² See AFL-CIO II (“These sectors...depend significantly on the ability of employees to collaborate, share ideas, and function effectively as teams, all of which are damaged by extreme differentials in compensation amongst employees.”).

Some commenters have asserted that the intended purpose of the provision is to address a broader public policy concern relating to income inequality, which they suggest is exacerbated by increasingly high levels of PEO compensation relative to other workers.¹⁶³ More specifically, some of these commenters have suggested that the mandated disclosure requirement will encourage the boards of public companies to consider the relationship between the PEO's compensation and the compensation of other employees, which, these commenters suggest could, in turn, curb excessive PEO compensation.¹⁶⁴ It has also been suggested that shareholders of public companies could use pay ratio information, together with pay-for-performance disclosure, to help inform their say-on-pay votes, which could also serve to limit PEO compensation.¹⁶⁵

Commenters have also suggested¹⁶⁶ that comparing PEO pay to the compensation of the median worker may help offset an upward bias in executive pay resulting from the practice of benchmarking PEO compensation solely against the compensation of other PEOs.¹⁶⁷ To the extent that pay ratio disclosure diminishes the focus of benchmarking executive compensation exclusively to the level of peer-PEO pay, the mandate of Section 953(b) may provide indirect economic benefits to registrants and their shareholders by reducing the frequency of pay increases

¹⁶³ See Letter from Americans for Financial Reform (“[T]his information clearly bears directly on the important public policy issues of pay equity and income inequality”). See also House Letter and Senate Letter (each stating “income inequality is a growing concern among many Americans...by 2010 large company CEO pay had skyrocketed to \$10.8 million, or 319 times the median worker’s pay. Section 953(b) was intended to shine a light on figures like this at every company.”).

¹⁶⁴ See, e.g., AFL-CIO I and letters from Americans for Financial Reform; Group of International Investors; Institute for Policy Studies. In contrast, the National Association of Corporate Directors asserted that pay ratio information would not be useful for this purpose. See letter from NACD.

¹⁶⁵ See letters from CtW Investment Group and S. Towns.

¹⁶⁶ See AFL-CIO II and letter from Americans for Financial Reform.

¹⁶⁷ See, e.g., M. Faulkender and J. Yang, Inside the Black box: the Role and Composition of Compensation Peer Groups, J. OF FINANCIAL ECONOMICS. 96, 257-270 (2010); C. Elson and C. Ferrere, Executive Superstars, Peer Groups and Overcompensation: Cause, Effect and Solution, J. OF CORPORATION LAW. Forthcoming (2013) for one view that benchmarking is inefficient because it can lead to increases in executive compensation not tied to firm performance.

that are tied to a benchmarking process that is not based on performance. It is also possible, however, that pay ratio disclosure could exacerbate any upward bias in executive pay by providing another benchmark that could be used in certain situations to increase PEO compensation (i.e., for a PEO whose company's pay ratio is lower than its peers' pay ratios). In addition to these possibilities, there is also evidence that setting executive compensation through benchmarking practices is practical and efficient,¹⁶⁸ particularly when the market can observe the method used.¹⁶⁹ To the extent that current benchmarking practices and disclosure requirements are efficient, additional pay ratio disclosure would not provide additional benefits.

Similar benefits to the potential benefits cited by commenters may be achieved using the currently available information on PEO compensation and the industry median or average wages of U.S. workers, although currently available data do not provide company-specific information. Also, these commenters did not provide details about the causes of compensation disparity within particular companies or industries and did not address whether there are alternative means to effect an overall reduction in PEO compensation, or, alternatively, an overall improvement in the wages and benefits for workers. The evidence that the current PEO compensation practice is not efficient or that the benchmarking process causes the upward bias in executive compensation is

¹⁶⁸ See, e.g. J. Bizjak, M. Lemmon, and L. Naveen, Does the use of peer groups contribute to higher pay and less efficient compensation? J. OF FINANCIAL ECONOMICS. 90, 152-168 (2008). This study shows that benchmarking is a practical and efficient mechanism used to gauge the market wage necessary to retain valuable human capital.

¹⁶⁹ See, e.g., J. Bizjak, M. Lemmon, and T. Nguyen, Are all CEOs Above Average? An Empirical analysis of compensation Peer Groups and Pay Design. J. OF FINANCIAL ECONOMICS. 100, 538-555 (2011). This study finds that disclosure of peer groups mandated in the 2006 Adopting Release has reduced the bias in peer group choice.

not sufficiently clear to establish that the purpose of the provision is a remedy for a specific market failure in the current compensation practice.¹⁷⁰

In contrast, other commenters believe that the disclosure mandated by Section 953(b) would not have any benefit, or, at most, would not have benefits sufficient to justify the compliance costs, which many of such commentators anticipate would be substantial.¹⁷¹ Some of these commenters questioned the materiality of pay ratio information to an investment decision and specifically questioned the meaningfulness of the information in the form expressly required by Section 953(b).¹⁷² This view was also asserted by the minority in the Senate Report accompanying the legislation.¹⁷³ In light of these comments, we are particularly interested in receiving information relating to material, direct economic benefits to investors or shareholders of the affected registrants derived from the pay ratio disclosure.

¹⁷⁰ See, e.g., J. Core, W. Guay, and R. Thomas, Is U.S. CEO Compensation Broken? J. OF APPLIED CORPORATE FINANCE. 12, 97-104 (2005); C. Fryman and D. Jenter, CEO Compensation, ANNUAL REVIEW OF FINANCIAL ECONOMICS. 2, 75-102 (2010).

¹⁷¹ See, e.g., letter from Meridian Compensation Partners LLC (stating that “disclosure of the CEO pay ratio will provide investors with little or no meaningful information about an issuer’s executive or employee pay practices. We further believe that what value this information may have to investors is far outweighed by the administrative burden and associated costs borne by issuers in accumulating the compensation data necessary to make the CEO pay ratio disclosure.”); COEC I (opposing Section 953(b) because it “does not believe that [the ratio] will provide any meaningful or material information that will be used by investors.”); Brian Foley & Co. (asserting that Section 953(b) disclosure “realistically provides little serious added analytical value, and presents, in its current form, a variety of practical issues and potentially significant calculation costs.”); letter from NACD (stating that “it would take global companies months and thousands of hours to come up with a completely useless number”).

¹⁷² See, e.g., letters from Group of Exec. Comp. Lawyers (“We are unaware of any evidence correlating corporate performance to the ratio of CEO pay to median employee pay.”) and Group of Trade Associations (“While it may be of general interest to some investors for different purposes, it is unclear how the pay ratio disclosure will be material for the reasonable investor when making investment decisions.”). See also, letter from RILA (noting “current Item 402 requirements if applied to the overall employee population of an issuer will only serve to distort the already questionable meaning of the Compensation Ratio”).

¹⁷³ See Senate Report, supra note 23 (“Although provisions like this appeal to popular notions that chief executive officer salaries are too high, they do not provide material information to investors who are trying to make a reasoned assessment of how executive compensation levels are set. Existing SEC disclosures already do this.”).

We note that some commenters asserted that certain investors incorporate social and governance issues, like pay equity, as part of their investment decisions.¹⁷⁴ These investors may realize non-economic benefits associated with their investment decisions based on this type of information. These commenters, however, did not quantify the extent to which investors would value pay ratio information or would incorporate the disclosure required by Section 953(b) into their investment or voting decision, if at all.¹⁷⁵ We also note that many commenters disagreed with the assertion that this type of disclosure is material to investors or would be useful to an investment or voting decision, particularly in the form required by the Dodd-Frank Act.¹⁷⁶ As mentioned above, currently it is not possible to quantify the usefulness to investors of company-specific pay ratio information as required by Section 953(b) as compared to the usefulness of publicly available statistics on average salaries, or the usefulness of any other company-specific metric of employee compensation or satisfaction. We understand from some commenters that the proposed pay ratio disclosure could be used by some investors in allocating capital and from that perspective would be perceived by such investors as a benefit, although not necessarily an economic benefit measured by a financial return. It is uncertain whether the investment decisions

¹⁷⁴ See letters from Americans for Financial Reform; Group of International Investors; and Social Investment Forum.

¹⁷⁵ We are not aware of any empirical studies that address the value of pay disparity disclosure specifically. We are aware of research that has studied whether there is a correlation between information about employee satisfaction and long-term equity returns in an effort to understand how the market values a public company's intangible assets. This research was based on the equity prices of companies that were identified on Fortune Magazine's list of the "100 Best Companies to Work For in America." See A. Edmans, Does the stock market fully value intangibles? Employee satisfaction and equity prices, J. OF FINANCIAL ECONOMICS 101, 621-640 (2011) (finding evidence implying that the market fails to incorporate intangible assets, like employee satisfaction, fully into stock valuations until the intangible subsequently manifests in tangibles, such as earnings, that are valued by the market; and finding evidence suggesting that the non-incorporation of intangibles into stock prices is not simply due to the lack of salient information about them).

¹⁷⁶ See, e.g., COEC I and letters from Brian Foley & Co.; Group of Trade Associations; Meridian Compensation Partners, LLC; NACD; and RILA.

by these investors would impact the overall efficiency of U.S. capital markets, or if there would be an impact, whether the impact would be net positive or negative.

Nevertheless, as discussed above, in designing the proposed requirements, we have sought to preserve what we believe to be the potential benefits, as articulated by commenters, of the mandated requirement. To the extent that some investors and other stakeholders may seek the disclosure of pay ratio information, both those investors and the registrants who have already disclosed similar information voluntarily may benefit from mandated, rather than voluntary, disclosure of pay ratio information. Given that some registrants have already disclosed information similar to the pay ratio voluntarily,¹⁷⁷ those registrants may benefit from the mandated disclosure requirement to the extent that standardized pay ratio information may decrease uncertainty around, or increase the relevance of, the voluntarily disclosed information.¹⁷⁸ To the extent that the voluntarily disclosed information and the manner in which it is calculated differs from the disclosure that would be required under the proposed rules, those companies may incur costs. We request comment throughout this release about the potential benefits of the disclosure mandated by the Dodd-Frank Act and the proposed rules and any alternative ways of achieving these benefits in a manner consistent with the Dodd-Frank Act. We seek further comment on the impact of the proposed requirements on the efficiency of the U.S. capital markets.

¹⁷⁷ We are not aware of any registrants that currently provide pay ratio disclosure in the form contemplated by the proposed rules in their filings with the Commission. However, several registrants provide (or in the past have provided) voluntary disclosures that provide a comparison of CEO compensation with worker pay.

¹⁷⁸ See, e.g., B. Bushee and C. Leuz, Economic consequences of SEC disclosure regulation: evidence from the OTC bulletin board, J. OF ACCOUNTING AND ECONOMICS. 39, 233-264 (2005); R. Lambert, C. Leuz, and R. Verrecchia, Accounting Information, Disclosure, and the Cost of Capital, J. OF ACCOUNTING RESEARCH. 45, 385-420 (2007).

2. Costs

The following discussions are mainly intended to address costs to registrants that are subject to the pay ratio disclosure, investors who invest their capital in those registrants and employees of the registrants who invest their human capital in those registrants. As noted above, the provision does not identify a specific objective and therefore, the appropriateness of the costs in relation to the statutory objective is not readily assessable. Therefore, the following analysis on costs focuses on direct compliance costs on registrants and possible second-order effects on efficiencies and competition. We expect that the effects of the pay ratio disclosure requirement on capital formation would be minimal.

Many commenters raised concerns about the significant compliance costs that would arise from requiring the use of “total compensation” as defined in Item 402(c)(2)(x) to calculate employee pay and requiring registrants to identify the median instead of the average.¹⁷⁹ According to these commenters, the primary driver of the significant compliance costs is that many registrants, whether large multinationals or companies of modest revenue size and market capitalization, maintain multiple and complex payroll, benefits and pension systems (including systems maintained by third party administrators) that are not structured to easily accumulate and analyze all the types of data that would be required to calculate the annual total compensation for

¹⁷⁹

See, e.g., letters from Davis Polk (noting that compliance will be “highly costly and burdensome, with tremendous uncertainty as to accuracy. Companies are justifiably concerned about the costs and burdens to accomplish the formidable data collection and calculation tasks for employees worldwide between the end of the year and the first required filing.”); Frederick W. Cook & Co., Inc. (stating “the calculation of median total pay for all employees other than the CEO is problematic, burdensome and perhaps impossible for many issuers”) and Protective Life Corporation (“It is difficult to overemphasize how burdensome this requirement could be for large employers. Calculating annual total compensation is much more complicated than simply adding up numbers that companies already have available.... Since many large companies use outside accounting, actuarial and compensation and pension administration firms to perform these calculations, the costs of disclosure will increase accordingly.”) See also COEC I and letters from ABA; Group of Exec. Comp. Lawyers; Group of Trade Associations; Meridian Compensation Partners, LLC; NACD; and R. Morrison.

all employees in accordance with Item 402(c)(2)(x). Thus, in order to compile such disclosure, registrants would either need to integrate these data systems or consolidate the data manually, which, in both cases, these commenters have stated would be highly costly and time consuming.¹⁸⁰

In addition, several commenters raised concerns about expected compliance costs arising from the complexity of the "total compensation" calculation under Item 402(c)(2)(x).¹⁸¹ These commenters made various recommendations to simplify the total compensation definition, such as including only cash compensation, including only cash compensation and equity-based compensation, including only compensation that is reported to the U.S. Internal Revenue Service on Form W-2 or other relevant tax authority, or including only compensation that is required to be recorded in the payroll system of a particular jurisdiction and its overseas equivalents.¹⁸²

As discussed elsewhere in this release, registrants would be able to choose from several options in order to identify the median and provide the required disclosure. Registrants may choose to calculate the annual total compensation for each employee and the PEO using Item 402(c)(2)(x) and to identify the median using this method. In addition, the proposed requirements would allow registrants to choose a statistical method to identify the median that is appropriate to

¹⁸⁰ See, e.g., COEC II and letters from Meridian Compensation Partners, LLC; R. Morrison; and Group of Trade Associations ("There is a widespread misconception that this information is readily available at the touch of a button.").

For example, one commenter submitted a survey demonstrating that, of the 95 companies surveyed, 10.9% maintained a centralized payroll computer system that could be used to calculate cash compensation of each employee (or a sample of employees); 28.3% had payroll systems in each location or regionally that could be used to aggregate the data; 47.8% expected to compile the data manually and 13% expected to be able to use some combination of information technology and manual data gathering. See COEC II.

¹⁸¹ See, e.g., COEC I and II; and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

¹⁸² See COEC I and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

the size and structure of their own businesses and the way in which they compensate employees, rather than prescribing a particular methodology or specific computation parameters. The proposed rules also would permit registrants to use a consistently applied compensation measure to identify the median employee and calculate and disclose that median employee's total compensation in accordance with Item 402(c)(2)(x). The proposed requirements also would permit registrants to use reasonable estimates in calculating the annual total compensation for employees other than the PEO, including when disclosing the annual total compensation of the median employee identified using a consistently applied compensation measure. We believe that this flexible approach is consistent with Section 953(b) and could ease commenters' concerns about the potential burdens of complying with the disclosure requirement. Also, allowing these specific alternatives could reduce the potential uncertainty for registrants as to how to comply with the proposed rules.

Although some commenters have estimated the cost of compliance for certain registrants,¹⁸³ the estimates we have received vary significantly. The estimates provided by commenters are also based on the commenters' initial reading and interpretation of the statute and not the proposed means of implementation. One commenter reported that a registrant estimated that compliance would cost approximately \$7.6 million and take approximately 26 weeks,¹⁸⁴ while another registrant estimated approximately \$2.0 million annually solely for computing the actuarial change in accrued pension benefit.¹⁸⁵ We have also received cost information from discussions with registrants and industry groups, including the following estimates:

¹⁸³ See COEC II and letter from Group of Trade Associations.

¹⁸⁴ See letter from Group of Trade Associations (the commenter does not clarify whether these estimates reflect a one-time or ongoing annual burden).

¹⁸⁵ See letter from Group of Trade Associations.

- approximately 201 to 500 hours per year, plus significant costs;
- \$3 to \$6.5 million for a multinational manufacturing company with 90 separate payrolls;
- \$4.725 million for a multinational consumer products company (including an estimated 50 hours per country for employees located in 80 countries);
- \$100 million dollars for a multinational company; and
- \$350,000 to implement plus \$100,000 a year for ongoing compliance for a global technology company.

We are, however, unable to quantify with any precision the compliance costs at this time.¹⁸⁶

Although these estimates are a useful starting point for our analysis, we do not believe the aggregate of these estimates necessarily represents an accurate indication of the expected compliance costs because they do not take into account the flexibility allowed under the proposed requirements.¹⁸⁷ Also, these estimates, although providing potentially useful data points, do not reflect costs incurred across the breadth of the registrant population subject to the requirement. Commenters did not provide sufficient information on the factors used to produce these estimates to enable us to evaluate these cost estimates, such as, among others, how separate payrolls are maintained within a company across divisions or subsidiaries, how the compensation components that the current payroll systems record compare to the “total compensation” as defined in Item

¹⁸⁶ In light of the limitations of these estimates, we were not able to use these estimates to inform the hour and cost burden estimates that are required by the Paperwork Reduction Act of 1995 (the “PRA”). See Section V of this release. Our discussion and analysis in that section describes the assumptions we made for purposes of deriving our PRA estimates. We request comment on our PRA estimates in Section V. We expect to review and revise those PRA estimates in light of any further information we receive on estimated costs.

¹⁸⁷ We expect that the flexibility allowed under the proposed requirements could, at least for some registrants, substantially reduce the overall compliance burden, and we request estimates or data that quantifies this impact.

402(c)(2)(x), whether the estimated costs reflect internal personnel costs, technology costs or the costs of third-party service providers and outside professionals, and any assumptions used in deriving the estimates. Accordingly, we could not quantify differential costs from these estimates when the flexibility allowed under the proposed requirements is applied to each of those inputs. Also, these estimates do not precisely distinguish between initial and ongoing costs, while we expect that, for many registrants, the overall compliance burden will diminish after systems are in place to gather and verify the underlying data. We request comment throughout this release for additional information about the costs of compliance, including, where applicable, estimates or data that differentiate between categories of registrants facing relatively harder or easier burdens that could better inform our understanding of the direct and indirect costs of the proposed rules.

We are particularly sensitive to the competitive effects that could impact registrants subject to the requirements of Section 953(b). In this regard, we have assumed that these registrants would incur direct costs to compile the information and may incur indirect costs arising from revealing information about the cost structure of their workforce that registrants not covered by Section 953(b) would not have to reveal. Such costs are potentially significant, although as described elsewhere in this release we have sought to exercise our discretion to reduce such costs. Any material costs resulting from Section 953(b), however, could result in differential pressures from and treatment by market participants for companies competing in the same industry that are similar except for whether they are covered by Section 953(b). Accordingly, registrants covered by Section 953(b) could be at a competitive disadvantage to registrants (including private companies, foreign private issuers, smaller reporting companies and emerging growth companies) that are outside the scope of Section 953(b). This disadvantage could be greater for registrants that have already completed an initial public offering but that

would otherwise have qualified for emerging growth company status.¹⁸⁸ In addition, we understand from commenters that some registrants covered by Section 953(b) would likely incur higher costs of compliance based on size, business type and level of integration of payroll and benefits systems — such as large, multinational companies that do not maintain integrated employee compensation information on a global basis. Therefore, the competitive impact of compliance with the disclosure requirements prescribed by Section 953(b) could disproportionately fall on U.S. companies with large workforces and global operations, although the incremental impact of the fixed cost components of compliance will be proportionally smaller for large, multinational companies compared to smaller companies.

We also acknowledge that there could be competitive impacts that result from indirect costs of disclosure. Registrants subject to Section 953(b) could be subject to competitive harm if their competitors are able to infer proprietary or sensitive information from the disclosure of the median of the annual total compensation of all employees. For example, it could be possible for a competitor to infer sensitive information about a registrant's cost structure based on information about median levels of employee compensation. This could also have an impact on labor markets if competitors use the disclosure to target and hire away a registrant's employees. We have sought to use our discretion to reduce the potential for such indirect costs, by permitting flexibility in the manner in which issuers may determine median compensation. We request comment on whether the flexibility provided by the proposed rule would make it more difficult for competitors to infer a registrant's cost structure from such disclosure. Alternatively, a registrant subject to Section 953(b) could be at a competitive disadvantage when hiring or

¹⁸⁸

Registrants that completed their first sale of common equity in a registered offering before December 8, 2011 do not qualify as emerging growth companies, regardless of the level of their annual total revenues or public float. See Section 101(d) of the JOBS Act. These registrants could be at a competitive disadvantage to companies with similar levels of revenue and public float that do qualify as emerging growth companies.

retaining a PEO if there is pressure to limit PEO wages based on the pay ratio disclosure while non-covered registrants are not subject to the same pressure.

Finally, a registrant subject to Section 953(b) could face pressure from its PEO or from employees to increase compensation in light of the pay ratio disclosure of the registrant's competitors. Alternatively, there could be incentives to alter the median employee compensation either by increasing all employee compensation or by reducing the number of lowest wage employees or groups of employees, such as a specific office or division of a company. One method of doing this, as previously mentioned, is through outsourcing operations to third parties, including through the use of independent contractors, "leased" workers or other temporary employees. In some instances this might not harm and could even improve the profit margin of the registrant, but it could also result in changes to the business structure that are inefficient. Pressure for a registrant to maintain a low pay ratio could also curtail the expansion of business operations into lower cost geographies. This could adversely affect states and municipalities in lower wage geographies seeking to generate jobs for their communities. We do not have data that can be used to analyze the likelihood or potential magnitude of these impacts. We request comment on these and any other potential uses of the disclosure that could result in costs for registrants or that could impact competition.

D. Discussion of Benefits and Costs Arising from the Exercise of Our Discretion

1. General

In addition to the statutory benefits and costs described above, we believe that the use of our discretion in implementing the statutory requirements could result in benefits and costs to registrants and users of the pay ratio disclosure. We discuss below the choices we made in implementing the statute and the associated benefits and costs. We are unable, in most cases, to provide quantified estimates of these benefits and costs because we lack particularized data on the

potential effects of these policy choices. Specifically, we expect that most registrants do not currently track total compensation as determined pursuant to Item 402 for their employees, thus we would not be able to acquire sufficiently analogous data.

In general, the proposed rules implementing Section 953(b) are designed to comply with the statutory mandate. Because commenters supporting Section 953(b) have emphasized the potential benefits that could arise from adding pay ratio information to the total mix of executive compensation information,¹⁸⁹ we have sought to make the mandated disclosure of Section 953(b) work with the existing executive compensation disclosure regime. In light of the significant potential costs that commenters attribute to the requirements of Section 953(b),¹⁹⁰ we believe that it is appropriate for the proposed rules to allow registrants flexibility, which we believe should help lower the costs of compliance generally. The proposal seeks to implement Section 953(b) without imposing additional requirements that are not mandated by the Dodd-Frank Act. In this respect, the proposed requirements reflect our consideration of the relative costs and benefits of a more flexible approach as opposed to a more prescriptive approach.

In weighing alternatives, we considered the potential costs and benefits of comparability of disclosure across registrants. Although a flexible approach could reduce the comparability of disclosure across registrants, we do not believe that precise conformity or comparability of the ratio across companies is necessarily achievable, due to the variety of factors that could influence

¹⁸⁹ See, e.g., letters from Americans for Financial Reform; Group of International Investors; Calvert Investment Management; CtW Investment Group; K. Burgoyne; House Letter; Institute for Policy Studies; Senate Letter; Social Investment Forum; Trillium Asset Management; UAW Retiree Medical Benefits Trust; and S. Towns.

¹⁹⁰ See, e.g., letter from Group of Trade Associations.

the ratio,¹⁹¹ or justifiable, in light of the substantial additional costs that such an approach would impose on registrants. In addition, we believe that a flexible approach would not significantly diminish the potential benefits of the mandated disclosure. In this respect, we note that some commenters suggest that the expected benefits of pay ratio disclosure derive from its ability to offer an internal comparison, by providing a metric by which a PEO's compensation can be evaluated within the context of his or her own company.¹⁹² We also acknowledge that some commenters that support Section 953(b) disclosures suggest that the mandated disclosure could be used to compare compensation practices between companies and registrants,¹⁹³ and our flexible approach could impose costs on investors seeking to use the pay ratio disclosure to compare registrants. We note, however, that using the ratios to compare compensation practices between registrants without taking into account inherent differences in business models, which may not be readily available information, could possibly lead to potentially misleading conclusions and to unintended consequences.

¹⁹¹ We note that some commenters raised the issue of comparability in their letters. For example, Towers Watson noted, "Among other issues, there's no way (without significantly more information) to reliably compare ratios between companies. For example, companies in different industries will pay their employees at different levels. And even within the same industry, companies located in different geographical areas will pay their employees at different levels. As a result, this disclosure does not provide much meaningful information regarding differences in executive to employee pay ratios from company to company." See letter from Towers Watson. See also letter from RILA (noting that pay ratio disclosure "is more likely to result in confusion and erroneous comparisons between companies because of inherent differences in business models, staffing and compensation practices...these disparate results are only magnified if the ratio is used to compare publicly traded companies across industry sectors.").

¹⁹² See letters from CtW Investment Group; and letter from Senator Menendez.

¹⁹³ See, e.g., AFL-CIO I and letter from Americans for Financial Reform.

2. Implementation Choices and Alternatives

a. Filings Subject to the Proposed Disclosure Requirements

Although some commenters raised questions as to whether Section 953(b)(1) could be read to require pay ratio disclosure in every Commission filing,¹⁹⁴ other commenters suggested that the statute, by referring to filings described in Item 10(a) of Regulation S-K, is better read as applying only to those filings for which the applicable form requires Item 402 disclosure.¹⁹⁵ The proposed requirements follow the latter approach. We believe that requiring pay ratio disclosure in filings that do not contain other executive compensation information would not present this information in a meaningful context. Because some commenters have asserted that the pay ratio disclosure would provide another metric to evaluate executive compensation disclosure,¹⁹⁶ we believe that the proposed pay ratio disclosure would be less useful for this purpose if it were provided on a stand-alone basis, unaccompanied by other Item 402 information, such as the summary compensation table required by Item 402(c) and the compensation discussion and analysis required by Item 402(b). Therefore, we believe it is appropriate to read Section 953(b) as requiring pay ratio disclosure in only those filings that are required to include other Item 402 information. We seek information from commenters regarding how to quantify the costs or the benefits of this approach.

¹⁹⁴ See, e.g., COEC I and letters from American Benefits Council; Davis Polk; Compensia, Inc.; SCSGP; and Towers Watson.

¹⁹⁵ See, e.g., letters from ABA and RILA.

¹⁹⁶ See, e.g., Senate Letter; House Letter; and AFL-CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

b. Registrants Subject to the Proposed Pay Ratio Disclosure Requirements

The proposed requirements would apply to only those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c). We recognize that the reference to “each issuer” in Section 953(b) could be read to apply to all issuers that are not emerging growth companies, including smaller reporting companies and foreign private issuers. As a result of the specific reference in Section 953(b) to the definition of total compensation contained in Item 402(c)(2)(x), and the absence of Congressional direction to apply this requirement to companies not previously subject to Item 402(c) requirements, the proposals would not apply to registrants that are not subject to Item 402(c) requirements.

As discussed in detail above in Section II.B.2.a., we considered whether a broader reading of the statute was warranted in the context of smaller reporting companies. Requiring smaller reporting companies to provide the pay ratio disclosure consistent with the requirement for other registrants would require smaller reporting companies to collect data and calculate compensation for the PEO in a manner they otherwise would not be required to calculate compensation. Although quantifying the costs to smaller reporting companies of calculating PEO compensation under Item 402(c)(2)(x) instead of under Item 402(n)(2)(x), or of complying with the requirements prescribed by Section 953(b), is not currently feasible, we assume that such costs could be significant. Based on a review of EDGAR filings for calendar year 2011, we estimate that there are approximately 3,750 smaller reporting companies that would benefit by not being required to comply with the proposed requirements.

We also considered whether to expand the coverage of the proposed requirements to registrants, such as foreign private issuers and MJDS filers, that are not currently required to provide Item 402 disclosure. Foreign private issuers, for example, provide a modified version of

executive compensation disclosure under Form 20-F, while MJDS filers follow the executive compensation requirements arising under Canadian law. Although quantifying the costs to these registrants of calculating PEO compensation under Item 402(c)(2)(x) or of complying with the requirements prescribed by Section 953(b) is not currently possible, we assume that such costs could be significant. Based on a review of EDGAR filings for calendar year 2011, we estimate that there are approximately 750 foreign private issuers filing on Form 20-F and 144 MJDS filers that would benefit from the exclusion from the proposed requirements.

c. Employees Included in the Identification of the Median

Section 953(b) expressly requires disclosure of the median of the annual total compensation of “all employees.” Consistent with that mandate, the proposed requirements state that “employee” or “employee of the registrant” includes any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries (including officers other than the PEO).¹⁹⁷ Therefore, under the proposed requirements, “all employees” covers all such individuals. In contrast, workers who are not employed by the registrant or its subsidiaries, such as independent contractors or “leased” workers or other temporary workers who are employed by a third party, would not be covered.

We considered whether Section 953(b) is intended to cover employees of the registrant alone, or also cover employees of the registrant’s subsidiaries. By directing the Commission to amend Item 402, we believe that Section 953(b) is intended to cover employees on an enterprise-wide basis, including both the registrant and its subsidiaries, which is the same approach as that taken for other Item 402 information. This interpretation could raise compliance costs for

¹⁹⁷ Rule 405 under the Securities Act states that the term “employee” does not include a director, trustee or officer. This parenthetical in the proposed rules is intended to clarify that officers, as that term is defined under Rule 405, are not excluded from the definition of employee for purposes of the proposed pay ratio disclosure requirements.

registrants that are holding companies that have a significant portion of their workers employed by operating subsidiaries rather than by the holding company. We also note that allowing a holding company registrant to exclude employees from the identification of the median solely on the basis of its corporate structure could affect the potential meaningfulness of the disclosure. Further, allowing holding company registrants to exclude employees could provide a potential competitive advantage over non-holding company registrants due to lower compliance costs associated with having fewer workers covered by the rule.

Because Section 953(b) directs the Commission to amend Item 402, we believe it is appropriate to apply the same definition of subsidiary that is used for other disclosure under Item 402. We acknowledge that compliance costs for some registrants potentially could be further reduced if we limited the application of the proposed rules to employees of wholly-owned subsidiaries, or some other definition of subsidiary. We request comment on whether using a different definition of subsidiary would reduce costs for registrants, or whether it would raise costs by causing registrants to make a new, separate determination of which entities are subsidiaries for purposes of pay ratio requirements. Comment is also requested on whether a different definition of subsidiary would affect any benefits expected to be derived from the proposed rule. Because registrants already make the determination of which entities are subsidiaries for purposes of Rule 405 and Rule 12b-2 in connection with other required disclosure, we believe that using the same set of entities for purposes of the proposed requirements would simplify compliance for most registrants and make the information easier for users of the information to understand.

We recognize that it is possible that a registrant could alter its corporate structure or its employment arrangements in order to reduce the number of employees covered by the rule, and,

therefore, reduce its costs of compliance or to alter the reported ratio to achieve a particular objective with the ratio disclosure. For example, a registrant could choose to use only independent contractors or “leased” workers instead of hiring its own employees. Or a registrant could choose to outsource or franchise some aspects of its business, either to lower compliance costs by having fewer employees subject to the proposed pay ratio requirements or in an effort to “improve” its pay ratio. One commenter has questioned the likelihood of this behavior.¹⁹⁸ To the extent that there is an incentive for companies to change their business model to adjust their pay ratio, such an incentive would arise wherever a prescriptive standard is used. Therefore, we have sought to avoid adding prescriptive standards that are not mandated by the Dodd-Frank Act.

As discussed in Section II.C.2.a., we acknowledge the concerns of commenters that the inclusion of non-U.S. employees raises compliance costs for multinational companies and introduces cross-border compliance issues. We also recognize that these companies could suffer competitively if they compete with companies that have lower costs of compliance, due to, for example, fewer employees, fewer global locations, or data systems that are more centralized. We have weighed these considerations and are proposing that the requirement cover all employees without carve-outs for specific categories of employees.

Although we believe that the inclusion of non-U.S. employees in the calculation of the median is consistent with the statute, we considered ways to address the costs of compliance that commenters attribute to the provision’s coverage of a registrant’s global workforce. In particular, we considered the concerns of commenters that data privacy regulations in various jurisdictions could impact the ability of registrants to gather and verify the data needed to identify the median.

¹⁹⁸

See AFL CIO I (“It is simply not credible to suggest that companies will dramatically restructure their operations to manipulate this [pay ratio] data. Moreover, such a business decision would be improper under state corporate laws that require boards of directors to put the interests of shareholders before the interests of company CEOs who may be potentially embarrassed by their companies’ Section 953(b) disclosures.”).

We believe that the proposed flexibility afforded to registrants in selecting a methodology to identify the median, such as statistical sampling, the use of a consistently applied compensation measure to identify a median employee, as well as the ability of registrants to use reasonable estimates in the calculation of total compensation of employees other than the PEO and the identification of the median, could enable registrants to better manage the costs and burdens arising from local data privacy regulations. We specifically requested comment on these issues in order to gain more information about appropriate ways to address these potential issues in a way that is consistent with Section 953(b) and the costs and benefits of any alternatives.

Section 953(b) does not prescribe a particular calculation date for the determination of who should be treated as an employee for purposes of the rule. We believe that a bright line calculation date for determining who is an employee would ease compliance for registrants by eliminating the need to monitor changing workforce composition during the year, while still providing a recent snapshot of the entire workforce. Accordingly, the proposed requirement includes a calculation date for determining who is an employee for purposes of identifying the median by defining “employee” as an individual employed as of the last day of the registrant’s last completed fiscal year.¹⁹⁹ This calculation date would be consistent with the one used for determining the named executive officers under current Item 402 requirements.

We believe that the potential benefits of the disclosure mandated by Section 953(b) would not be significantly diminished by covering only individuals employed at year-end, rather than covering every individual employed during the year. Although we believe that this approach could help contain compliance costs for registrants, by not requiring registrants to monitor the composition of the workforce during the year, we note that it could have other economic effects.

¹⁹⁹ Proposed Item 402(u)(4).

For example, this approach would not capture seasonal or temporary employees that are not employed at year-end. In the case of a registrant with a significant amount of such workers, the exclusion of such workers from the median calculation could reduce the potential benefits of the rule, as a median so calculated may not fully reflect the workforce required to run the registrant's business. It could also cause the proposed requirements to be costlier for, and thereby have an anti-competitive impact on, registrants whose temporary or seasonal workers are employed at year-end as opposed to at other times during the year. Finally, it is possible that registrants could try to structure their employment arrangements to reduce the number of workers employed on the calculation date or to alter the reported ratio to achieve a particular objective with the ratio disclosure, although it is not known whether registrants will do so. Currently, it is not possible to quantify whether any such restructuring of employee arrangements would have a material impact on a registrant's reported median annual total compensation. Comment is requested on this issue.

The proposed requirements also include an instruction that permits a registrant to annualize the compensation for all permanent employees (other than those in temporary or seasonal positions) who were employed for less than the full fiscal year. We did not propose to require registrants to perform this type of adjustment, however, because we do not believe that the costs of requiring companies to make an extra calculation would be justified.

We believe that this annualizing adjustment would not significantly diminish the potential usefulness of the disclosure mandated by Section 953(b), particularly because the ratio uses median employee compensation, not average employee compensation. For example, we would not expect that annualizing the salary of a permanent new hire would impact the potential ability of an investor to use the pay ratio disclosure as an indicator of employee morale or to gain an understanding of a registrant's investment in human capital, which some commenters have

identified as a benefit of the disclosure under Section 953(b).²⁰⁰ For annualizing adjustments to have any significant impact on the reported pay ratio, both the fraction of permanent new hires to all employees of the registrant and their annualized compensation would have to be relatively large. We do not believe those factors are typical of employment arrangements of many registrants. We also note that some of the commenters that support Section 953(b) disclosure were also supportive of allowing annualizing adjustments.²⁰¹

By permitting, but not requiring, registrants to annualize compensation for these employees, the comparability of disclosure across companies could be reduced. We do not believe that precise comparability or conformity of disclosure from registrant to registrant is necessarily achievable due to the variety of factors that could cause the ratio to differ, and, accordingly, we do not believe that the costs associated with promoting precise comparability would be justified. We assume that comparability of disclosure would be promoted at a lower cost to registrants by proscribing all annualizing adjustments, rather than by prescribing rules for making such adjustments for employees who were employed for less than the full year.

d. Identifying the Median

Section 953(b) does not expressly set forth a methodology that must be used to identify the median, nor does it mandate that the Commission must do so in its rules. In order to allow the greatest degree of flexibility while maintaining consistency with the statutory provision, the

²⁰⁰ See AFL-CIO I and letters from Calvert Investment Management; CtW Investment Group; Group of International Investors; Americans for Financial Reform; Drucker Institute; Institute for Policy Studies; Social Investment Forum; Trillium Asset Management; and UAW Retiree Medical Benefits Trust.

²⁰¹ See AFL-CIO II and letters from Social Investment Forum and Trillium Asset Management.

proposed requirements do not specify any required calculation methodologies for identifying the median.²⁰²

Several commenters recommended allowing companies to use total direct compensation (such as annual salary, hourly wages and any other performance-based pay) or cash compensation to first identify a median employee.²⁰³ We agree that the costs of compliance could be reduced if registrants were permitted to identify the median of a less complex, more readily available figure, such as salary and wages, rather than total compensation as determined in accordance with Item 402(c)(2)(x). This approach could also help reduce costs for registrants that are not able to reduce costs using statistical sampling techniques. We are proposing to permit registrants to use any consistently applied compensation measure to identify the median employee and then calculate that median employee's annual total compensation in accordance with Item 402(c)(2)(x). For purposes of estimating the median employee, registrants may use the same annual period that is used in the payroll or tax records from which the compensation amounts are derived. We believe that registrants would be in the best position to select a compensation measure that is appropriate to their own facts and circumstances and that a consistently applied compensation measure would result in a reasonable estimate of a median employee. After identifying the median employee, registrants would be required to calculate that employee's annual total compensation in

²⁰² One of the difficulties in identifying a median arises from the situation that a registrant with multiple business units, geographical operations, or subsidiaries maintains payroll data at each business unit or subsidiary. Calculating the average for the consolidated entity only requires each subsidiary or business unit to convey information on the total (or average) compensation and the number of its employees to its parent entity, whereas identifying the median requires transferring the entire set of compensation data from each subsidiary to the parent entity. We recognized that registrants with multiple operations are likely to maintain payroll data at the business unit or subsidiary level, and thus allowing them to use the average employee compensation could reduce their compliance costs. Nevertheless, we believe that Section 953(b) is clear in requiring the median rather than the average.

²⁰³ See AFL-CIO II and letters from ABA; American Benefits Council; Americans for Financial Reform; CtW Investment Group; Protective Life Corporation; RILA; and SCSGP.

accordance with Item 402(c)(2)(x) for the last completed fiscal year, which would provide comparability with the calculation of the PEO's total compensation without imposing significant costs.

Allowing registrants to choose this alternative approach is likely to reduce registrants' compliance costs significantly, compared to requiring registrants to calculate total compensation in accordance with Item 402(c)(2)(x) for all employees and then identify the median. Registrants that choose this alternative approach would be able to identify a median employee from employee compensation data that they may already track or record or that may be less expensive for them to acquire than acquiring and computing all of the Item 402(c)(2)(x) compensation information for each employee. We acknowledge, however, that some registrants would still incur costs if they have to combine or sample from separately maintained payroll systems across segments and/or geographic locations. In addition, the proposal specifically permits registrants, in identifying a median employee, to use compensation amounts reported in payroll or tax records. This approach would reduce uncertainty for registrants and may also be less costly to them, compared to other alternatives that may use various sources of compensation data to generate reasonable estimates of total compensation in accordance with Item 402(c)(2)(x).

We are proposing this flexible approach because we believe that the appropriate and most cost effective methodology would necessarily depend on a registrant's particular facts and circumstances, including, among others, such variables as size and nature of the workforce, complexity of the organization, the stratification of pay levels across the workforce, the types of compensation the employees receive, the extent that different currencies are involved, the number of tax and accounting regimes involved, the number of payroll systems the registrant has and the degree of difficulty involved in integrating payroll systems to readily compile total compensation

information for all employees. We believe that these are likely the same factors that would cause substantial variation in the costs of compliance. By not prescribing specific methodologies that must be used, the proposed requirements would allow registrants to choose a method to identify the median that is appropriate to the size, structure and compensation practices of their own businesses, including permitting a registrant to identify the median employee using any consistently applied compensation measure. In addition, this flexibility could enable registrants to manage compliance costs more effectively than a more prescriptive approach would allow. We also believe that, by allowing registrants to minimize direct compliance costs, a flexible approach could mitigate, to some extent, any potential negative effects of the mandated requirements on competition. We recognize, however, that a flexible approach could increase uncertainty for registrants that prefer more specificity on how to comply with the proposed rules, particularly for registrants that do not use statistical analysis in the ordinary course of managing their businesses. In light of this potential uncertainty, we have provided clarity to registrants that the use of statistical sampling or other reasonable estimates in identifying the median would be permitted, as well as identifying the median employee based on any consistently applied compensation measure.

The reduction in compliance costs by using statistical sampling or other reasonable estimates in determining median would ultimately depend on a registrant's particular facts and circumstances. For example, in the following figure and tables, we show that the variance of underlying wage distributions can materially affect the appropriate sample size for statistical sampling.²⁰⁴ Industries characterized by the Bureau of Labor Statistics as having low wage

²⁰⁴ The analysis uses mean and median wage estimates from the Bureau of Labor Statistics (BLS) at the 4-digit NAICS industry level (290 industries) and assumes a lognormal wage distribution, a 95% confidence interval with 0.5% margin of error in the estimate of the median of the logarithm of wage. The lognormal

variances, such as *Motor Vehicle Manufacturing, Electric Power Generation, Coal Mining*, have estimated minimum appropriate sample sizes for an accurate median estimate of less than one hundred. In contrast, industries characterized by the high wage variances, such as *Offices of Physicians, Spectator Sports, and Motion Picture and Video* industries, have estimated minimum appropriate sample sizes of more than 1,000 employees. Figure 2 shows the distribution of estimated minimum appropriate sample sizes for each of the 290 4-digit NAICS industries tracked by the BLS.

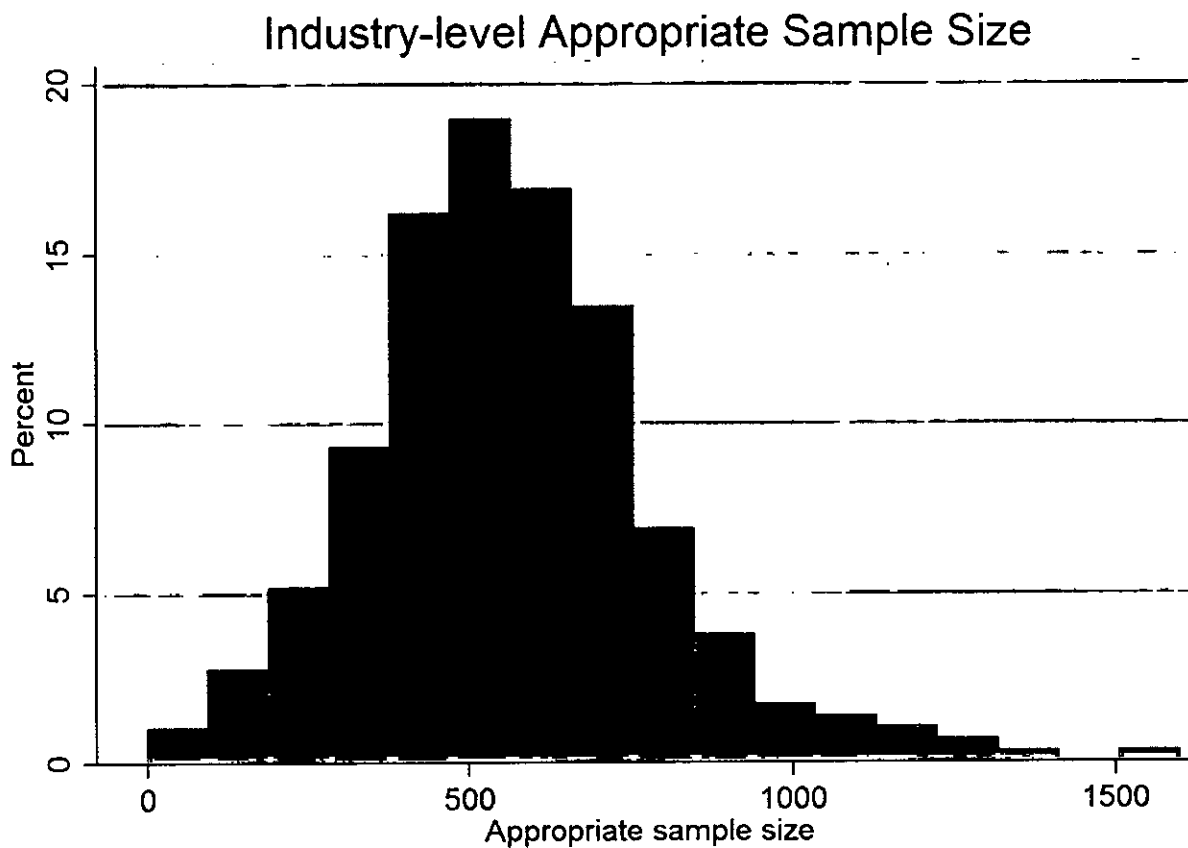
Table 2. The industries with the largest and smallest appropriate sample sizes.

Industry	Mean Wage (\$)	Median Wage (\$)	Appropriate Sample Size
<u>10 industries with smallest variance in wage distribution</u>			
Electric Power Generation, Transmission and Distribution	67,950	65,790	81
Motor Vehicle Manufacturing	56,160	54,430	81
Coal Mining	53,560	51,610	97
Support Activities for Water Transportation	57,220	55,080	99
Other Pipeline Transportation	67,240	64,180	117
Metal Ore Mining	56,540	53,900	124
Natural Gas Distribution	68,630	64,930	139
Wired Telecommunications Carriers	62,540	59,050	147
Software Publishers	91,050	85,290	156
Rail Transportation	56,020	52,560	166
<u>10 industries with largest variance in wage distribution</u>			
Offices of Physicians	69,710	38,960	1,601
Spectator Sports	40,550	25,720	1,357
Motion Picture and Video Industries	61,280	38,580	1,276
Health and Personal Care Stores	40,860	26,790	1,248
Home Health Care Services	36,650	24,600	1,199
Cut and Sew Apparel Manufacturing	34,530	23,280	1,199

wage distribution assumption is supported by the following studies: F. Clementi, and M. Gallegati, Pareto's law of income distribution: evidence for Germany, the United Kingdom, and the United States. ECONOPHYSICS OF WEALTH DISTRIBUTIONS, NEW ECONOMIC WINDOW. 3-14 (2005), and J. López and L. Servén, A Normal Relationship? Poverty, Growth and Inequality. WORLD BANK POLICY RESEARCH WORKING PAPER 3814 (2006). Also, see M. Pinkovskiy and X. Sala-i-Martin, Parametric Estimations of the World Distribution of Income, NBER WORKING PAPER 15433, (2009). This analysis also assumes that when the sampling is implemented, the sampling method would be a true random sampling, *i.e.*, it would not be biased by region, occupation, rank, or other factor.

Independent Artists, Writers, and Performers	63,560	41,550	1,156
Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures	67,660	44,820	1,104
Other Professional, Scientific, and Technical Services	45,860	31,470	1,079
Electronic Shopping and Mail-Order Houses	43,710	30,230	1,065

Figure 2. The distribution of appropriate sample size for median estimates for different industries.



Because these estimated minimum appropriate sample sizes are based on wage distributions measured by the BLS in standardized industries, they may not correspond to the appropriate minimum sample size at registrants with an employee base that does not correspond precisely to one of these industries. Even for registrants whose operations are wholly within one of these standardized industries, their appropriate sample size may also be different to the extent

that their distribution of employee wages is different than that of the industry. In these instances, a registrant's appropriate sample size could be higher or lower than that estimated for its industry.

Of the nearly 4,000 registrants that we believe will be subject to the rule, we estimate that approximately 50% have an organizational structure characterized by a compensation distribution that falls into a tractable statistical distribution category, which would allow the registrant use a simple random sampling method.²⁰⁵ Of these registrants for which we have industry classifications that match the BLS data, Table 3 shows estimated minimum appropriate sample sizes assuming that each registrant's wage distribution is similar to the BLS-measured industry distribution.

Table 3. Number of registrants according to sample size ranges

Sample Size(n) Ranges	No. of Registrants	Mean Wage (\$)	Median Wage (\$)
n<100	77	62,281	60,245
100≤n<250	149	50,269	46,298
250≤n<500	441	45,154	39,232
500≤n<750	682	41,736	33,410
750≤n<1000	119	46,997	34,897
n≥1000	29	61,221	37,906
Total	1,497		

For the remaining 50% of the potentially affected registrants that have multiple business segments, and thus are likely to maintain their payroll systems separately for each segment, statistical sampling could involve more steps and other assumptions. This may be particularly

²⁰⁵

This estimate is based on data from Standard and Poor's Compustat Segment database. Segment information is available for approximately 65% of the potentially affected registrants. Among these, 50% report having multiple business segments and 60% report having multiple geographical segments. Also, 25% of the potentially affected registrants self-report that they have both multiple business segments and geographical segments. Because the segment information is self-reported by the companies, it not based on standardized definitions of geographic areas such as states, countries or regions. Multiple geographical segments could represent different geographies with similar operations and thus similar wage distributions, for examples, different states within the United States.

true for approximately 25% of the potentially affected registrants that self-report that they have both multiple business segments and geographical segments.

While we believe that there is more than one statistical sampling approach that could result in reasonable estimates of the median for these registrants, all would be more complicated than simple random sampling. The alternative approaches would require drawing observations from each business or geographical segment with a unique distribution of compensation and statistically inferring the registrant's overall median based on the observations drawn. For example, the statistical inference may involve a weighted sample median using a stratified cluster sampling,²⁰⁶ or a numerically solved median estimate based on their knowledge or assumptions on the size and distribution for each segment and pre-estimated mean and variance of each business or geographical segment. Some methods, however, may not easily generate confidence intervals around the estimates or prescribe a minimum sample size. As a result, generating reasonable estimates through statistical sampling could result in a disproportionately higher cost to registrants with more complicated payroll systems or organization structures. Nevertheless, we believe that permitting registrants to use statistical sampling may lead to a reduction in compliance costs as compared to other methods of identifying the median.

We believe that a flexible approach would not significantly diminish the potential benefits of the disclosure mandated by Section 953(b). Although the proposed flexible approach could reduce the comparability of disclosure across registrants, we do not believe that precise conformity or comparability of the ratio across companies is necessary. As noted earlier in this release, some commenters believe that a primary benefit of the pay ratio disclosure would be

²⁰⁶

See, e.g., S. Gross. Median estimation in sample surveys. IN PROCEEDINGS OF THE SECTION ON SURVEY RESEARCH METHODS. AMERICAN STATISTICAL ASSOCIATION, 181-184. (1980).

providing a company-specific metric that investors could use to evaluate the PEO's compensation within the context of his or her own company, rather than a benchmark for compensation arrangements across companies. Accordingly, we do not believe that improving the comparability of the disclosure across companies by mandating a specific method for identifying the median would be justified in light of the costs that would be imposed on registrants by a more prescriptive rule. We do not believe that mandating a particular methodology would necessarily improve the comparability across companies because of the numerous other factors that could also cause the ratios to be less meaningful for company-to-company comparison. We also believe that greater comparability across companies could increase the likelihood that a registrant's competitors could infer proprietary or sensitive information about the registrant's business. This in turn could increase the indirect costs to registrants of the proposed requirements, such as competitive harms in labor markets discussed in the previous section or general costs arising from the mandated disclosure requirement.

Finally, we recognize that allowing registrants to select a methodology to identify the median, including identifying the median employee using and allowing the use of reasonable estimates, rather than prescribing a methodology or set of methodologies, could reduce benefits for investors if that flexibility enables a registrant to make its pay ratio appear more "favorable" and thus results in a pay ratio that does not reflect a more precisely and consistently calculated ratio. We are not able to determine, however, the extent to which the flexibility allowed by the proposed requirements could actually enable a registrant to adjust its pay ratio in any material respects.

e. Determination of Total Compensation

As mandated by Section 953(b), the proposed requirements would define "total compensation" by reference to Item 402(c)(2)(x) as in effect on the day before the date of

enactment of the Dodd-Frank Act, or July 20, 2010. We note that several commenters raised concerns about the potential compliance costs that could arise from the complexity of the “total compensation” calculation under Item 402(c)(2)(x).²⁰⁷ Commenters have observed that, because of this complexity, registrants typically compile information required by Item 402(c) manually for the named executive officers, which they have stated takes significant time and resources.²⁰⁸ We also note that commenters have raised concerns about the ability of companies to compile and verify the data needed to calculate total compensation in accordance with Item 402(c)(2)(x) for every employee and have asserted that the costs of doing so would be significant and unwarranted in light of the potential benefits of the disclosure, which such commenters anticipate to be minimal.²⁰⁹ To address these concerns, some commenters recommended that registrants be permitted to use reasonable estimates to determine the value of the various elements of total compensation of employees in accordance with Item 402(c)(2)(x).²¹⁰ We generally support this recommendation and we provided guidance about the use of estimates in this context.

We do not believe that the use of reasonable estimates would diminish the potential usefulness of the pay ratio disclosure as a general point of comparison of PEO pay to employee pay within a company, and we do not believe that the use of reasonable estimates would be inconsistent with Section 953(b). Furthermore, we believe that requirements that allow registrants to use reasonable estimates in these calculations would impose lower compliance costs than requirements that prohibit the use of estimates. We acknowledge that, however, to the extent

²⁰⁷ See, e.g., COEC I and II; and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

²⁰⁸ See letter from Davis Polk.

²⁰⁹ See, e.g., COEC I and II; and letters from ABA; American Benefits Council; Protective Life Corporation; and R. Morrison.

²¹⁰ See COEC I and letters from ABA and SCSGP.

that the use of estimates causes the ratio to be an inaccurate reflection of the registrant's median compensation, it could diminish the potential usefulness of the disclosure.

As discussed above, the proposal allows registrants to identify the median employee using any consistently applied compensation measure and then determine and disclose the Item 402(c)(2)(x) total compensation for that median employee. A registrant would be permitted to calculate compensation for all employees in accordance with Item 402(c)(2)(x), but would only be required to calculate and disclose such information for the median employee. The proposed rules also permit registrants to use reasonable estimates in the calculation of annual total compensation for the median employee that must be disclosed and used in the pay ratio.

f. Disclosure of Methodology, Assumptions and Estimates; Additional Disclosure

We are proposing instructions for the disclosure of the methodology and material assumptions, adjustments and estimates used in the identification of the median or the calculation of the annual total compensation (or any elements of total compensation) of employees. The proposed instruction provides that registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount as such. Registrants' disclosure of the methodology and material assumptions, adjustments and estimates used should be designed to provide information for a reader to be able to evaluate the appropriateness of the estimates. For example, when statistical sampling is used, registrants should disclose the size of both the sample and the estimated whole population, any material assumptions used in determining the sample size, which sampling method (or methods) is used, and, if applicable, how the sampling method deals with separate payrolls such as geographically separated employee

populations or other issues arising from multiple business or geographic segments. In order to promote comparability from year to year, the instruction also provides that, if a registrant changes methodology or material assumptions, adjustments or estimates from those used in the previous period, and if the effects of any such change are material, the registrant must briefly describe the change, the reasons for the change and an estimate of the impact of the change on the median and the ratio. This approach is consistent with other Commission rules that allow registrants flexibility to choose a methodology, such as the valuation method for determining the present value of accrued pension benefits in Item 402(h)(2) or the description of models, assumptions and parameters in Item 305 of Regulation S-K (quantitative and qualitative disclosures about market risk). Five commenters recommended requiring this information in cases where the rules allowed registrants to use estimation techniques.²¹¹

Because we are concerned that disclosure about methodology, assumptions, adjustments and estimates could become dense and overly technical, which we believe would limit its usefulness, the instruction asks for a brief overview and makes clear that it is not necessary to provide technical analyses or formulas. We do not believe that a detailed, technical discussion (such as statistical formulas, confidence levels or the steps used in data analysis) would enhance the potential usefulness of the pay ratio, as suggested by some commenters,²¹² as a metric to evaluate the level of PEO compensation. We expect that a succinct description of the methodology and material assumptions, adjustments and estimates used would not be overly burdensome for registrants and would be more informative for investors. We expect that the costs

²¹¹ See AFL-CIO II and COEC I; and letters from Group of Exec. Comp. Lawyers, Meridian Compensation Partners, LLC; and SCSGP.

²¹² See, e.g., Senate Letter; House Letter; and AFL-CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

of the additional disclosure on registrants would be marginal, as these additional disclosures are intended to simply describe what has already been done or assumed in the calculations, and therefore will not require additional actions for registrants. It is likely that some costs may be incurred in developing and reviewing the appropriate language to describe the approach taken.

We considered the recommendations of commenters relating to requirements for additional narrative discussion of the ratio and supplemental information about a registrant's employee compensation structures and policies.²¹³ Section 953(b) does not mandate a narrative discussion to accompany the pay ratio disclosure, and the proposed requirements do not include a specific requirement for narrative discussion of the ratio, its components or any supplemental information that could provide context for or explain the ratio. We believe that additional narrative disclosure about the ratio would not, for many registrants, provide useful information for investors that would justify the costs associated with providing that additional narrative disclosure. While some investors could find supplemental information about a registrant's employment practices, the composition of its workforce and similar topics (such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies) useful or informative, we note that Section 953(b) does not call for that level of detail. We note too, that, as with other mandated disclosure under our rules, registrants would be permitted to supplement the required disclosure with a narrative discussion if they choose to do so.

g. Defining "Annual"

In order to provide clarity, the proposed requirement defines "annual total compensation" to mean total compensation for the last completed fiscal year, consistent with the time period used

²¹³ See AFL-CIO I and letter from Americans for Financial Reform.

for the other Item 402 disclosure requirements. This clarification is intended to address questions from commenters about the need to update the pay ratio disclosure throughout the year and make clear that the disclosure does not need to be updated more than once a year.

Two commenters suggested other possible alternatives for the calculation of “annual” total compensation. One of these commenters recommended that registrants should have flexibility to select a time period for calculating the annual total compensation of employees, noting that registrants without a calendar year fiscal year-end might benefit from the flexibility to use the calendar year period since that would be consistent with the registrant’s tax reporting obligations.²¹⁴ Another commenter suggested two timing rules that would grant registrants further flexibility to use the 12-month time periods that their payroll systems use.²¹⁵ We understand that these suggestions are intended to reduce compliance costs for registrants by giving registrants the ability to use information in the form that it is currently compiled for other purposes, such as tax and payroll recordkeeping. We believe, however, that it is appropriate for the time period for the pay ratio disclosure to be the same as the time period used for the registrant’s other executive compensation disclosures, although the proposed flexibility in identifying the median employee could address the concerns raised by these commenters.

As discussed above, we propose to allow a registrant that is identifying the median employee by reference to compensation amounts derived from its payroll or tax records to use the same annual period that is used in the payroll or tax records from which the compensation

²¹⁴ See letter from American Benefits Council.

²¹⁵ See letter from Group of Exec. Comp. Lawyers (recommending: “Rule One — the registrant can select any date as of which to calculate median compensation, provided the date is within 12 months of the proxy filing, and is the most recent practicable date, and Rule Two — if different payroll systems are involved, the 12-month period for computing compensation data for each payroll system’s data will be acceptable so long as the period ends within 12 months of the date chosen under Rule One.”).

amounts are derived. We also did not propose to define or limit what would qualify as payroll or tax records so that registrants would be able to use information that they already track and report for tax purposes. We believe that permitting companies to identify the median employee using compensation information in the form that it is maintained in their own books and records would reduce compliance costs, yet still yield a reasonable estimate of the median employee.

Registrants using that approach to identify the median employee would be required to calculate the Item 402(c)(2)(x) total compensation for that median employee for the last completed fiscal year, in order to maintain consistency with other Item 402 information.

h. Updating the Pay Ratio Disclosure for the Last Completed Fiscal Year

The proposed requirements include instructions to clarify the timing for updating pay ratio disclosure after the end of a registrant's fiscal year. Without the proposed instructions, a registrant could be required to include pay ratio disclosure in an annual report or registration statement filed after the end of the fiscal year, but before it has compiled the executive compensation information for that fiscal year for inclusion in its proxy statement relating to its annual meeting of shareholders, which could raise additional incremental costs for registrants that elect to provide executive compensation disclosure in their annual proxy statement rather than their annual report and for registrants that are conducting registered offerings at the beginning of their fiscal year.

To address this, we considered the recommendation of commenters that pay ratio disclosure not be required to be updated for the most recently completed fiscal year until the registrant files its proxy statement for its annual meeting of shareholders. The proposed requirements generally follow this approach, but the proposed instructions provide a similar

accommodation for registrants that do not file annual proxy statements²¹⁶ and align the proposed requirement to the timing rules for providing Item 402 disclosure in annual reports and proxy and information statements. We believe that the proposed instruction would provide certainty to registrants as to when the updated information is required and would allow sufficient time after the end of the fiscal year to identify the median. We believe that such an approach would not diminish the potential usefulness of the disclosure.

We also believe that this approach could reduce additional costs for registrants in connection with filings made or required to be made before the filing of the proxy or information statement for the annual meeting of shareholders (or written consents in lieu of such a meeting) that would typically contain the registrant's other Item 402 disclosure covering the most recently completed fiscal year. In addition, under the proposed approach, updating the pay ratio disclosure would not be an additional hurdle for a registrant that requests effectiveness of a registration statement after the end of its fiscal year and before the filing of the proxy statement for its annual meeting of shareholders. In this regard, the proposed approach could alleviate some of the potential impact on capital formation from Section 953(b).

i. Instructions for Registrants Relying on Instruction 1 to Items 402(c)(2)(iii) and (iv)

We have also proposed instructions to provide consistency with current executive compensation disclosure rules in cases where a registrant cannot compute the total compensation of the PEO because the salary or bonus of the PEO is not calculable until a later date. Similar to existing requirements for the disclosure of PEO total compensation under those circumstances,

²¹⁶ Based on a review of EDGAR filings in calendar year 2012, approximately 250 registrants that would be subject to the proposed requirements do not file proxy or information statements in connection with annual meetings of shareholders, including 15D filers (other than smaller reporting companies and ABS issuers) and registrants that are not corporate entities required to hold annual meetings of shareholders.

the proposed requirements permit the registrant to omit pay ratio disclosure until those elements of the PEO's total compensation are determined and to provide the pay ratio disclosure in the same filing under Item 5.02(f) of Form 8-K in which the PEO's salary or bonus is disclosed. In taking the proposed approach, we have assumed that the potential benefits of the disclosure could be diminished if the pay ratio were to be calculated using less than the entire amount of the PEO's total compensation for the period, because the ratio would be lower than if it reflected the full PEO total compensation, and that this could justify the potential costs to investors of a delay in the timing of the disclosure.

Instead of this approach, we considered whether to require registrants to report pay ratio disclosure using a reasonable estimate of the elements of PEO compensation that are not calculable. We also considered whether registrants should be permitted to use an incomplete amount, comprising only the elements of total compensation that are calculable at the time.

In some cases, the amount of compensation that is omitted under the Instruction 1 to Items 402(c)(2)(iii) and (iv) could be significant. Therefore, the pay ratio could be lower if it were presented using an amount of PEO total compensation that fails to adequately account for the amounts of salary or bonus ultimately included in the PEO's actual total compensation, including the alternative approach of using estimated PEO compensation, and such an approach could incentivize registrants to give their PEOs more of these types of compensation in order to achieve a more favorable ratio at the time of the proxy statement or annual report. We believe that the potential incentive to change compensation practices could be exacerbated by an alternative approach that permitted or required calculation using incomplete total compensation amounts.

Based on the number of registrants that have historically relied on Instruction 1 to Items 402(c)(2)(iii) and (iv),²¹⁷ we do not expect that the proposed instruction would impact a significant number of registrants each year.

j. Status of Disclosure as Filed not Furnished

Some commenters suggested that pay ratio information be deemed “furnished” and not “filed” for purposes of the Securities Act and the Exchange Act.²¹⁸ We note that Section 953(b) states that the pay ratio information be disclosed in the registrant’s “filings” with the Commission. We further note that one of the reasons that commenters recommended treating the information as furnished and not filed is because of the difficulty that some companies may have in determining and verifying the information, which must be covered by the certifications required for Exchange Act filings under the Sarbanes-Oxley Act of 2002. We also recognize that some registrants could have more difficulty in gathering and verifying the information than others. Nevertheless, we believe that the flexibility afforded to registrants in connection with identifying the median could reduce some of the difficulties of compiling the required information, because registrants would be able to tailor the methodology to reflect their own facts and circumstances. The ability to use reasonable estimates in connection with the calculation of annual total compensation for employees other than the PEO could also alleviate some of these concerns. In addition, we believe that the proposed transition periods discussed below, which are designed to give registrants sufficient time to develop and implement compliance procedures, could mitigate some concerns about compiling and verifying the information.

²¹⁷ For example, based on a review of EDGAR filings in 2012, only 22 registrants relied on Instruction 1 to Items 402(c)(2)(iii) and (iv) in connection with the total compensation of their PEO.

²¹⁸ See COEC I and letters from ABA; Protective Life Corporation; and RILA.

k. Proposed Compliance Date

Section 953(b) does not specify a date when registrants must begin to comply with the requirements that we implement under the provision. We are proposing to require that a registrant must begin to comply with proposed Item 402(u) with respect to compensation for the registrant's first fiscal year commencing on or after the effective date of the rule, and, as proposed, a registrant would be permitted to omit this initial pay ratio disclosure from its filings until the filing of its annual report on Form 10-K for that fiscal year or, if later, the filing of a proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such year. Similar to the proposed instructions for updating pay ratio disclosure, the proposed transition instructions also require that this initial pay ratio disclosure must, in any event, be filed as provided in connection with General Instruction G(3) of Form 10-K not later than 120 days after the end of such fiscal year.

Several commenters noted that companies will need a long transition period to enable them to implement systems to compile the disclosure and verify its accuracy.²¹⁹ We understand that this time would likely be needed by large, multinational registrants and any registrants that currently do not have a centralized, consolidated payroll, benefits and pension system that captures the information necessary to identify the median of the annual total compensation of all employees,²²⁰ however, we seek comment on whether the flexibility in the proposed rules would reduce the need for a lengthy transition period. We expect that it will take registrants one full

²¹⁹ See letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

²²⁰ See letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

reporting cycle to implement and test any necessary systems,²²¹ and we have designed the initial transition period to provide that time for transition and implementation.

I. Proposed Transition Periods

The proposed requirements also include a transition period for new registrants because we are sensitive to the impact that the proposed rules could have on capital formation. We note that the requirements of Section 953(b), as amended by the JOBS Act, distinguish between certain newly public companies and all other issuers by providing an exemption for emerging growth companies. We also note that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial public offering, which could have a negative impact on capital formation. In this regard, we expect that, in order to be disqualified for emerging growth company status, these companies are likely to be businesses with more extensive operations or a greater number of employees than many emerging growth companies, which could increase the initial efforts needed to comply with the proposed requirements. We believe that providing a transition period for these newly public companies could mitigate this potential impact on capital formation.

Accordingly, the proposed requirements also include instructions that would permit new registrants to delay compliance, so that pay ratio disclosure would not be required in a registration statement on Form S-1 or S-11 for an initial public offering or a registration statement on Form 10. Instead, such a registrant would be required to first comply with proposed Item 402(u) with respect to compensation for the first fiscal year commencing on or after the date the registrant first becomes subject to the requirements of Section 13(a) or Section 15(d) of the Exchange Act.

²²¹

See letters from American Benefits Council and Group of Exec. Comp. Lawyers.

We note that commenters did not address the impact of pay ratio disclosure requirements on newly public companies. Although investors might benefit from pay ratio information in connection with an initial public offering or Exchange Act registration, we believe it is appropriate to give companies time to develop any needed systems to compile the disclosure and verify its accuracy. The transition period for new registrants is similar to the proposed time frame provided for other registrants to comply with pay ratio disclosure requirements following the effective date of the final rules. The proposed approach is also similar to the current phase-in for newly public companies in connection with Item 308 of Regulation S-K, for management's report on the registrant's internal control over financial reporting. We seek comment in this release on whether these timing and transition rules are sufficient to address the burdens on capital formation that could arise due to the mandated pay ratio disclosure requirements.

We have not proposed a separate transition period for companies that cease to qualify as emerging growth companies. We acknowledge that companies exiting emerging growth status could need additional time to implement systems to compile and verify their pay ratio disclosure, particularly because registrants may not be able to predict in advance, depending on which of the four conditions occurs, when they will cease to be an emerging growth company. By exempting emerging growth companies from the scope of Section 953(b), the JOBS Act essentially provides a transition period for companies for as long as they qualify for emerging growth company status. In connection with other executive compensation provisions, the JOBS Act includes specific transition periods for companies exiting emerging growth company status.²²² It does not, however, include a similar transition provision in the case of Section 953(b). Therefore, we are not proposing any additional transition period for compliance after a company ceases to qualify as

²²² See, e.g., Section 102(a)(1)(B) (providing such a transition for say-on-pay compliance).

an emerging growth company. We seek comment in this release on whether additional transition periods are needed for these companies.

E. Request for Comment

Throughout this release, we have discussed the anticipated costs and benefits of the proposed rules. We request data to quantify the costs and the value of the benefits described throughout this release. We seek estimates of these costs and benefits, as well as any costs and benefits not described, that may result from the adoption of these proposed amendments. We also request comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked.

61. We request comment on all aspects of the costs and benefits of the proposed rules, including identification and assessment of any costs and benefits not already discussed. We seek comment and data on the magnitude and the value of the benefits identified. We also welcome comments on the accuracy of the cost estimates and request that commenters provide data that may be relevant to these cost estimates. In addition, we seek estimates and views regarding these costs and benefits for particular covered registrants, including small registrants, and, where relevant, for particular categories of covered registrants, as well as any other costs or benefits that may result from the adoption of these proposed amendments.
62. What are the characteristics of employee compensation data that current payroll systems (or other management information systems) maintain? Would it be necessary for registrants to change such systems or other employee compensation records in order to track the information needed to comply with the proposed pay ratio rules? What would the transition costs be to make any such changes? How generally are payroll systems maintained across business or geographic segments and how would the separate payroll

information across segments be aggregated to comply with the proposed rules? What are the initial and ongoing costs to comply and what activities incur those costs, such as burden hours/wages of company personnel, development and maintenance of computer systems, use of third-party service providers and other professionals? How would the use of reasonable estimates or statistical sampling affect these costs generally, including the need to change current payroll systems? Please also describe benefits, if any, to the registrant, beyond compliance with the proposed rules, from implementing changes to current payroll systems or management information systems.

63. How would allowing registrants to choose an approach for determining the median influence potential costs? How would allowing registrants to choose an approach that permits registrants to use any consistently applied measure of compensation and/or statistical sampling to identify the median employee and then calculate that employee's total compensation in accordance with Item 402(c)(2)(x) affect compliance costs, particularly as compared to requiring registrants to calculate total compensation in accordance with Item 402(c)(2)(x) for all employees to identify the median? Comparisons of the costs of each approach would be particularly helpful. Would allowing for alternative approaches retain the benefits of Section 953(b)? If not, please provide specific information or data on what benefits would not be achieved under the proposed rules.
64. What are the transition costs that will be imposed on registrants as a result of the proposals, if adopted? Please be detailed and provide quantitative data or support, as practicable. Where applicable, please also distinguish between costs that are initial, non-recurring implementation costs and the costs of ongoing compliance.

65. What impact would the proposed rules have on the incentives of boards, senior executives and shareholders? Would the proposed rules be likely to change the behavior of registrants, investors or other market participants? Should we alter the proposed requirements to address that impact? If so, describe any changes that would address that impact and discuss any related costs and benefits that would arise from such a change.
66. What impact would the proposed rules have on competition? Would the expected compliance costs put registrants subject to the rule at a competitive disadvantage? Are there particular industries or types of registrants that would be more likely to be impacted? If so, what changes to the proposed requirements could mitigate the impact?
67. What impact would the proposed rules have on market efficiency? Are there any positive or negative effects of the proposed rules on efficiency that we may have overlooked? How could the rules be changed to promote any positive effect or to mitigate any negative effect on efficiency, while still satisfying the mandate of Section 953(b)?
68. Could a registrant's competitors infer proprietary or sensitive information about the registrant's business operations, strategy or labor cost-structure from the proposed pay ratio disclosure? If so, please tell us what type of information could be inferred and how that could be determined. Please also tell us what changes to the proposed requirements could mitigate that concern?
69. What impact would the proposed rules have on capital formation? How could the rules be changed to promote capital formation or to mitigate any negative effect on capital formation resulting from the rules, while still satisfying the mandate of Section 953(b)?

V. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (the “PRA”).²²³ We are submitting the proposed amendments to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.²²⁴ The titles for the collection of information are:

- “Regulation S-K” (OMB Control No. 3235-0071);²²⁵
- “Form 10-K” (OMB Control No. 3235-0063);
- “Regulation 14A and Schedule 14A” (OMB Control No. 3235-0059);²²⁶
- “Regulation 14C and Schedule 14C” (OMB Control No. 3235-0057);²²⁷
- “Form 8-K” (OMB Control No. 3235-0060);
- “Form S-1” (OMB Control No. 3235-0065);²²⁸

²²³ 44 U.S.C. 3501 *et seq.*

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

²²⁵ The paperwork burden from Regulation S-K is imposed through the forms that are subject to the disclosures in Regulation S-K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience, we estimate the burdens imposed by Regulation S-K to be a total of one hour.

²²⁶ As described below, our estimates for Form 10-K take into account the burden that would be incurred by including the proposed disclosure in the annual report directly or incorporating by reference from a proxy or information statement. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for proxy statements on Schedule 14A.

²²⁷ As described below, our estimates for Form 10-K take into account the burden that would be incurred by including the proposed disclosure in the annual report directly or incorporating by reference from a proxy or information statement. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for information statements on 14C.

²²⁸ As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K rather than Forms S-1, S-4, S-11 or N-2 as applicable (because registrants would incorporate the disclosure from Form 10-K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form S-1.

- “Form S-4” (OMB Control No. 3235-0324)²²⁹
- “Form S-11” (OMB Control No. 3235-0067),²³⁰
- “Form 10” (OMB Control No. 3235-0064),²³¹ and
- “Form N-2” (OMB Control No. 3235-0026).²³²

These regulations, schedules and forms were adopted under the Securities Act and the Exchange Act, and in the case of Form N-2,²³³ the Investment Company Act of 1940.²³⁴ They set forth the disclosure requirements for periodic and current reports, registration statements and 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 each form or schedule constitute reporting and cost burdens imposed by each collection of information.

²²⁹ As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K rather than Forms S-1, S-4, S-11 or N-2 as applicable (because registrants would incorporate the disclosure from Form 10-K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form S-4.

²³⁰ As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K rather than Forms S-1, S-11 or N-2 as applicable (because registrants would incorporate the disclosure from Form 10-K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form S-11.

²³¹ As described below, because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we estimate no annual incremental increase in the paperwork burden associated with Form 10 as a result of the proposed requirements.

²³² Only Forms N-2 filed by business development companies would be subject to the proposed disclosure requirements, because Form N-2 requires business development companies, and not other investment companies, to provide Item 402 disclosure. As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K rather than Forms S-1, S-11 or N-2 as applicable (because registrants would incorporate the disclosure from Form 10-K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form N-2.

²³³ 17 CFR 239.14 and 274.11a-1.

²³⁴ 15 U.S.C. 80a-1 *et seq.*

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.

The proposals discussed in this release are intended to satisfy the requirements of Section 953(b) of the Dodd-Frank Act, which directs the Commission to amend Item 402 of Regulation S-K to add the pay ratio disclosure requirements specified by that provision. Compliance with the proposed requirements will be mandatory for affected registrants. Responses to the information collections will not be kept confidential, and there will be no mandatory retention period for the information disclosed.

B. Summary of Collection of Information Requirements

In order to satisfy the legislative mandate in Section 953(b), we are proposing to add new paragraph (u) to Item 402 of Regulation S-K. This new paragraph (u) would require registrants to disclose:

- the median of the annual total compensation of all employees of the registrant (excluding the principal executive officer),
- the annual total compensation of the registrant's principal executive officer, and
- the ratio between these two amounts.

For this purpose, Section 953(b) specifies that total compensation is to be determined in accordance with Item 402(c)(2)(x). Item 402 already requires registrants to disclose the annual total compensation of the principal executive officer in accordance with Item 402(c)(2)(x).²³⁵ The median of the annual total compensation of all employees and the ratio would be new,

²³⁵

As of the date of this proposal, the requirements for the calculation of total compensation under Item 402(c)(2)(x) are the same as those in effect on July 20, 2010. Therefore, for purposes of this PRA analysis, we have assumed that registrants would not need to recalculate the annual total compensation for the principal executive officer in connection with the proposed pay ratio disclosure.

incremental disclosure burdens and would require affected registrants to collect compensation information for employees that is not currently required to be disclosed.

Investors and other market participants interested in executive compensation disclosure have indicated that the proposed disclosure would be useful in informing investment and voting decisions, particularly for say-on-pay votes and in director elections.²³⁶ In this regard, pay ratio information could be used by shareholders for purposes of evaluating the actions of the board of directors in fulfilling its responsibilities to the company and its shareholders.²³⁷ Pay ratio information could also be used to enhance an investor's understanding of a registrant's compensation practices applicable to non-executive employees relative to the named executive officers.²³⁸

The proposed disclosure under new paragraph (u) of Item 402 would be required in registration statements and annual reports that require executive compensation information under Item 402 of Regulation S-K and in proxy and information statements relating to an annual meeting of shareholders or written consents in lieu of such a meeting.²³⁹ In addition, the proposed requirements would allow certain new registrants to omit the disclosure otherwise required by Item 402(u) from filings made during a specified transition period.

Finally, in order to conform the proposed requirements to current rules for the disclosure of PEO compensation when certain elements are not yet known, the proposals include a

²³⁶ See, e.g., letters from CtW Investment Group and S. Towns.

²³⁷ See, e.g., letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

²³⁸ See, e.g., letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

²³⁹ Consistent with the scope of Section 953(b), the proposed requirements would not apply to the annual reports and proxy and information statements of emerging growth companies, smaller reporting companies or foreign private issuers. In addition, consistent with the instructions J and I of Form 10-K, the proposed requirements would not apply to the annual reports of issuers of asset-backed securities or to wholly-owned subsidiary registrants.

conforming amendment to Item 5.02 of Form 8-K. This proposed amendment would require registrants that are disclosing PEO total compensation in accordance with Item 5.02 of Form 8-K to also provide in that filing the updated pay ratio disclosure required by Item 402(u). Because Item 5.02 of Form 8-K provides a delayed method of filing information that would otherwise be required in the registrant's proxy or information statement or annual report, the PRA analysis assumes that the burden and cost of compliance with proposed Item 402(u) would be associated primarily with those forms and schedules rather than Form 8-K.

C. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the proposed amendments, if adopted, would increase the burdens and costs for registrants that are subject to the proposed disclosure requirements. For purposes of the PRA, we estimate that the total annual increase in the paperwork burden for all affected registrants to comply with the proposed collection of information requirements to be approximately 545,792 hours of company personnel time and total costs of approximately \$72,772,200 for the services of outside professionals.²⁴⁰ These estimates include the time and the cost of implementing data gathering systems and disclosure controls and procedures, compiling necessary data, preparing and reviewing disclosure, filing documents and retaining records.

In deriving these estimates, we have assumed that:

- Registrants subject to the proposed requirements would satisfy the proposed requirements by either including the information directly in annual reports on Form 10-K or incorporating the information by reference from a proxy statement on Schedule 14A or information statement on Schedule 14C. Our estimates

²⁴⁰

We describe how we derived the three-year average hour and cost burdens per response below. For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest hundred.

assume that substantially all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K;

- For registrants that would be permitted to provide their pay ratio disclosure in a filing made in accordance with Item 5.02 of Form 8-K, rather than in Form 10-K, the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K rather than Form 8-K;²⁴¹
- 100% of new registrants would use the proposed transition provisions allowing them to omit the proposed disclosure from their filings and, for follow-on offerings by these registrants, the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K rather than Forms S-1, S-11 or N-2 as applicable (because registrants would incorporate the disclosure from Form 10-K); and
- For Form 10-K and Form 8-K, 75% of the burden would be carried by the company internally and that 25% of the burden would be carried by outside professionals retained by the company at an average cost of \$400 per hour.²⁴²

As discussed above in this release, we understand from commenters that the costs of compliance will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, the nature of their operations, the nature of their workforce, the location of their operations, and, significantly, the extent that their existing payroll

²⁴¹ Our PRA estimates for Form 8-K include an estimated one hour burden to account for the inclusion of the proposed pay ratio disclosure.

²⁴² The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis we estimate that such costs would be an average of \$400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting.

systems collect the information necessary to identify the median of the annual total compensation of their employees (including whether a single, centralized computer system covers all employees of the registrant and whether the company's benefits and cash compensation records reside in the same system). Because the proposed requirements would allow registrants some flexibility in identifying the median and the annual total compensation of employees, the actual burden could be lower if the methodology used is able to reduce the effort needed to collect the data or if the registrant is able to use information that it uses for other purposes.²⁴³ We believe that the actual burdens will likely vary significantly among individual companies based on these factors.²⁴⁴ Our estimates reflect average burdens, and, therefore, some companies may experience costs in excess of our estimates and some companies may experience costs that are lower than our estimates.²⁴⁵

We have derived our burden estimates by estimating the average number of hours it would take a registrant to prepare and submit the required data. In determining these estimates, we considered the burden estimates for similar disclosure requirements. We believe the burden hours associated with the preparation of the proposed pay ratio disclosure may be comparable to a

²⁴³ See Section II of this release for a discussion of the proposed requirements.

²⁴⁴ We also note that companies could address these factors in a variety of ways. For example, some companies might perform the data collection and consolidation manually, while others may incur the cost of implementing an information technology solution for collecting the data. In addition, some companies might outsource some of the burden hours to consultants or third party payroll management providers, which could increase the costs to the registrant while decreasing the burden hours of company personnel.

²⁴⁵ Although we received some information from commenters and stakeholders regarding the time and costs to comply with Section 953(b), in light of the limitations of that information described above in Section IV of this release, we did not use that information as the basis for our PRA estimates. We received various hours estimates, including estimates of approximately 201 to 500 hours, and another estimate of 4,000 hours (based on 50 hours per country where employees are located). We received four cost estimates, including \$7.6 million, \$6.5 million, \$4.725 million and \$350,000 per registrant. We note that all of these estimates are estimates based on the commenter's initial reading and interpretation of the statute and do not reflect the discretionary choices we have made in the proposed rule implementing the statute. For instance these estimates do not take into account the ability to use statistical sampling. We also note that the estimates do not represent the full breadth of the registrant population. As noted in our economic analysis section, we anticipate that the PRA estimates will be revised in light of further information we receive on estimated costs.

registrant's preparation of the summary compensation table and other executive compensation disclosures required by the 2006 amendments to Item 402.²⁴⁶ We recognize that, in this proposal, the burden reflects the compilation of data covering the entire workforce rather than only the named executive officers. We note that the proposal allows for a broad use of any consistently applied compensation measure and statistical sampling and the use of other reasonable estimates to identify the median. As noted above, the actual burden will vary depending on factors including the size of the company, the number of employees and how many are located outside of the United States. For a company with a medium-sized workforce, located primarily in the United States, that is able to identify a median employee from a sample of its employee population using a consistently applied compensation measure, the burden hours could be less than the estimated burden hours for the 2006 amendments to Item 402.²⁴⁷ In contrast, for a large, multi-national registrant with hundreds of thousands of employees, the burden hours could be more than the estimated burden hours for the 2006 amendments to Item 402.²⁴⁸ We believe, therefore, that it is reasonable to assume that the burden hours will be a multiple of the average burden hours associated with the 2006 amendments to Item 402. We also expect that, similar to the 2006 amendments, the proposed rules' burden would be greatest during the first year of their effectiveness and diminish in subsequent years. Accordingly, to derive our estimates, we

²⁴⁶ See 2006 Adopting Release, *supra* note 14, at 53215 (which we estimated to be a three-year average of 95 hours, based on 170 hours in year one, 80 hours in year two and 35 hours in year three and thereafter).

²⁴⁷ We expect that such a company would be determining total compensation under Item 402(c)(2)(x) for only one additional employee.

²⁴⁸ For these companies, we considered the estimated burden of other international reporting regimes, such as the Commission's rules implementing Section 1502 of the Dodd-Frank Act. See Conflict Minerals, Release No. 34-67716 (Aug. 22, 2012) [77 FR 56273] (which we estimated to be a three year average of 495 hours). In that regard, we assume this proposal would be less burdensome because the underlying information would be under the control of the registrant rather than data that must be gathered from unrelated third parties in the registrant's supply chain.

multiplied the average burden estimate for the 2006 amendments by two, yielding an estimated burden of 340 hours in year one, 160 hours in year two and 70 hours in year three and thereafter, for a three-year average burden of 190 hours.

We used this three-year average hour burden to estimate the cost and hour burden for each collection of information as follows:

1. Regulation S-K

While the proposed amendments would make revisions to Regulation S-K, the collection of information requirements for that regulation are reflected in the burden hours estimated for the forms and schedules listed below. The rules in Regulation S-K do not impose any separate burden. Consistent with historical practice, we are proposing to retain an estimate of one burden hour to Regulation S-K for administrative convenience.

2. Form 10-K

Only Forms 10-K that are filed by registrants that are not smaller reporting companies or emerging growth companies would be required to include the proposed disclosure. For purposes of our PRA estimates, we have assumed that 100% of asset-backed securities issuers would omit Item 402 disclosure from Form 10-K pursuant to Instruction J of Form 10-K and 100% of wholly-owned subsidiary registrants would omit Item 402 disclosure from Form 10-K pursuant to Instruction I of Form 10-K, and, accordingly, these registrants would also not be subject to the proposed disclosure requirements. Based on a review of EDGAR filings in calendar year 2011, we estimate that of the approximately 8,870 annual reports filed in that year, approximately 3,830 annual reports are filed by registrants that would be subject to the proposed disclosure

requirements.²⁴⁹ We estimate that the proposed disclosure requirements would add an average of 190 burden hours to the total burden hours required to produce each Form 10-K that is subject to the proposed requirements (143 hours in-house personnel time and a cost of approximately \$19,000 for outside professionals).

We estimate that the preparation of annual reports currently results in a total annual compliance burden of 21,430,988 hours and an annual cost of outside professionals of \$2,857,465,000. If the proposals were adopted, we estimate that the incremental cost of outside professionals for annual reports would be approximately \$72,770,000 per year and the incremental company burden would be approximately 545,775 hours per year.

3. Form 8-K

As described in this release, we are proposing to require a registrant that is filing its PEO total compensation on a delayed basis due to the unavailability of certain components of compensation on Form 8-K (in accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv) of Regulation S-K and Item 5.02(f) of Form 8-K) to provide the proposed pay ratio disclosure at the same time. We have proposed a conforming amendment to Item 5.02 of Form 8-K that would require a registrant to include updated pay ratio disclosure in the Form 8-K that it files to disclose its PEO total compensation information.²⁵⁰ We estimate that the burden for adding the pay ratio disclosure to that Form 8-K filing would be one hour per registrant.²⁵¹ We also estimate that the

²⁴⁹ Based on a review of EDGAR filings in 2011, approximately 3,750 annual reports were filed by smaller reporting companies, approximately 290 were filed by ABS issuers and approximately 100 were filed by wholly-owned subsidiaries of other registrants. We have also reduced the total number of Form 10-K filings by 900 to reflect the approximate number of emerging growth companies that have identified themselves as such in their EDGAR filings as of May 2013.

²⁵⁰ See Section II.C.7.b. above.

²⁵¹ As noted above, we have assumed that the burden relating to the proposed pay ratio requirements would remain associated with the registrant's proxy or information statement or annual report, and, therefore, our PRA estimates for those forms reflect that burden.

proposed Form 8-K amendment would not result in additional Form 8-K filings because registrants who omit disclosure in reliance on Instruction 1 to Items 402(c)(2)(iii) and (iv) are already required to file a Form 8-K. The proposed amendments would, however, add pay ratio disclosure requirements to that Form 8-K filing.

Based on a review of EDGAR filings for calendar years 2011 and 2012, we estimate that approximately 29 Forms 8-K are filed pursuant to Item 5.02(f) annually and approximately 75% of these relate to disclosure of PEO compensation. As a result, we estimate that 22 of the Forms 8-K filed in a given year would spend 1 additional hour preparing the disclosure required by the amendments (0.75 hours of internal personnel time and a cost of approximately \$100 for professional services), in addition to the total burden hours required to produce each Form 8-K. We estimate that the preparation of current reports on Form 8-K currently results in a total annual compliance burden of 507,665 hours and an annual cost of outside professionals of \$67,688,700. If the proposals were adopted, we estimate that the incremental company burden would be approximately 16.5 hours per year and approximately \$2,200 in the incremental cost of outside professionals for current reports on Form 8-K.

4. Proxy Statements on Schedule 14A

Only proxy statements on Schedule 14A that are required to include Item 402 information, and that are not filed by smaller reporting companies or emerging growth companies, would be required to include the proposed pay ratio disclosure. For purposes of our PRA estimates, consistent with past amendments to Item 402,²⁵² we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K, even if registrants

²⁵²

We took a similar approach in connection with the rules for Summary Compensation Table disclosure required by the 2006 amendments to Item 402. See 2006 Adopting Release, supra note 14.

include the proposed disclosure required in Form 10-K by incorporating that disclosure by reference from a proxy statement on Schedule 14A.

5. Information Statements on Schedule 14C

Only information statements on Schedule 14C that are required to include Item 402 information, and that are not filed by smaller reporting companies or emerging growth companies, would be required to include the proposed pay ratio disclosure. For purposes of our PRA estimates, consistent with past amendments to Item 402, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K, even if registrants include the proposed disclosure required in Form 10-K by incorporating that disclosure by reference from an information statement on Schedule 14C.

6. Form S-1

Because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we estimate that approximately 70 registration statements on Form S-1 would be required to include the proposed disclosure.²⁵³ In addition, because we assume that all of these Forms S-1 will incorporate by reference the registrant's disclosure from its annual report, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K.

7. Form S-4

We have assumed that registrants filing on Form S-4 for whom executive compensation information under Item 402 is required pursuant to Items 18 or 19 of Form S-4 will incorporate by reference the pay ratio disclosure contained in the registrant's annual report. Thus, we have

²⁵³

Based on a review of EDGAR filings for calendar year 2012, we estimate that approximately 70 Forms S-1 would be filed in connection with follow-on offerings (rather than initial public offerings) by companies that are not emerging growth companies or smaller reporting companies.

assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K.

8. Form S-11

Because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we have assumed that five registration statements on Form S-11 would be required to include the proposed disclosure.²⁵⁴ In addition, because we assume that these Forms S-11 will incorporate by reference the registrant's pay ratio disclosure contained in its annual report, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K.

9. Form N-2

Only Forms N-2 filed by business development companies would be subject to the proposed disclosure requirements. Based on a review of EDGAR filings for calendar year 2011, our best estimate of the total number of business development companies is 41 and that 28 of these have no employees.²⁵⁵ Therefore, of the 205 Forms N-2 that are filed annually, we estimate that approximately 41 are filed by business development companies and approximately 13 of these business development companies have employees. In addition, because we assume that all of these Forms N-2 will incorporate by reference the registrant's disclosure in its annual report, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10-K.

²⁵⁴ Based on a review of EDGAR filings for calendar year 2012, we estimate that approximately five Forms S-11 would be filed in connection with follow-on offerings by registrants that are not emerging growth companies.

²⁵⁵ As discussed in this release, the proposed requirements for identifying the median apply to workers who are employees of the registrant. Business development companies are often externally managed rather than having their own employees.

10. Form 10

Because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we estimate no annual incremental increase in the paperwork burden associated with Form 10 as a result of the proposed requirements.

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

Tables 1 and 2 below illustrate the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments for annual reports on Form 10-K and current reports on Form 8-K under the Exchange Act. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the proposed disclosure. We recognize that some registrants may need to include the pay ratio disclosure in more than one filing covering the same period, accordingly actual numbers may be lower than our estimates.

As discussed above, there is no change to the estimated burden of the collection of information under Forms S-1, S-4, S-11 or N-2 or under Schedule 14A and 14C because we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10-K. In addition, there is no change to the estimated burden of the collection of information under Form 10, because we have assumed that all new registrants would take advantage of the proposed transition period. There is no change to the estimated burden of the collection of information under Regulation S-K because the burdens that Regulation S-K imposes are reflected in our revised estimates for the forms.

Table 1: Calculation of Increases in Burden Estimates Due to the Rule Proposal

	Estimated Annual Responses Subject to Proposed Requirements (A)	Estimated Hour Burden Per Response (B)	Estimated Aggregate Incremental Hour Burden (C) = (A) * (B)	75% Company (Hours) (D) = (C) * 0.75	25% Outside Professional (Hours) (E) = C * 0.25	Estimated Aggregate Cost of Outside Professions in Connection with Proposed Requirements (F) = (E) * \$400
Form 10-K	3,830	190	898,700	545,775	181,925	\$72,770,000
Form 8-K	22	1	22	16.5	5.5	\$2,200
Total	3,852	191	898,722	545,792	181,931	\$72,772,200

Table 2: Calculation of Total PRA Burden Estimates

	Current Annual Responses (A)	Proposed Annual Responses (B)	Current Burden Hours (C)	Increase in Burden Hours (D) ²⁵⁶	Proposed Burden Hours (E) = C+D	Current Professional Costs (F)	Increase in Professional Costs (G)	Proposed Professional Costs =F+G
Form 10-K	14,296	14,296	21,430,988	545,775	22,105,013	\$2,857,465,000	\$72,770,000	\$2,930,235,000
Form 8-K	118,387	118,387	507,665	16.5	507,681.5	\$67,688,700	\$2,200	\$67,690,900
Total	132,683	132,683	21,938,653	545,792	22,612,694	\$2,925,153,700	\$72,772,200	\$2,997,925,900

E. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;

²⁵⁶

The increase in burden hours reflected in the table is based on the aggregate incremental burden hours per form multiplied by the annual responses that would be required to include additional disclosure under our rules as proposed. As explained in the discussion above, for purposes of determining the total increase in burden hours, we have reduced the current number of annual responses to reflect that the proposed disclosure requirements will not apply to all forms filed. See Table 1 for estimates per response.

- Determine whether there are ways to enhance the quality, utility and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-07-13. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-07-13 and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549-2736. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

VI. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),²⁵⁷ we solicit data to determine whether the proposed amendments constitute a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries;
or
- Significant adverse effects on competition, investment or innovation.

Commenters should provide comment and empirical data on (a) the potential annual effect on the U.S. economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VII. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the amendments contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed amendments would provide that a registrant (other than a smaller reporting company or an emerging growth company) would be required to disclose a pay ratio (showing the median of the annual total compensation of all employees of the registrant and its subsidiaries to the annual total compensation of the principal executive officer of the registrant) in filings that are required to include executive compensation information pursuant to Item 402 of Regulation S-K. Section 953(b) does not apply to smaller reporting companies and

²⁵⁷ Public Law No. 104-121, tit. II, 110 Stat. 857 (1996).

does not apply to emerging growth companies, and, consistent with Section 953(b), the proposed requirements would not apply to smaller reporting companies or emerging growth companies. Because smaller reporting companies and emerging growth companies are not subject to the proposed requirements, we believe the proposed rules would not have a significant economic impact on a substantial number of small entities.

VIII. STATUTORY AUTHORITY AND TEXT OF AMENDMENTS

The amendments contained herein are being proposed pursuant to Sections 7, 10 and 19(a) of the Securities Act, Sections 3(b), 12, 13, 14, 15(d) and 23(a) of the Exchange Act, Section 953(b) of the Dodd-Frank Act, as amended, and Section 102(a)(3) of the JOBS Act.

List of Subjects

17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations, is proposed to be amended as follows:

PART 229 — STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 — REGULATION S-K

1. The general authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78 mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39,

80b-11 and 7201 et seq.; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111-203, 124 Stat. 1904; and Sec. 102(a)(3) Pub. L. 112-106, 126 Stat. 309, unless otherwise noted.

* * * * *

2. Amend Section 229.402 by:
 - a. In paragraph (l) removing “(k) and (s)” and adding in its place “(k), (s) and (u)”;and
 - b. Adding paragraph (u) directly after the Instructions to Item 402(t).

The addition reads as follows:

§ 229.402 (Item 402) Executive Compensation.

* * * * *

- (u) Pay ratio disclosure. (1) Disclose:
- (i) The median of the annual total compensation of all employees of the registrant, except the PEO of the registrant;
 - (ii) The annual total compensation of the PEO of the registrant; and
 - (iii) The ratio of the amount in paragraph (u)(1)(i) of this Item to the amount in paragraph (u)(1)(ii) of this Item. For purposes of the ratio required by this paragraph (u)(1)(iii), the amount in paragraph (u)(1)(i) of this Item shall equal one, or, alternatively, the ratio may be expressed narratively as the multiple that the amount in paragraph (u)(1)(ii) of this Item bears to the amount in in paragraph (u)(1)(i) of this Item.
- (2) (i) For purposes of this paragraph (u), the total compensation of employees of the registrant (including the PEO of the registrant) shall be determined in accordance with paragraph (c)(2)(x) of this Item 402. In determining the total compensation, all references to “named executive officer” in this Item 402 and the instructions thereto may be deemed to refer instead, as

applicable, to “employee” and, for non-salaried employees, references to “base salary” and “salary” in this Item 402 and the instructions thereto may be deemed to refer instead, as applicable, to “wages plus overtime.”

(ii) For purposes of this paragraph (u), annual total compensation means total compensation for the registrant’s last completed fiscal year.

(3) For purposes of this paragraph (u), employee or employee of the registrant means an individual employed by the registrant or any of its subsidiaries as of the last day of the registrant’s last completed fiscal year. This includes any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries on that day (including officers other than the PEO).

Instruction 1 to Item 402(u). Updating for the last completed fiscal year. Pay ratio information (i.e., the disclosure called for by paragraph (u)(1) of this Item) with respect to the registrant’s last completed fiscal year is not required to be disclosed until the filing of its annual report on Form 10-K for that last completed fiscal year or, if later, the filing of a definitive proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such fiscal year; provided that, the required pay ratio information must, in any event, be filed as provided in General Instruction G(3) of Form 10-K (17 CFR 249.310) not later than 120 days after the end of such fiscal year. In any filing made by a registrant after the end of its last completed fiscal year and before the filing of such Form 10-K or proxy or information statement, as applicable, a registrant that was subject to the requirements of paragraph (u) of this Item for the fiscal year prior to the last completed fiscal year shall include or incorporate by reference the information required by paragraph (u) of this Item for that prior fiscal year.

Instruction 2 to Item 402(u). Methodology and use of estimates. (i) Registrants may use (A) a methodology that uses reasonable estimates to identify the median and (B) reasonable estimates to calculate the annual total compensation or any elements of total compensation for employees other than the PEO.

(ii) In determining the employees from which the median is identified, a registrant may use (A) its employee population or (B) statistical sampling or other reasonable methods.

(iii) A registrant may identify the median employee using (A) annual total compensation or (B) any other compensation measure that is consistently applied to all employees included in the calculation, such as amounts derived from the registrant's payroll or tax records. In using a compensation measure other than annual total compensation to identify the median employee, if that measure is recorded on a basis other than the registrant's fiscal year (such as payroll or tax information), the registrant may use the same annual period that is used to derive those amounts. Where a compensation measure other than annual total compensation is used to identify the median employee, the registrant must (A) disclose the compensation measure used and (B) calculate and disclose the annual total compensation for that median employee.

(iv) Registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount. This disclosure should be a brief overview; it is not necessary to provide technical analyses or formulas. If a registrant changes methodology or material assumptions, adjustments or estimates from those used in its pay ratio disclosure for the prior fiscal year, and if the effects of any such change are material, the registrant shall briefly

describe the change and the reasons for the change, and shall provide an estimate of the impact of the change on the median and the ratio.

Instruction 3 to Item 402(u). Permitted annualizing adjustments. A registrant may annualize the total compensation for all permanent employees (other than those in temporary or seasonal positions) that were employed by the registrant for less than the full fiscal year (such as newly hired employees or permanent employees on an unpaid leave of absence during the period).

Instruction 4 to Item 402(u). PEO compensation not available. A registrant that is relying on Instruction 1 to Item 402(c)(2)(iii) and (iv) in connection with the salary or bonus of the PEO for the last completed fiscal year, shall disclose that the pay ratio required by paragraph (u) of this Item is not calculable until the PEO salary or bonus, as applicable, is determined and shall disclose the date that the PEO's actual total compensation is expected to be determined. The disclosure required by paragraph (u) of this Item must then be disclosed in the filing under Item 5.02(f) of Form 8-K (17 CFR 249.308) that discloses the PEO's salary or bonus in accordance with Instruction 1 to Item 402(c)(2)(iii) and (iv).

Instruction 5 to Item 402(u). Transition period. A registrant must comply with paragraph (u) of this Item with respect to compensation for the first fiscal year commencing on or after the date the registrant first becomes subject to the requirements of Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), and may omit such pay ratio disclosure from any filing until it the filing of its annual report on Form 10-K for such fiscal year or, if later, the filing of a proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such year, provided that, such pay ratio disclosure must, in any event, be filed as provided in General Instruction G(3) of Form 10-K (17 CFR 249.310) not later than 120 days after the end of such fiscal year.

Instruction 6 to Item 402(u). Emerging growth companies. A registrant is not required to comply with paragraph (u) of this Item if it is an emerging growth company as defined in Section 3(a) of the Exchange Act (15 U.S.C. 78c(a)).

PART 249 — FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The general authority citation for part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111-203, 124 Stat. 1904; and Sec. 102(a)(3) Pub. L. 112-106, 126 Stat. 309, unless otherwise noted.

* * * * *

4. Form 8-K (referenced in §249.308) is amended by revising paragraph (f) of Item 5.02, by adding “(1)” directly after “(f)” and adding paragraph (2) after the second sentence.

The revisions and additions read as follows:

Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8-K

* * * * *

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

* * * * *

(f)(1) * * *

(2) As specified in Instruction 4 to Item 402(u) of Regulation S-K (17 CFR 229.402(u)), disclosure under this Item 5.02(f) with respect to the salary or bonus of a principal executive officer shall include pay ratio disclosure pursuant to Item 402(u) of Regulation S-K calculated using the new total compensation figure for the principal executive officer. Pay ratio disclosure is not required under this Item 5.02(f) until the omitted salary or bonus amounts for such principal executive officer become calculable in whole.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

September 18, 2013

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34-70462; File No. S7-45-10]

RIN 3235-AK86

Registration of Municipal Advisors

AGENCY: Securities and Exchange Commission.

ACTION: Final Rule.

SUMMARY: Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended Section 15B of the Securities Exchange Act of 1934 (“Exchange Act”) to require municipal advisors, as defined below, to register with the Securities and Exchange Commission (“Commission” or “SEC”), effective October 1, 2010. To enable municipal advisors to temporarily satisfy this requirement, the Commission adopted an interim final temporary rule, Exchange Act Rule 15Ba2-6T, and form, Form MA-T, effective October 1, 2010. To enable municipal advisors to continue to register under the temporary registration regime until the applicable compliance date for permanent registration, the Commission is extending Rule 15Ba2-6T, in a separate release, to December 31, 2014. The Commission is today adopting new Rules 15Ba1-1 through 15Ba1-8, new Rule 15Bc4-1, and new Forms MA, MA-I, MA-W, and MA-NR under the Exchange Act. These rules and forms are designed to give effect to provisions of Title IX of the Dodd-Frank Act that, among other things, require the Commission to establish a registration regime for municipal advisors and impose certain record-keeping requirements on such advisors.

DATES:

Effective Date: [insert date that is 60 days after publication in the Federal Register].

42 of 90

Compliance Date: The applicable compliance dates are discussed in the section of the release titled "V. Implementation and Compliance Dates".

FOR FURTHER INFORMATION CONTACT:

Office of Municipal Securities: John Cross, Director, at (202) 551-5839; Jessica Kane, Senior Special Counsel to the Director, at (202) 551-3235; Rebecca Olsen, Attorney Fellow, at (202) 551-5540; or Mary Simpkins, Senior Special Counsel, at (202) 551-5683; at Office of Municipal Securities, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

Office of Market Supervision: Molly Kim, Senior Special Counsel, at (202) 551-5644; Ira Brandriss, Special Counsel, at (202) 551-5651; Brian Baltz, Special Counsel, at (202) 551-5762; Jennifer Dodd, Special Counsel, at (202) 551-5653; Derek James, Special Counsel, at (202) 551-5792; Yue Ding, Attorney-Adviser, at (202) 551-5842; or Eugene Hsia, Attorney-Adviser, at (202) 551-5709; at Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is adopting Rules 15Ba1-1 to 15Ba1-8 (17 CFR 240.15Ba1-1 to 240.15Ba1-8) and 15Bc4-1 (17 CFR 240.15Bc4-1) under the Exchange Act; Forms MA, MA-I, MA-W, and MA-NR (17 CFR 249.1400, 1410, 1420, and 1430); and Rules 30-3a (17 CFR 200.30-3a) and 19d (17 CFR 200.19d) under the Commission's Rules of Organization and Program Management. The Commission is amending Rules 30-18 (17 CFR 200.30-18) and 19c (17 CFR 200.19c) under the Commission's Rules of Organization and Program Management.

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	5
II.	INTRODUCTION	16
A.	Background	16

1.	Overview of Municipal Securities Market	16
a.	Municipal Advisors	16
b.	Municipal Entities and Municipal Financial Products	19
2.	Historical Regulation of Municipal Securities and Municipal Advisors.	23
a.	Municipal Securities Market	23
b.	Municipal Advisors	27
B.	Dodd-Frank Act and the Need for Oversight	28
C.	Interim Final Temporary Rule 15Ba2-6T and Form MA-T	30
D.	Proposal to Establish a Registration Regime for Municipal Advisors	32
III.	DISCUSSION	33
A.	Rules for the Registration of Municipal Advisors	34
1.	Rule 15Ba1-1: Definition of "Municipal Advisor" and Related Terms	34
a.	Statutory Definition of "Municipal Advisor"	34
b.	Interpretation of the Term "Municipal Advisor"; Definition of Related Terms	37
i.	Advice Standard in General	39
ii.	Municipal Entity	48
iii.	Obligated Person	57
iv.	Municipal Financial Products	70
v.	Municipal Derivatives	70
vi.	Guaranteed Investment Contracts	77
vii.	Issuance of Municipal Securities	80
viii.	Investment Strategies	83
ix.	Pooled Investment Vehicles	107
x.	Solicitation of a Municipal Entity or Obligated Person..	113

c.	Exclusions and Exemptions from the Definition of “Municipal Advisor”	129
	i. Public Officials and Employees of Municipal Entities and Obligated Persons	129
	ii. Responses to Requests for Proposals or Requests for Qualifications	148
	iii. Municipal Entity or Obligated Person Represented by an Independent Municipal Advisor	151
	iv. Broker, Dealer, or Municipal Securities Dealer Serving as an Underwriter	157
	v. Registered Investment Advisers	178
	vi. Registered Commodity Trading Advisors; Swap Dealers	195
	vii. Accountants, Attorneys, Engineers and Other Professionals	206
	viii. Banks	235
2.	Rule 15Ba1-2	250
	a. Application for Municipal Advisor Registration	250
	b. Information Requested in Form MA	266
	c. Information Requested in Form MA-I	329
3.	Rule 15Ba1-3: Exemption of Certain Natural Persons Associated with Registered Municipal Advisors From Registration	359
4.	Rule 15Ba1-4: Withdrawal From Municipal Advisor Registration; Form MA-W	359
	a. Rule 15Ba1-4: Withdrawal From Municipal Advisor Registration	359
	b. Form MA-W	361
5.	Rule 15Ba1-5: Amendments to Form MA and Form MA-I	365
6.	Rule 15Ba1-6: Consent to Service of Process to be Filed by Non-Resident Registered Municipal Advisors; Legal Opinion to be Provided by Non-Resident Municipal Advisors; and Form MA-NR	369

a.	Rule 15Ba1-6: Consent to Service of Process to be Filed by Non-Resident Registered Municipal Advisors; Legal Opinion to be Provided by Non-Resident Municipal Advisors	369
b.	Form MA-NR.....	372
7.	Rule 15Ba1-7: Registration of Successor to Municipal Advisor	375
8.	General Instructions and Glossary	377
9.	Rule 15Bc4-1: Persons Associated with Municipal Advisors	394
B.	Approval or Denial of Registration	396
C.	Rule 15Ba1-8: Books and Records to be Made and Maintained by Municipal Advisors.....	397
IV.	DESIGNATION OF FINRA TO EXAMINE FINRA MEMBER MUNICIPAL ADVISORS	410
V.	IMPLEMENTATION AND COMPLIANCE DATES.....	411
VI.	DELEGATION OF AUTHORITY.....	415
A.	Delegation to the Director of the Office of Municipal Securities.....	416
B.	Delegation to the Director of the Office of Compliance Inspections and Examinations	417
VII.	PAPERWORK REDUCTION ACT.....	420
VIII.	ECONOMIC ANALYSIS.....	478
IX.	FINAL REGULATORY FLEXIBILITY ANALYSIS	569
X.	STATUTORY BASIS AND TEXT OF AMENDMENTS	591

I. EXECUTIVE SUMMARY

Section 975 of the Dodd-Frank Act creates a new class of regulated persons, “municipal advisors,” and requires these advisors to register with the Commission. This new registration requirement, which became effective on October 1, 2010, makes it unlawful for any municipal advisor to provide certain advice to or on behalf of, or to solicit, municipal entities or certain other

persons without registering with the Commission.¹ A person is deemed under the Exchange Act to have a statutory fiduciary duty to any municipal entity for whom such person acts as a municipal advisor.

The new registration requirements and regulatory standards are intended to mitigate some of the problems observed with the conduct of some municipal advisors, including “pay to play” practices, undisclosed conflicts of interest, advice rendered by financial advisors without adequate training or qualifications, and failure to place the duty of loyalty to their clients ahead of their own interests.² According to a Senate Report related to the Dodd-Frank Act, “[t]he \$3 trillion municipal securities market is subject to less supervision than corporate securities markets, and market participants generally have less information upon which to base investment decisions. During the [financial] crisis, a number of municipalities suffered losses from complex derivatives products that were marketed by unregulated financial intermediaries.”³ Accordingly, in response to the financial crisis that began in 2008, the Dodd-Frank Act amended the Exchange Act to require “a range of municipal financial advisors to register with the [Commission] and comply with regulations issued by the [MSRB].”⁴

In September 2010, the Commission adopted, and subsequently extended, an interim final temporary rule establishing a temporary means for municipal advisors to satisfy the registration

¹ See 15 U.S.C. 78o-4(a)(1)(B).

² See, e.g., Municipal Securities Rulemaking Board, Unregulated Municipal Market Participants – A Case for Reform, April 2009, [http://www.msrb.org/News-and-Events/Press-Releases/Press-Releases/~media/Files/Special-Publications/MSRBReportonUnregulatedMarketParticipants_April09.ashx](http://www.msrb.org/News-and-Events/Press-Releases/Press-Releases/~/media/Files/Special-Publications/MSRBReportonUnregulatedMarketParticipants_April09.ashx) (“MSRB Study”).

³ See S. Rep. No. 111-176, at 38 (2010).

⁴ See *id.*

requirement.⁵ As of March 31, 2013, there were approximately 1,130 Form MA-T registrants, including approximately 330 registrants that are also registered investment advisers and/or broker-dealers. In December 2010, the Commission proposed a permanent registration regime to govern municipal advisor registration (“Proposal”).⁶ The Commission has considered comments received in connection with both the 2010 interim final temporary rules, as well as the Proposal, and is today establishing a permanent registration regime for municipal advisors and imposing certain record-keeping requirements on such advisors. Further, the Commission today, in a separate release, is extending the expiration date of the temporary registration regime to December 31, 2014.⁷ This extension will enable municipal advisors that are required to register with the Commission on or after the Effective Date but before the applicable compliance date to continue to register under the temporary registration regime.

The statutory definition of a “municipal advisor” is broad and includes persons that may not have been considered to be municipal financial advisors prior to the enactment of the Dodd-Frank Act. Historically, municipal advisors have been largely unregulated.⁸ The Commission believes that the information disclosed pursuant to the rules and forms established by the permanent registration regime for municipal advisors will enhance the Commission’s oversight of municipal advisors and their activities in the municipal securities markets. The publicly-available online information provided pursuant to these rules and forms should also aid municipal entities and obligated persons in choosing municipal advisors and help provide greater transparency when

⁵ See Section II.C. below and Securities Exchange Act Release No. 62824 (September 1, 2010), 75 FR 54465 (September 8, 2010) (“Temporary Registration Rule Release”).

⁶ See Section II.D. below and Securities Exchange Act Release No. 63576 (December 20, 2010), 76 FR 824 (January 6, 2011) (“Proposal”).

⁷ See Rule 15Ba2-6T and Securities Exchange Act Release No. 70468 (September 23, 2013) (“Form MA-T Extension Release”).

⁸ See, e.g., MSRB Study, *supra* note 2.

engaging in transactions or investments with municipal advisors.

The Exchange Act defines the term “municipal advisor” to mean a person (who is not a municipal entity or an employee of a municipal entity) that: (1) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (2) undertakes a solicitation of a municipal entity.⁹ The definition of municipal advisor includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors that provide municipal advisory services, unless they are statutorily excluded.¹⁰

The statutory definition of “municipal advisor” explicitly excludes: (1) a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in Section 2(a)(11) of the Securities Act of 1933); (2) any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice; (3) any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps; (4) attorneys offering legal advice or providing services of a traditional legal nature; and (5) engineers providing engineering advice.¹¹

The Exchange Act defines the term “municipal financial product” to mean municipal derivatives, guaranteed investment contracts, and investment strategies.¹² “Investment strategies” is defined to include plans or programs for the investment of proceeds of municipal securities that are

⁹ See 15 U.S.C. 78o-4(e)(4)(A).

¹⁰ See 15 U.S.C. 78o-4(e)(4)(B).

¹¹ See 15 U.S.C. 78o-4(e)(4)(C).

¹² See 15 U.S.C. 78o-4(e)(5).

not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.¹³

The Proposal reflected the Commission's preliminary interpretation of the new statutory requirements, based on its understanding at that time of Congressional objectives and intent in adopting Section 975 of the Dodd-Frank Act. The Commission requested comment generally on the Proposal and also requested comment on over 175 specific issues. The Commission received over 1,000 comment letters on the Proposal, representing a wide range of viewpoints, which are discussed throughout this release. Commenters included municipal advisors, municipal entities, broker-dealers, banks, accountants, lawyers, engineers, registered investment advisers, organizations representing industry participants, investors, the Municipal Securities Rulemaking Board, members of Congress, and others.

Commenters generally supported the goals of the Proposal, although many expressed concerns about its breadth and recommended that the Proposal be amended or clarified in certain respects. Major themes in the comments included: (1) concerns about the proposed treatment of appointed board members and other public officials of municipal entities as advisors; (2) concerns about the proposed application to advice on investments of all municipal funds (versus investments associated with proceeds of municipal securities); and (3) potential effects on securities activities of banks for which there are no statutory exclusions from the definition of "municipal advisor." The Commission staff discussed many issues with other U.S. financial regulators, commenters, and interested market participants in devising a final rule that requires registration of parties engaging in municipal advisory activities without unnecessarily imposing additional regulation.

One theme reflected in the statutory exclusions to the definition of a municipal advisor and

¹³ See 15 U.S.C. 78o-4(e)(3).

in the Commission's consideration of additional regulatory exemptions involves an approach that focuses and limits the scope of these exclusions and exemptions based on identified activities ("activities-based exemptions") rather than on the basis of the status of particular categories of market participants ("status-based exemptions"). This approach aims to ensure that exemptions apply in targeted circumstances to appropriate identified activities. By comparison, a concern with status-based exemptions is that they could provide inappropriate competitive advantages to covered categories of market participants.¹⁴

In consideration of the views expressed, suggestions for alternatives, and other information provided by commenters, the Commission is adopting the rules with significant modifications from the Proposal to narrow the scope of the registration requirement, including through certain activity-based exemptions from the definition of municipal advisor, and to provide additional guidance to market participants about what constitutes municipal advice and who is required to register as a municipal advisor. Some of the more significant changes made in this adopting release are summarized as follows.

Broad Exemption for Public Officials and Employees of Municipal Entities and Obligated Persons

The Exchange Act excludes municipal entities and employees of municipal entities from the definition of municipal advisor.¹⁵ The Proposal did not extend the exclusion for "employees of a municipal entity" to include appointed officials. The Commission received approximately 670 comment letters to the effect that the proposed exclusion for employees of municipal entities was unduly narrow and that it failed to provide sufficient coverage for appointed board members and other public officials associated with municipal entities. The final rule provides a broad exemption

¹⁴ See *infra* Sections VIII.D.5.b. (discussing alternatives to the exclusions from the definition of municipal advisor) and VIII.D.6.b. (discussing alternatives to the exemptions from the definition of municipal advisor).

¹⁵ See 15 U.S.C. 78o-4(e)(4)(A).

from municipal advisor registration for all employees, governing body members, and other officials of municipal entities and obligated persons, to the extent that they act within the scope of their employment or official capacity.¹⁶ The Commission does not expect that the ordinary performance of the duties of an appointed member of a governing body of a municipal entity – such as voting, providing a statement or discussion of views, or asking questions at a public meeting – would cause that individual to be a municipal advisor with respect to the municipal entity on whose board he or she serves.

Limitation to Investments Related to Proceeds of Municipal Securities Instead of All Public Funds

The Exchange Act provides that the term “‘investment strategies’ includes plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments” (emphasis added).¹⁷ In the Proposal, the Commission proposed to interpret the “investment strategies” definition broadly to cover not only the statutorily-identified matters but also plans, programs, or pools of assets that invest any funds held by or on behalf of a municipal entity.

The Commission received approximately 60 comment letters to the effect that the Proposal interpreted the “investment strategies” definition too broadly to cover advice to municipal entities regarding plans or programs for the investment of all public funds of municipal entities (rather than investments more narrowly associated with proceeds of municipal securities and the recommendation of and brokerage of municipal escrow arrangements). The Commission has determined to adopt the statutory definition of “investment strategies,” but is also adopting an exemption for certain persons that will result in a narrower application of “investment strategies”

¹⁶ See infra Section III.A.1.c.i.

¹⁷ See 15 U.S.C. 78o-4(e)(3).

than originally proposed, limiting such strategies to matters relating to the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments, in lieu of all public funds of municipal entities.¹⁸ This more circumscribed approach to “investment strategies” has a narrowing effect throughout the municipal advisor registration regime (e.g., many investment advisers and a significant portion of the bank activities identified by commenters will not be subject to municipal advisor registration).

New Tailored Exemption for Banks

The Exchange Act does not exclude banks from the definition of municipal advisor. The Commission received approximately 300 comment letters to the effect that the Proposal did not provide needed exemptions for so-called “traditional banking” activities. Most of these comments regarding the impact on banks related to the proposed broad interpretation of the “investment strategies” definition. Many commercial banks and banking associations asserted that the Commission’s interpretation of “investment strategies” was overly broad and would potentially cover traditional banking products and services, such as deposit accounts, cash management products, and loans to municipalities. As a result, according to commenters, banks or bank employees that provide advice regarding such products and services could be considered municipal advisors, adding “a new layer of regulation on bank products for no meaningful public purpose.”¹⁹

The narrowing of the application of “investment strategies” in the final rule is designed to address the main concerns raised by these commenters.²⁰ In addition, the final rule provides a new tailored exemption from the definition of municipal advisor for a bank providing advice with

¹⁸ See infra Section III.A.1.b.viii.

¹⁹ See infra note 876 and accompanying text (discussing comments regarding an exemption for banks from the municipal advisor registration rules).

²⁰ See infra Section III.A.1.c.viii.

respect to the following: (1) any investments that are held in a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank; (2) any extension of credit by a bank to a municipal entity or obligated person, including the issuance of a letter of credit, the making of a direct loan, or the purchase of a municipal security by the bank for its own account; (3) any funds held in a sweep account; or (4) any investment made by a bank acting in the capacity of an indenture trustee or similar capacity (e.g., a bond indenture trustee, paying agent, or municipal escrow agent).

The final rule preserves the municipal advisor registration requirement for banks that engage in municipal advisory activities, such as banks that act as financial advisors to municipal entities in structuring issues of municipal securities. Also, the final rule preserves the municipal advisor registration requirement for banks that provide advice with respect to municipal derivatives.

Advice Standard in General

For purposes of the municipal advisor definition, the Dodd-Frank Act did not specifically define or otherwise provide a general standard to determine what constitutes “advice” to a municipal entity or obligated person. The Commission received comments requesting clarification of “advice” and suggesting general parameters for defining advice that distinguish between providing general information to a municipal entity and recommending a specific action to a municipal entity. While the Commission believes that the determination of whether a person provides advice to or on behalf of a municipal entity or obligated person depends on all the relevant facts and circumstances, the Commission also believes that additional guidance on the advice standard for purposes of the municipal advisor definition will provide greater clarity regarding the applicability of the municipal advisor registration requirement. Accordingly, the adopted rules provide that advice excludes, among other things, the provision of general information that does not

involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues).²¹

Exemption for Certain Swap Dealers

The Exchange Act does not exclude swap dealers from the definition of municipal advisor. The Commission received comments suggesting that regulation of swap dealers under the municipal advisor registration regime should be coordinated with other regulatory programs. The Commission recognizes that swap dealers are also subject to the provisions of Title VII of the Dodd-Frank Act,²² which provide the Commodity Futures Trading Commission (“CFTC”) with authority to register and implement business conduct standards for swap dealers with respect to their interactions with municipal entities and obligated persons that are “special entities,” as discussed further below in Section III.A.1.c.vi. The final rules exempt any registered swap dealer to the extent that such dealer recommends a municipal derivative or a trading strategy that involves a municipal derivative, so long as such dealer or associated person is not “acting as an advisor” to the municipal entity or obligated person, applying the standards applicable to the parties to such transactions under the existing regulatory regime of the CFTC.²³

Exemption When There is an Independent Registered Municipal Advisor

Several commenters suggested that a person providing advice with respect to municipal

²¹ See infra Section III.A.1.b.i.

²² See Dodd-Frank Act §§ 731 et seq., 764 et seq.

²³ See infra Section III.A.1.c.vi. The Commission also received similar comments regarding security-based swap dealers. As discussed herein, although the Commission is not providing an exemption in the rules as adopted for security-based swap dealers, security-based swap dealers may be eligible for exemption pursuant to another exemption, such as when there is a separate registered municipal advisor, and the Commission may in the future consider whether to provide a comparable exemption by rule. See id.

financial products or the issuance of municipal securities should not be regulated as a municipal advisor if the municipal entity or obligated person is otherwise represented by a municipal advisor. The Commission believes that if a municipal entity or obligated person is represented by a registered municipal advisor, parties to the municipal securities transaction and others who are not registered municipal advisors should be able to provide advice to such municipal entity or obligated person, so long as the responsibilities of each of the parties are clear.

Accordingly, the final rules exempt persons providing advice with respect to municipal financial products or the issuance of municipal securities from the definition of municipal advisor so long as: (1) an independent registered municipal advisor is providing advice with respect to the same aspects of the municipal financial product or issuance of municipal securities, is registered pursuant to Section 15B of the Exchange Act and the rules and regulations thereunder, and is not, and within at least the past two years was not, associated with the person seeking to rely on this exemption; (2) such person receives from the municipal entity or obligated person a representation in writing that it is represented by, and will rely on the advice of, an independent registered municipal advisor; and (3) such person provides written disclosure to the municipal entity or obligated person that such person is not a municipal advisor and, with respect to a municipal entity, is not subject to the statutory fiduciary duty applicable to municipal advisors under the Exchange Act, and such person provides a copy of such disclosure to the municipal entity's or the obligated person's independent registered municipal advisor.²⁴

Exclusion of Individuals from Registration

In the Proposal, the Commission proposed to require registration of all individuals associated with municipal advisory firms who engage in municipal advisory activities, as contrasted

²⁴ See infra Section III.A.1.c.iii.

with limiting registration to the municipal advisory firms themselves. For reasons further discussed in Sections III.A.2.a. and III.A.3. of this adopting release, the Commission is limiting the registration requirement to municipal advisory firms and sole proprietors.

II. INTRODUCTION

A. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.²⁵ The Dodd-Frank Act was enacted, among other things, to promote the financial stability of the United States by improving accountability and transparency in the financial system.²⁶ With Section 975 of Title IX of the Dodd-Frank Act, Congress amended Section 15B of the Exchange Act²⁷ to, among other things, make it unlawful for municipal advisors²⁸ to provide certain advice to, or solicit, municipal entities²⁹ or certain other persons without registering with the Commission.³⁰

1. Overview of Municipal Securities Market

a. Municipal Advisors

As discussed in the Proposal,³¹ until the passage of the Dodd-Frank Act, the activities of municipal advisors were largely unregulated, and municipal advisors were generally not required to register with the Commission or any other federal, state, or self-regulatory entity with respect to their municipal advisory activities. As discussed below in this section and in the Proposal,³² some

²⁵ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

²⁶ See Pub. L. No. 111-203 Preamble.

²⁷ 15 U.S.C. 78o-4.

²⁸ See *infra* Section III.A.1. (discussing the term “municipal advisor”).

²⁹ See *infra* Section III.A.1.b.ii. (discussing the term “municipal entity”).

³⁰ See Section 975(a)(1)(B) of the Dodd-Frank Act; 15 U.S.C. 78o-4(a)(1)(B).

³¹ See Proposal, 76 FR at 825.

³² See *id.*

entities that are now subject to registration as municipal advisors pursuant to Section 15B of the Exchange Act and rules or regulations promulgated thereunder currently are subject to regulation by various federal and state regulators in other capacities. These entities include brokers, dealers, municipal securities dealers, investment advisers, and banks. Such regulations, however, generally do not apply specifically to these entities' municipal advisory activities.

Municipal advisors, commonly referred to as "financial advisors,"³³ engage in municipal advisory activities in a variety of contexts. With respect to the issuance of municipal securities, municipal advisors (which may include entities registered as brokers, dealers, municipal securities dealers, or investment advisers acting as municipal advisors), among other things, may assist municipal entities in developing a financing plan, assist municipal entities in evaluating different financing options and structures, assist in the selection of other parties to the financing (such as bond counsel and underwriters), coordinate the rating process, ensure adequate disclosure, and/or evaluate and negotiate the financing terms.³⁴ According to the Municipal Securities Rulemaking Board ("MSRB"), approximately \$315 billion (70%)³⁵ of the municipal debt issued in 2008 was issued with the participation of municipal advisors.³⁶ The MSRB also stated that participation by municipal advisory firms in the issuance of municipal securities is rising, noting a 63% participation rate in 2006, a 66% participation rate in 2007, and a 70% participation rate in 2008.³⁷ A study that

³³ See infra note 36 (referring to municipal advisors as "financial advisors").

³⁴ See Jayaraman Vijayakumar and Kenneth N. Daniels, 2006, The Role and Impact of Financial Advisors in the Market for Municipal Bonds ("Vijayakumar and Daniels"), Journal of Financial Services Research, 30:43, at 46.

³⁵ See MSRB Study, supra note 2, at 1.

³⁶ See id. (referring to municipal advisors as "financial advisors"). Approximately 43% of the \$453 billion of municipal debt issued in 2008 (by par amount of bonds) (or 62% of the \$315 billion of municipal debt issued with financial advisors) was issued with the assistance of "financial advisors" that were not part of dealer firms regulated by the MSRB. See id., at 2.

³⁷ See id., at 2.

looked at historical involvement by “financial advisors” identified participation rates of approximately 50% in the period from 1984 to 2002.³⁸

As discussed in the Proposal,³⁹ municipal advisors may also engage in municipal advisory activities with respect to municipal financial products.⁴⁰ For example, as derivatives – which are municipal financial products – developed in the municipal securities market, some municipal advisory firms began marketing themselves as experts in derivatives. These municipal advisory firms are generally referred to as “swap advisors.”⁴¹ Swap advisors may provide advice solely with respect to a municipal derivative transaction or may provide advice in other types of municipal advisory capacities.

Further, municipal advisors may provide advice to municipal entities concerning guaranteed investment contracts and investment strategies.⁴² These advisory firms may assist in the investment of proceeds from bond offerings as well as manage other public monies. Such public monies include general and special funds of state and local governments, public pension plans, and other funds dedicated to public programs, such as public transportation, police and fire protection, public health, and public education. In addition, municipal advisors may help state and local governments find and evaluate other advisors that manage public funds and provide other types of services.⁴³

Other persons that may be required to register as municipal advisors include those who

³⁸ See Arthur Allen and Donna Dudney, May 2010, Does the Quality of Financial Advice Affect Prices? The Financial Review 45: 389 (“Allen and Dudney”).

³⁹ See Proposal, 76 FR at 825.

⁴⁰ See infra Section III.A.1.b.iv. (discussing the term “municipal financial products”).

⁴¹ See MSRB Study, supra note 35.

⁴² See infra Sections III.A.1.b.vi. and III.A.1.b.viii. (discussing the terms “guaranteed investment contracts” and “investment strategies,” respectively).

⁴³ See Investment Advisers Act Release No. 3043 (July 1, 2010), 75 FR 41018, 41019 (July 14, 2010) (“Political Contributions Final Rule”).

solicit municipal entities on behalf of brokers, dealers, municipal securities dealers, municipal advisors, and investment advisers. Such solicitation activities are discussed herein.⁴⁴

b. Municipal Entities and Municipal Financial Products

The municipal securities market consists of approximately 44,000 issuers,⁴⁵ a diverse group that includes states, their political subdivisions (such as cities, towns, counties, and school districts), and their instrumentalities, authorities, agencies, and special districts. These public bodies are governed by state and local laws, including state constitutions, statutes, city charters, and municipal codes.⁴⁶ Such constitutions, statutes, charters, and codes impose on municipal issuers requirements relating to governance, budgeting, accounting, and other financial matters.⁴⁷ The governing bodies of municipal issuers are as varied as the types of issuers, ranging from state governments, cities, towns, counties, and school districts, to authorities, agencies, and other special districts.⁴⁸

Municipal securities are issued by government entities to pay for a variety of public projects, to obtain cash flow for other governmental needs, and to provide tax-exempt or taxable financing for non-governmental private projects by acting as a conduit on behalf of private organizations.⁴⁹ In 2011, there were over one million different municipal bonds outstanding, totaling \$3.7 trillion in

⁴⁴ See infra Section III.A.1.b.x.

⁴⁵ See Commission Report on the Municipal Securities Market, 1 (July 31, 2012), available at <http://sec.gov/news/studies/2012/munireport073112.pdf> (“2012 Report on the Municipal Securities Market”).

⁴⁶ See American Bar Association, Disclosure Roles of Counsel in State and Local Government Securities Offerings 1 (Third Edition, 2009) (“Disclosure Roles of Bond Counsel”).

⁴⁷ See id., at 2.

⁴⁸ See id., at 78.

⁴⁹ The Internal Revenue Code delineates the purposes for which tax-exempt municipal bonds may be issued for the benefit of organizations other than states and local governments, i.e., conduit borrowers. See 26 U.S.C. 142-145, 1394.

principal.⁵⁰ Also, there were 13,463 municipal issuances, totaling \$355 billion of principal.⁵¹ Further, in 2011, the average daily trading volume for the municipal bond market was \$11.3 billion.⁵²

Interests offered by college savings plans (“529 Savings Plans”) that comply with Section 529 of the Internal Revenue Code⁵³ are another type of municipal security. 529 Savings Plans involve offerings of interests in state tuition programs and qualified savings plans that are public instrumentalities of the particular state, and provide tax advantages designed to encourage saving for future college costs.⁵⁴ 529 Savings Plan assets have increased from approximately \$9 billion in 2000 to approximately \$190 billion in 2012, and the number of 529 Savings Plan accounts has increased from approximately 1.3 million in 2000 to approximately 11 million in 2012.⁵⁵

A person that sells interests in 529 Savings Plans generally must be registered as a broker, dealer, or municipal securities dealer and comply with applicable MSRB rules.⁵⁶ 529 Savings Plans are also relevant in the context of municipal advisor regulation, because an issuance of interests in

⁵⁰ See 2012 Report on the Municipal Securities Market, supra note 45, at 5. In 2011, there were fewer than 50,000 different corporate bonds, totaling \$11.5 trillion in principal (this figure includes foreign bonds). See id. There were also \$22.5 trillion of corporate equities outstanding. See id.

⁵¹ See id., at 6.

⁵² See id., at 21. Compare this to the corporate bond market, which in 2011 had an average daily trading volume of \$20.6 billion. See id.

⁵³ See 26 U.S.C. 529.

⁵⁴ See 2012 Report on the Municipal Securities Market, supra note 45, at 8.

⁵⁵ See College Savings Plans Network 529 Report (March 2013), available at <http://www.collegesavings.org/includes/pdfs/March%202013%20529%20Report%20Final.pdf> and Investment Company Institute, 529 Plan Program Statistics, Fourth Quarter 2012, available at http://www.ici.org/research/stats/529s/529s_12_q4.

⁵⁶ See, e.g., MSRB Notice 2002-19 (May 14, 2002) (Application of Fair Practice and Advertising Rules to Municipal Fund Securities).

529 Savings Plans is an issuance of municipal securities.⁵⁷ Further, 529 Savings Plans may engage in transactions involving municipal financial products and may also seek advice in connection with such products or issuances.⁵⁸ Moreover, third parties seeking to advise 529 Savings Plans may solicit such plans for that purpose.⁵⁹

Public pension plans may also engage in transactions in municipal financial products and seek advice in connection with such transactions. Third parties may solicit these public pension plans on behalf of firms seeking to provide advice to these plans.⁶⁰ According to the 2011 Census Bureau survey, there were 3,418 state- and locally-administered pension systems in 2011.⁶¹ As of the first quarter of 2013, public pension plans had over \$3 trillion of assets and represented approximately 30 percent of all U.S. pension assets.⁶²

In addition to public pension plans and 529 Savings Plans, state and local government agencies also maintain other pools of assets, including general funds and other special funds. Governmental entities generally invest such funds in a combination of individualized investments,

⁵⁷ See MSRB, 529 Plan Basics, available at <http://emma.msrb.org/EducationCenter/FAQs.aspx?topic=PlanBasics> and MSRB, Interpretation Relating to Sales of Municipal Fund Securities in the Primary Market (January 18, 2001), available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/Definitional/Rule-D-12.aspx?tab=2#_4B905EF1-5F85-4D2E-B27C-6B94EF405F47 (citing Letter from Catherine McGuire, Chief Counsel, Division of Trading and Markets, Commission, to Diane G. Klinke, General Counsel, MSRB, dated February 26, 1999, in response to letter from Diane G. Klinke, General Counsel, MSRB, to Catherine McGuire, Chief Counsel, Division of Trading and Markets, Commission, dated June 2, 1998).

⁵⁸ See Political Contributions Final Rule, *supra* note 43, at 41044-46.

⁵⁹ See *id.*, at 41019.

⁶⁰ See *id.*

⁶¹ See U.S. Census Bureau, Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Report: 2011 (August 2013), available at <http://www2.census.gov/govs/retire/2011summaryreport.pdf>.

⁶² See Federal Reserve Board, Financial Accounts of the United States – Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, Table L.117 (First Quarter 2013), available at <http://www.federalreserve.gov/releases/z1/current/z1.pdf>.

investment agreements, and local government investment pools (“LGIPs”).⁶³

Historically, the over-the-counter derivatives markets have been relatively opaque because of their privately negotiated, bilateral nature and the limited availability of transaction data such as prices and volumes.⁶⁴ Accordingly, there is currently no comprehensive data on how many municipal issuers are active in the \$162 trillion interest-rate swap market,⁶⁵ although reported estimates of the size of the municipal derivatives market range from \$100 billion to \$300 billion annually in notional principal amount.⁶⁶ Further, estimates of the number of municipal issuers that have engaged in derivative transactions also vary. Some anecdotal evidence suggests a relatively wide use of municipal derivatives in recent years. For instance, a 2008 review of Pennsylvania Department of Community and Economic Development records indicated that 185 school districts, towns, and counties in Pennsylvania have entered into derivative transactions since 2003, when the state’s law was explicitly changed to allow for such transactions.⁶⁷ Other estimates, however, have

⁶³ According to a 2009 article, 45 states have LGIPs with assets totaling more than \$250 billion. See Jeff Pentages, Local Government Investment Pools and the Financial Crisis: Lessons Learned, October 2009, *Government Finance Review* 25. As of the first quarter of 2013, state and local governments had approximately \$2.1 trillion dollars in total financial assets. See Federal Reserve Board, Financial Accounts of the United States – Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, Table L.104 (First Quarter 2013), available at <http://www.federalreserve.gov/releases/z1/current/z1.pdf>.

⁶⁴ The Dodd-Frank Act, however, will require more public reporting of derivative transactions in the future. For example, the CFTC has adopted rules to implement a framework for the real-time public reporting of swap transactions and pricing data for swap transactions. See 77 FR 1182 (January 9, 2012). Moreover, the Dodd-Frank Act requires the Commission to adopt, and the Commission has proposed, rules to provide for the reporting of security-based swaps information to registered security-based swap data repositories or to the Commission and the public dissemination of security-based swap transaction, volume, and pricing information. See Securities Exchange Act Release No. 63346 (November 19, 2010), 75 FR 75208 (December 2, 2010).

⁶⁵ See 2012 Report on the Municipal Securities Market, supra note 45, at 91.

⁶⁶ See MSRB Study, supra note 35, at 10.

⁶⁷ See Martin Z. Braun, Deutsche Bank Swap Lures County as Budgets Crumble, Bloomberg (Nov. 26, 2008), available at

pointed to a less widespread use of derivatives among municipal issuers. For example, a 2007 study by Standard & Poor's identified 750 municipal issuers that engaged in interest rate swaps.⁶⁸ In addition, in October 2009, Moody's undertook a review of the state and local governments for which Moody's provides ratings and identified 500 entities with outstanding interest rate swaps.⁶⁹ Moody's also estimated that Pennsylvania issuers accounted for 22% of all municipal derivative transactions, suggesting that a broad participation in derivative transactions by municipal entities in Pennsylvania did not necessarily translate into a broad participation by municipal entities nationwide.⁷⁰ Since 2008, the use of derivatives by municipal entities has declined, and many municipal entities have terminated existing interest rate swaps.⁷¹

2. Historical Regulation of Municipal Securities and Municipal Advisors

a. Municipal Securities Market

As discussed in the Proposal,⁷² the Securities Act of 1933 ("Securities Act")⁷³ and the

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aUYLG7W1nGpM>.

⁶⁸ See Joe Mysak, California Declares War on State Bond Short-Sellers, Bloomberg (Apr. 27, 2010), available at <http://www.bloomberg.com/news/2010-04-28/california-declares-war-on-short-sellers-of-bonds-commentary-by-joe-mysak.html>.

⁶⁹ See Joe Mysak, Swaps Nightmares Become Real for Amateur Financiers, Bloomberg (Dec. 15, 2009), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVCDZ6c1PYC0>.

⁷⁰ See id.

⁷¹ See, e.g., William Selway, Derivatives Sold to Governments Get Dodd-Frank Disclosure: One Year Later, Bloomberg (Jul. 18, 2011), available at <http://www.bloomberg.com/news/2011-07-18/derivatives-sold-to-governments-get-dodd-frank-disclosure-one-year-later.html>; Michael McDonald, Wall Street Collects \$4 Billion From Taxpayers as Swaps Backfire, Bloomberg (Nov. 10, 2010), available at <http://www.bloomberg.com/news/2010-11-10/wall-street-collects-4-billion-from-taxpayers-as-swaps-backfire.html>; Transcript of the U.S. Securities and Exchange Commission Birmingham Field Hearing on the State of the Municipal Securities Market, at 239-240 and 243.

⁷² See Proposal, 76 FR at 826.

⁷³ 15 U.S.C. 77a et seq.

Exchange Act⁷⁴ were both enacted with exemptions for municipal securities, except for the antifraud provisions of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.⁷⁵ In the early 1970s, the municipal securities market was still relatively small.⁷⁶ Up until that time, the standard issue was usually a general obligation bond, with fairly standard features, and the typical participants were banks, underwriters, and bond counsel.⁷⁷

In 1975, Congress granted new authority to regulate intermediaries in the market for municipal securities. As part of the Securities Acts Amendments of 1975 (“1975 Amendments”), Congress created a limited regulatory scheme for the municipal securities market at the federal level.⁷⁸ That scheme included mandatory registration with the Commission for brokers, dealers, and municipal securities dealers involved in effecting municipal securities transactions,⁷⁹ and gave

⁷⁴ 15 U.S.C. 78a *et seq.*

⁷⁵ *See, e.g.*, Securities Act Section 3(a)(2) (15 U.S.C. 77c(a)(2)); Securities Act Section 12(a)(2) (15 U.S.C. 77l(a)(2)); Exchange Act Section 3(a)(12) (15 U.S.C. 78c(a)(12)); Exchange Act Section 3(a)(29) (15 U.S.C. 78c(a)(29)).

⁷⁶ There were \$235.4 billion of municipal bonds outstanding in 1975 after an issuance of \$58 billion in that year. *See* The Bond Buyer’s Municipal Finance Statistics, 1975 (June 1976). At the end of 1976, there were \$323 billion of corporate bonds outstanding, which was about one third more than state and local government securities and about half as much as U.S. Treasury securities. *See* Federal Reserve Bank of New York, the Market for Corporate Bonds (Autumn 1977). As of the first quarter of 2013, there were approximately \$3.7 trillion of municipal bonds outstanding, \$13 trillion of corporate and foreign bonds outstanding, and \$12 trillion of Treasury securities outstanding. *See* Federal Reserve Board, Financial Accounts of the United States – Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, Tables L.209, 211 and 212, (First Quarter 2013), available at <http://www.federalreserve.gov/releases/z1/current/z1.pdf>.

⁷⁷ *See* Ann Judith Gellis, Municipal Securities Market: Same Problems – No Solutions, 21 Del. J. Corp. L. 427, 428 (1996).

⁷⁸ *See, e.g.*, Exchange Act Sections 15(c)(1), 15(c)(2), 15B(c)(1), 15B(c)(2), 17(a), 17(b), and 21(a)(1) (15 U.S.C. 78o(c)(1), 78o(c)(2), 78o-4(c)(1), 78o-4(c)(2), 78q(a), 78q(b), and 78u(a)(1)).

⁷⁹ The Exchange Act defines a “municipal securities dealer” as any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity,

the Commission broad rulemaking and enforcement authority over such persons.⁸⁰ In addition, the 1975 Amendments authorized the creation of the MSRB and granted it authority to promulgate rules concerning transactions in municipal securities by brokers, dealers, and municipal securities dealers. The 1975 Amendments, however, did not create a regulatory scheme for, or impose any new requirements on, municipal issuers. Rather, the 1975 Amendments expressly prohibited the Commission and the MSRB from requiring municipal securities issuers, either directly or indirectly, to file any application, report, or document with the Commission or the MSRB prior to any sale by the issuer.⁸¹

As noted above and in the Proposal, pursuant to the 1975 Amendments, unless an exception or exemption applies, all brokers, dealers, and municipal securities dealers that underwrite or trade municipal securities are required to register with the Commission.⁸² All brokers, dealers, and municipal securities dealers that engage in municipal securities transactions also must register with the MSRB and comply with its rules.⁸³ Furthermore, unless it is a bank, each broker, dealer, and municipal securities dealer that engages in municipal securities transactions must be a member of

through a broker or otherwise. See 15 U.S.C. 78c(a)(30).

⁸⁰ See supra note 78. Enforcement activities regarding municipal securities dealers must be coordinated by the Commission, the Financial Industry Regulatory Authority (“FINRA”), and the appropriate bank regulatory agency. See Exchange Act Sections 15B(c)(6)(A), 15B(c)(6)(B), and 17(c) (15 U.S.C. 78o-4(c)(6)(A), 78o-4(c)(6)(B), 78q(c)).

⁸¹ Section 15B(d)(1) of the Exchange Act (commonly known as the “Tower Amendment”) provides that “[n]either the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities.” 15 U.S.C. 78o-4(d)(1).

⁸² See 15 U.S.C. 78o-4(a)-(b). See also Proposal, 76 FR at 827.

⁸³ See 15 U.S.C. 78o-4(c)(1). See also MSRB, Registration Guidelines for Regulated Entities, available at <http://www.msrb.org/Rules-and-Interpretations/~media/Files/User-Manuals/GuidelinesforRegistration.ashx>.

FINRA.⁸⁴ FINRA is required to examine brokers, dealers, and municipal securities dealers for compliance with the Exchange Act, rules and regulations thereunder, and MSRB rules.⁸⁵ Bank municipal securities dealers are examined by their appropriate regulatory agencies.⁸⁶

Since 1975, the municipal securities market has grown and evolved significantly to encompass a wide variety of bond structures⁸⁷ and credit enhancements. The variety of financing options has led municipal entities to increasingly rely on external advisors to assist them in deciding among the structural choices for their debt and to help them negotiate with a variety of specialized intermediaries.⁸⁸ For example, municipal bond insurance was first introduced in 1971.⁸⁹ The introduction of variable rate municipal bonds in the early 1980s increased the use of letter of credit-supported municipal bonds.⁹⁰ In 1988, auction rate securities were introduced into the municipal market.⁹¹ In addition, derivative products have been utilized by municipal securities issuers

⁸⁴ See 15 U.S.C. 78o(b)(8) and 78o-4(a).

⁸⁵ See 15 U.S.C. 78o-4(c)(7).

⁸⁶ The term “appropriate regulatory agency,” when used with respect to a municipal securities dealer, is defined in Section 3(a)(34)(A) of the Exchange Act. 15 U.S.C. 78c(a)(34)(A). The Commission also has the authority to examine all registered municipal securities dealers. See 15 U.S.C. 78q(b)(1).

⁸⁷ Although it is helpful to think of municipal securities as either (1) general obligation bonds backed by the “full faith and credit,” or an unlimited taxing power of the issuing entity, or (2) revenue bonds, these general categories mask a broad range of diversity and complexity in the underlying security for municipal bonds. See Gary Gray and Patrick Cusatis, *Municipal Derivative Securities – Uses and Valuation* 21 (1995) (discussion of revenue bonds). See also *Disclosure of Bond Counsel*, *supra* note 46, at 54-55 (discussion of conduit bonds).

⁸⁸ See Vijayakumar and Daniels, *supra* note 34, at 43-44.

⁸⁹ See Gray and Cusatis, *supra* note 87, at 30-31.

⁹⁰ See *id.* As the Commission noted in the Proposal, although the use of letters of credit and bond insurance has declined since 2008, these forms of credit enhancement remain an option for municipal entities to consider when issuing municipal securities. See 76 FR at 827, note 48. See also 2012 Report on the Municipal Securities Market, *supra* note 45, at 10-11.

⁹¹ See Gray and Cusatis, *supra* note 87, at 41.

beginning generally with interest rate swap transactions in the mid-1980s. The derivatives utilized since then have become more complex.⁹²

b. Municipal Advisors

As discussed above and in the Proposal,⁹³ many market participants advise municipal entities about the issuance of municipal securities and municipal financial products. Historically, however, these participants have been largely unregulated with respect to their municipal advisory activities. In addition, Commission staff has taken the position that financial advisors that limit their advisory activities solely to advising municipal issuers as to the structuring of their financings may not need to register as investment advisers.⁹⁴

Approximately fifteen states, however, as well as a number of municipalities, have rules relating to the conduct of some municipal advisors (generally, financial advisors and swap advisors). For example, these governmental entities have enacted pay-to-play prohibitions that range from broad proscriptions relating to all state and local contracts to narrowly defined rules that apply only to specific situations.⁹⁵ Some state and local entities also require certain types of

⁹² See *id.*, at 49. Municipal derivatives must often be structured in accordance with the provisions of the tax code and other laws that apply to the issuance of tax-exempt financings. See David L. Taub, Understanding Municipal Derivatives, August 2005, Government Finance Review 21. The most common use for derivatives in the municipal securities market is the use of interest rate swaps for new, anticipated, or outstanding debt. See *id.*

⁹³ See Proposal, 76 FR at 827.

⁹⁴ See Division of Investment Management: Staff Legal Bulletin No. 11, Applicability of the Advisers Act to Financial Advisors of Municipal Securities Issuers (Sep. 19, 2000), available at <http://www.sec.gov/interps/legal/slbim11.htm> ("Staff Legal Bulletin No. 11") (explaining staff's views as to the circumstances under which financial advisors (a) may be investment advisers, and (b) may give advice to issuers of municipal securities regarding the investment of offering proceeds without being deemed to be investment advisers).

⁹⁵ See MSRB Study, *supra* note 35, at 4.

municipal advisors to disclose actual or apparent conflicts of interest.⁹⁶

B. Dodd-Frank Act and the Need for Oversight

As discussed in more detail below and in the Proposal,⁹⁷ the Dodd-Frank Act amended the Exchange Act to require municipal advisors to register with the Commission.⁹⁸ In addition, the Exchange Act, as amended by the Dodd-Frank Act, grants the MSRB regulatory authority over municipal advisors⁹⁹ and imposes a fiduciary duty on municipal advisors when advising municipal entities.¹⁰⁰

The Commission believes that regulation of municipal advisors is in the public interest and will improve the protection of municipal entities, including the protection of municipal entities in their capacities as investors, and those who invest in municipal securities. As noted above,¹⁰¹ according to a Senate Report related to the Dodd-Frank Act, “[t]he \$3 trillion municipal securities market is subject to less supervision than corporate securities markets, and market participants generally have less information upon which to base investment decisions. During the [financial]

⁹⁶ See *id.*, at 6.

⁹⁷ See, generally, Proposal, 76 FR 824.

⁹⁸ See Section 975(a)(1)(B) of the Dodd-Frank Act; 15 U.S.C. 78o-4(a)(1)(B).

⁹⁹ See 15 U.S.C. 78o-4(b).

¹⁰⁰ See 15 U.S.C. 78o-4(c). Specifically, Exchange Act Section 15B(c)(1) provides that: “A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor’s fiduciary duty or that is in contravention of any rule of the Board.” 15 U.S.C. 78o-4(c)(1). The Commission notes that a number of commenters discussed the applicability of fiduciary duty to municipal advisors. This adopting release generally does not address those comments, as this release generally concerns the registration of municipal advisors. The Commission notes, however, that the fiduciary duty of a municipal advisor, as set forth in Exchange Act Section 15B(c)(1), extends only to its municipal entity clients. The Exchange Act does not impose a fiduciary duty with respect to advice to obligated persons. See *infra* note 202 and accompanying text (discussing the definition of the term “obligated person”).

¹⁰¹ See *supra* notes 3-4 and accompanying text.

crisis, a number of municipalities suffered losses from complex derivatives products that were marketed by unregulated financial intermediaries.”¹⁰² Accordingly, in response to the financial crisis that began in 2008, the Dodd-Frank Act amended the Exchange Act to require “a range of municipal financial advisors to register with the [Commission] and comply with regulations issued by the [MSRB].”¹⁰³

A number of actions brought by the Commission against municipal market participants also highlight the abuses in the municipal securities market. For example, the Commission brought a number of actions alleging payments by J.P. Morgan Securities Inc. (now J.P. Morgan Securities LLC) to local firms whose principals or employees were friends of public officials of Jefferson County, Alabama in connection with a \$5 billion bond underwriting and interest rate swap agreement business.¹⁰⁴ In addition, the Commission has settled several actions against major financial institutions for their role in a series of complex, wide-ranging bid-rigging schemes

¹⁰² See S. Rep. No. 111-176, at 38 (2010).

¹⁰³ See *id.*

¹⁰⁴ The Commission had alleged that J.P. Morgan Securities engaged in an improper payment scheme in connection with obtaining municipal securities underwriting and interest swap agreement business from Jefferson County, Alabama. The Commission had alleged that J.P. Morgan Securities incorporated certain of the costs of these payments into higher swap interest rates that it charged the County, directly increasing the swap transaction costs to the County and its taxpayers. J.P. Morgan Securities was censured, paid a \$25 million civil penalty, made a \$50 million payment to the County, and forfeited more than \$647 million in claimed termination fees under the swaps. See In the Matter of J.P. Morgan Securities Inc., Securities Exchange Act Release No. 60928 (Nov. 4, 2009) (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order). See also SEC v. Larry P. Langford, et al., Litigation Release No. 20545 (Apr. 30, 2008) and SEC v. Charles E. LeCroy and Douglas W. MacFaddin, Litigation Release No. 21280 (Nov. 4, 2009) (charging an Alabama local government official, a bond dealer and J.P. Morgan Securities employees with conducting undisclosed payment schemes in connection with awarding Jefferson County municipal bond and swap agreement business).

involving derivatives utilized by municipalities and underlying obligors as reinvestment products.¹⁰⁵ Further, in August 2011, the Commission filed a civil injunctive action against Stifel, Nicolaus & Co., Inc. and its former Senior Vice President, David Noack, for allegedly violating federal securities laws in connection with a \$200 million sale of highly leveraged and unsuitably risky derivatives to five Wisconsin school districts.¹⁰⁶ According to the complaint, Stifel and Noack misrepresented the risks of the investments and failed to disclose material facts to the school districts.

C. Interim Final Temporary Rule 15Ba2-6T and Form MA-T

The registration requirement for municipal advisors established by the Dodd-Frank Act became effective on October 1, 2010.¹⁰⁷ To enable municipal advisors to temporarily satisfy the registration requirement, and to make relevant information available to the public and municipal

¹⁰⁵ Collectively, the five financial institutions, Banc of America Securities LLC, UBS Financial Services Inc., J.P. Morgan Securities LLC, Wachovia Bank, N.A., and GE Funding Capital Market Services, Inc., paid \$205 million to settle the Commission actions, all of which was distributed to hundreds of harmed municipal entities or borrowers, located in 47 states, the District of Columbia, Guam, and Puerto Rico, as well as an additional \$540 million to settle parallel proceedings by other federal and state authorities for their misconduct. See In the Matter of Banc of America Securities, Securities Exchange Act Release No. 63451 (Dec. 7, 2010); SEC v. UBS Financial Services Inc., Civil Action No. 11-CV-2885 (D.N.J. May 4, 2011); SEC v. J.P. Morgan Securities LLC, Civil Action No. 11-CV-3877 (D.N.J. Jul. 7, 2011); SEC v. Wachovia Bank, N.A., Civil Action No. 2:11-cv-07135-WJM-MF (D.N.J. Dec. 8, 2011); SEC v. GE Funding Capital Market Services, Inc., Civil Action No. 2:11-cv-07465-WJM-MF (D.N.J. Dec. 23, 2011).

¹⁰⁶ See SEC v. Stifel, Nicolaus & Co., Inc. and David W. Noack, Civil Action No. 2:11-cv-00755-AEG (E.D. Wisc. Aug. 10, 2011). The Commission also charged, and settled with, RBC Capital Markets, LLC for their involvement in these sales. According to the order instituting administrative and cease-and-desist proceedings, RBC negligently recommended and sold these investments, despite significant internal concerns about the suitability of the investments for municipalities like the school districts. Moreover, RBC's marketing materials failed to explain adequately the risks associated with the investments. See In the Matter of RBC Capital Markets, LLC, Securities Exchange Act Release No. 65404 (Sept. 27, 2011).

¹⁰⁷ See Section 975(i) of the Dodd-Frank Act.

entities, the Commission adopted interim final temporary Rule 15Ba2-6T¹⁰⁸ on September 1, 2010.¹⁰⁹ Pursuant to Rule 15Ba2-6T, a municipal advisor may temporarily satisfy the statutory registration requirement by submitting certain information electronically through the Commission's public website on Form MA-T.¹¹⁰

Form MA-T requires a municipal advisor to indicate the purpose for which it is submitting the form (i.e., initial application, amendment, or withdrawal), provide certain basic identifying and contact information concerning its business, indicate the nature of its activities, and supply information about its disciplinary history and the disciplinary history of its associated municipal advisor professionals.¹¹¹

As originally adopted, the interim final temporary rule provided that, unless rescinded, a municipal advisor's temporary registration by means of Form MA-T would expire on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule establishing a permanent registration regime; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) December 31, 2011.¹¹² The temporary registration procedure was developed as a transitional step toward the implementation of a permanent registration regime, which, as discussed below, the Commission is adopting today. On December 21, 2011, the Commission extended the expiration date of the

¹⁰⁸ 17 CFR 240.15Ba2-6T.

¹⁰⁹ See Temporary Registration Rule Release, supra note 5.

¹¹⁰ 17 CFR 249.1300T. A municipal advisor that completes the temporary registration form and receives confirmation from the Commission that the form was filed is temporarily registered for purposes of Section 15B. As of March 31, 2013, there were approximately 1,130 Form MA-T registrants.

¹¹¹ See Temporary Registration Rule Release, supra note 5, for a full description of the requirements of Form MA-T.

¹¹² See Temporary Registration Rule Release, 75 FR at 54471.

temporary registration regime to September 30, 2012, in order to continue to provide a method for municipal advisors to temporarily satisfy the statutory registration requirement.¹¹³ On September 21, 2012, the Commission further extended the expiration date of the temporary registration regime to September 30, 2013.¹¹⁴ Today, in a separate release, the Commission is extending the expiration date of the temporary registration regime to December 31, 2014.¹¹⁵ This extension will enable municipal advisors that are required to register with the Commission on or after the Effective Date but before the applicable compliance date to continue to register under the temporary registration regime.

D. Proposal to Establish a Registration Regime for Municipal Advisors

In light of the requirements of Section 975 of the Dodd-Frank Act, and in anticipation of the expiration of Rule 15Ba2-6T, on December 20, 2010, the Commission proposed Rules 15Ba1-1 to 15Ba1-7 under the Exchange Act and Forms MA, MA-I, MA-W, and MA-NR to establish a permanent registration regime for all persons meeting the definition of municipal advisor, including those persons currently registered on Form MA-T.¹¹⁶ The Proposal was published for comment in the Federal Register on January 6, 2011.¹¹⁷

In response to the Proposal, the Commission received over 1,000 unique comment letters

¹¹³ See Securities Exchange Act Release No. 66020 (December 21, 2012), 76 FR 80733 (December 27, 2011).

¹¹⁴ See Securities Exchange Act Release No. 67901 (September 21, 2012), 77 FR 59061 (September 26, 2012). As extended, all temporary municipal advisor registrations will expire on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on September 30, 2013. See 17 CFR 240.15Ba2-6T(e).

¹¹⁵ See Rule 15Ba2-6T and Form MA-T Extension Release, supra note 7.

¹¹⁶ See Proposal, 76 FR at 824.

¹¹⁷ See id.

from broker-dealers, investment advisers, individuals, banks, municipal entities, attorneys, engineers, and other market participants.¹¹⁸ In general, commenters supported the Proposal's overarching goal to establish a permanent registration regime for municipal advisors. As discussed further below, however, many commenters recommended that the Proposal be modified or clarified in certain respects.

The Commission has carefully considered these comments and is adopting Rules 15Ba1-1 to 15Ba1-8 and 15Bc4-1 under the Exchange Act and Forms MA, MA-I, MA-W, and MA-NR, with revisions as appropriate. In discussing these rules and forms, the Commission highlights and addresses below commenters' main issues, concerns, and suggestions.

The Commission believes that the information required to be disclosed pursuant to the new rules and forms will enhance the Commission's oversight of municipal advisors and their activities in the municipal securities market. Moreover, the Commission believes the information provided pursuant to these rules and forms will aid municipal entities and obligated persons in choosing municipal advisors and engaging in transactions or investments with municipal advisors.

III. DISCUSSION

Section 15B(a)(1) of the Exchange Act, as amended by the Dodd-Frank Act, makes it unlawful for a municipal advisor¹¹⁹ to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the

¹¹⁸ See <http://www.sec.gov/comments/s7-45-10/s74510.shtml>. The Commission has also considered the comment letters that were submitted in response to the publication of the Temporary Registration Rule Release. See <http://sec.gov/comments/s7-19-10/s71910.shtml> (comments received on the Temporary Registration Rule Release).

¹¹⁹ See *infra* Section III.A.1. (discussing the term "municipal advisor").

municipal advisor is registered with the Commission.¹²⁰ Section 15B(a)(2) of the Exchange Act, as amended by the Dodd-Frank Act, provides that a municipal advisor may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning the municipal advisor and any person associated with the municipal advisor as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹²¹

Consistent with the requirements of the Dodd-Frank Act, as discussed in detail below, the Commission is adopting new rules and forms that establish a Commission registration regime for municipal advisors, which the Commission believes is necessary and appropriate in the public interest and will improve the protection of municipal entities and investors in municipal securities.

A. Rules for the Registration of Municipal Advisors

1. Rule 15Ba1-1: Definition of “Municipal Advisor” and Related Terms

a. Statutory Definition of “Municipal Advisor”

Section 15B(e)(4)(A) of the Exchange Act,¹²² as amended by the Dodd-Frank Act, defines the term “municipal advisor” to mean a person (who is not a municipal entity¹²³ or an employee of a municipal entity¹²⁴) that (i) provides advice to or on behalf of a municipal entity or obligated person¹²⁵ with respect to municipal financial products¹²⁶ or the issuance of municipal securities,¹²⁷

¹²⁰ See 15 U.S.C. 78o-4(a)(1)(B). For a discussion of the terms “municipal entity,” “obligated person,” “municipal financial products,” and “solicitation of a municipal entity or obligated person,” see *infra* Section III.A.1.b.

¹²¹ See 15 U.S.C. 78o-4(a)(2).

¹²² 15 U.S.C. 78o-4(e)(4)(A).

¹²³ See *infra* Section III.A.1.b.ii. (discussing the term “municipal entity”).

¹²⁴ See *infra* Section III.A.1.c.i. (discussing the Commission’s interpretation of the exclusion for employees of a municipal entity from the definition of the term “municipal advisor” and a parallel exemption for employees of obligated persons).

¹²⁵ See *infra* Section III.A.1.b.iii. (discussing the term “obligated person”).

including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, or (ii) undertakes a solicitation of a municipal entity.¹²⁸ As discussed in the Proposal,¹²⁹ the statutory definition of municipal advisor is broad and includes persons that traditionally have not been considered to be municipal financial advisors. Specifically, the definition of a municipal advisor includes “financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors”¹³⁰ that engage in municipal advisory activities.¹³¹

The statutory definition of municipal advisor includes distinct groups of professionals that offer different services and compete in distinct markets. As noted in the Proposal, the three principal types of municipal advisors are: (1) financial advisors, including, but not limited to, brokers, dealers, and municipal securities dealers already registered with the Commission, that provide advice to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products;¹³² (2) investment advisers that advise municipal entities on the investment of public monies, including the proceeds of municipal securities;¹³³ and (3) third-party marketers and solicitors.

¹²⁶ See *infra* Section III.A.1.b.iv. (discussing the term “municipal financial products”).

¹²⁷ See *infra* Section III.A.1.b.vii. (discussing the term “issuance of municipal securities”).

¹²⁸ See *infra* Section III.A.1.b.x. (discussing the term “solicitation of a municipal entity or obligated person”).

¹²⁹ See Proposal, 76 FR at 828.

¹³⁰ See 15 U.S.C. 78o-4(e)(4).

¹³¹ See *infra* note 143 and accompanying text (discussing the definition of “municipal advisory activities”).

¹³² See Proposal, 76 FR at 829. For clarity, the Commission notes that financial advisors as referred to herein also include swap advisors, including some that are registered with the CFTC or the SEC in other capacities, that provide advice to municipal entities on their use of municipal financial products.

¹³³ See *infra* Section III.A.1.b.iv. (discussing the term “proceeds of municipal securities”).

Relevant exclusions from the definition of a municipal advisor also limit the scope of the three types of municipal advisors. The statutory definition of municipal advisor explicitly excludes “a broker, dealer, or municipal securities dealer serving as an underwriter..., attorneys offering legal advice or providing services that are of a traditional legal nature, [and] engineers providing engineering advice[.]”¹³⁴ Further, the statutory definition of municipal advisor excludes “any investment adviser registered under the Investment Advisers Act of 1940 [(“Investment Advisers Act”)], or persons associated with such investment advisers who are providing investment advice” and “any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps[.]”¹³⁵ As discussed more fully below in Section III.A.1.c., the Commission also proposed Rule 15Ba1-1(d)(2), and is adopting with modifications as Rules 15Ba1-1(d)(2) and 15Ba1-1(d)(3) a definition of “municipal advisor” that interprets those exclusions and provides other activity-based (but not status-based) exemptions.

The Commission also noted in the Proposal that, in defining the term municipal advisor in Exchange Act Section 15B(e)(4), Congress did not distinguish between persons who are compensated for providing advice and those who are not. Accordingly, as explained in the Proposal, the Commission believes compensation for providing advice with respect to municipal financial products or the issuance of municipal securities should not factor into the determination of whether a person must register with the Commission as a municipal advisor.¹³⁶ However, as clarified in this release, whether or not a person would have to register as a municipal advisor in connection with solicitation of a municipal entity or obligated person would depend upon whether

¹³⁴ See 15 U.S.C. 78o-4(e)(4)(C).

¹³⁵ See 15 U.S.C. 78o-4(e)(4)(C).

¹³⁶ See Proposal, 76 FR at 832, note 113 and accompanying text.

such person receives compensation (direct or indirect).¹³⁷

b. Interpretation of the Term “Municipal Advisor”; Definition of Related Terms

As noted above, Exchange Act Section 15B(e)(4) defines the term “municipal advisor” to mean, in part, a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or (ii) undertakes a solicitation of a municipal entity or obligated person.¹³⁸ The Commission discusses below the terms “municipal entity,” “obligated person,” “municipal financial products,” and “solicitation of a municipal entity or obligated person” as well as other terms relating to the definition of municipal advisor.¹³⁹ Rule 15Ba1-1(d), as proposed¹⁴⁰ and adopted, provides that the term “municipal advisor” has the same meaning as in Exchange Act Section 15B(e)(4),¹⁴¹ and, as discussed in Section III.A.1.c., provides certain exclusions and exemptions. For the purposes of clarity, however, Rule 15Ba1-1(d) as adopted also includes several non-substantive and organizational changes. For example, it: (1)

¹³⁷ See *infra* note 409 and accompanying text.

¹³⁸ See 15 U.S.C. 78o-4(e)(4). As noted in the Proposal, the Commission interprets the definition of “municipal advisor” to include the solicitation of a municipal entity or obligated person, because, as noted in the Proposal, the definition of municipal advisor under Exchange Act Section 15B(e)(4)(A) means, in part, a person that “undertakes a solicitation of a municipal entity,” and in defining the phrase “solicitation of a municipal entity,” Exchange Act Section 15B includes within that phrase, “or obligated person.” Also, Exchange Act Section 15B(a)(1)(B) includes solicitations of obligated persons. See Proposal, 76 FR at 831, note 102 and accompanying text.

See also Rule 15Ba1-1(d)(1)(i), which makes clear in the definition of “municipal advisor” that the Commission interprets the term “municipal advisor” to include persons that undertake solicitation of a municipal entity or obligated person.

¹³⁹ The Commission discusses the statutory exclusion for “an employee of a municipal entity,” along with other exclusions and exemptions from the definition of “municipal advisor,” in Section III.A.1.c. below.

¹⁴⁰ See proposed Rule 15Ba1-1(d)(1).

¹⁴¹ 15 U.S.C. 78o-4(e)(4).

incorporates in Rule 15Ba1-1(d)(1) the language of the statutory definition, rather than cross referencing the statute; (2) sets forth in Rule 15Ba1-1(d)(2) the statutory exclusions from the definition, as interpreted by the Commission; and (3) sets forth in Rule 15Ba1-1(d)(3) certain exemptions.¹⁴²

In certain of the rules and forms that the Commission is adopting with respect to the registration of municipal advisors, the Commission uses the term “municipal advisory activities” to refer to the activities that would generally require a person to register as a municipal advisor. In this regard, the Commission is adopting, substantially as proposed, a definition of the term “municipal advisory activities” with minor clarifying modifications. As adopted, “municipal advisory activities” means “(1) [p]roviding advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (2) [s]olicitation of a municipal entity or obligated person.”¹⁴³ The

¹⁴² See Rule 15Ba1-1(d). To the extent the Commission’s exemptions or interpretations of the exclusions differ substantively from the Proposal, those differences are discussed in detail below.

¹⁴³ In the Proposal, the Commission proposed to give “municipal advisory activities” the same meaning as the term “municipal advisory services” in Rule 15Ba2-6T (the temporary rule for the registration of municipal advisors). Thus, in proposed Rule 15Ba1-1(e), the Commission proposed to define “municipal advisory activities” to mean “advice to or on behalf of a municipal entity (as defined in Section 15B(e)(8) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-4(e)(8)) or obligated person (as defined in Section 15B(e)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-4(e)(10)) with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or a solicitation of a municipal entity or obligated person.” See Proposal, 76 FR at 829, note 77 and proposed Rule 15Ba1-1(e).

While the Commission received a few comments that certain activities should not be “municipal advisory activities,” these comments were in the context of whether certain persons should be subject to registration as “municipal advisors” and are addressed below in the context of the various exemptions and exclusions from the definition of “municipal advisor.” See, e.g., notes 780, 807, 835 and accompanying text (citing the Gilmore & Bell

Commission notes, for example, that advice to a municipal entity about whether to issue municipal securities would be “municipal advisor activity.”

Additionally, as discussed more fully below, in response to comments received on the Proposal and to provide additional clarity, the Commission is adopting rule text to provide guidance on the term “advice.” The Commission also notes, as mentioned above and explained in more detail below, that the definitions of “municipal advisor” and related terms that it is adopting today include several non-substantive, clarifying changes designed to reorganize and simplify the rule, including using defined terms, where possible, and providing greater clarity as to which statutory standards are being incorporated into the Commission’s rules, the Commission’s interpretation of such standards, and any exemptions the Commission is providing with these rules.

i. Advice Standard in General

In the Proposal and as noted above, the Commission defined the term “municipal advisory activities,” which includes certain advice to or on behalf of a municipal entity or obligated person,¹⁴⁴ and addressed the scope of activities that would require a person to register as a

Letter, the Rose Letter, and the Brinckerhoff Letter, in the context of exclusions or exemptions for accountants, attorneys, and engineers, respectively). These comments are addressed in Section III.A.1.c.vii.

The Commission is adopting the definition of “municipal advisory activities” substantially as proposed, but with minor non-substantive modifications to provide greater clarity and consistency with other organizational changes the Commission is making to the definitions. Specifically, the Commission is defining “municipal advisory activities” to mean “the following activities specified in section 15B(e)(4)(A) of the Act (15 U.S.C. 78o-4(e)(4)(A)) and paragraph (d)(1) of this section that, absent the availability of an exclusion under paragraph (d)(2) of this section or an exemption under paragraph (d)(3) of this section, would cause a person to be a municipal advisor: (1) [p]roviding advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (2) [s]olicitation of a municipal entity or obligated person.” See Rule 15Ba1-1(e).

¹⁴⁴ See Proposal, 76 FR at 829, note 77. See also *supra* note 143 and accompanying text (discussing the term “municipal advisory activities”).

municipal advisor. The Commission discussed the scope of such activities through its proposed interpretation of the definition of “municipal advisor,” which included guidance on the particular statutory exclusions and exemptions therefrom.¹⁴⁵

In the Proposal, the Commission requested comment on its interpretation of the definition of “municipal advisor” and related terms, and particularly sought comment on whether any of its interpretations should be in any way modified or clarified.¹⁴⁶ The Commission also requested comment on whether its interpretation of certain exclusions from the definition of “municipal advisor” should be narrowed or expanded to exclude or include various activities.¹⁴⁷ More specifically, the Commission requested comment on whether it should exclude the following persons from the definition of municipal advisor: (1) an entity that provides to clients investment advice, such as research information and generic trade ideas or commentary that does not purport to meet the needs or objectives of specific clients, and is provided to a municipal entity as part of its ongoing ordinary communications; and (2) a broker-dealer that provides to a municipal entity a list of securities meeting specified criteria that are readily available in the marketplace, but without making a recommendation as to the merits of any investment particularized to the municipal entity’s

¹⁴⁵ See, e.g., Proposal 76 FR at 832, text accompanying note 113 (discussing whether compensation for providing advice factors into the determination of whether a person must register as a municipal advisor), 833, note 118 and accompanying text (discussing the provision of certain kinds of advice by investment advisers), 833 (discussing whether a commodity trading advisor would be required to register as a municipal advisor if the advisor provides certain kinds of advice), and 833-834 (discussing with respect to accountants, attorneys and engineers whether certain kinds of advice and activities are “advice” within the meaning of the Exchange Act or would otherwise cause such persons to meet the definition of “municipal advisor”).

¹⁴⁶ See Proposal, 76 FR at 835.

¹⁴⁷ See id., at 836-838 (requesting comment on, among other things: whether there are other services or activities engaged in by accountants, engineers, attorneys or other professionals that should qualify such persons for exclusion from the definition of “municipal advisor;” and whether there are other specific types of persons that should be excluded and the circumstances under which they should be excluded).

specific circumstances or investment objectives.¹⁴⁸

In response to these requests for comment, commenters recommended additional guidance on the meaning and scope of the term “advice” both in general and, as addressed in more detail in subsequent sections on particular exclusions and exemptions, in the context of specific activities. A number of commenters requested that the Commission clarify the meaning of providing “advice to a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities.”¹⁴⁹ One commenter noted that “the concept of ‘advice’ is central to the application of Section 975,”¹⁵⁰ while another commenter stated that “[a]bsent a clear understanding of the scope of ‘advice,’ there will be substantial uncertainty as to which communications with municipal entity clients would be deemed ‘advice.’”¹⁵¹ The Commission also received comments suggesting general parameters for defining advice. For example, one commenter suggested that the

¹⁴⁸ See Proposal, 76 FR at 838.

¹⁴⁹ See, e.g., letters from Raymond J. Dorado, Executive Vice President, Deputy General Counsel, Bank of New York Mellon Corporation, dated February 23, 2011 (“BNY Letter”); Wayne A. Abernathy, Executive Vice President, Financial Institutions Policy and Regulatory Affairs, American Bankers Association, Cecelia A. Calaby, Executive Director and General Counsel, ABA Securities Association, and Eli K. Peterson, Vice President and Regulatory Counsel, The Clearing House Association LLC, dated February 22, 2011 (“American Bankers Association Letter I”); Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, dated February 22, 2011 (“Financial Services Roundtable Letter”); John M. McNally, President, National Association of Bond Lawyers, dated February 25, 2011 (“NABL Letter”); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated February 22, 2011 (“SIFMA Letter I”); Alexandra M. MacLennan, Chair, Disclosure Group, and D. Bruce Gabriel, Practice Group Leader, Public and Infrastructure Finance Group, Squire, Sanders & Dempsey (US) LLP, dated February 22, 2011 (“Squire Sanders & Dempsey Letter”); Adella M. Heard, Senior Vice President and Assistant General Counsel, First Tennessee Bank National Association, dated February 18, 2011 (“First Tennessee Bank Letter”); Dale E. Brown, President and Chief Executive Officer, Financial Services Institute, dated April 28, 2011 (“Financial Services Institute Letter”); Sandra K-H Werner, Chief Executive Officer, First National Bank and Trust, dated February 18, 2011 (“First National Bank and Trust Letter”).

¹⁵⁰ BNY Letter.

¹⁵¹ Financial Services Roundtable Letter.

Commission “distinguish between situations in which information is provided to a municipal entity or obligated person as opposed to a recommendation as to a specific course of action.”¹⁵² Similarly, another commenter suggested that “advice” is generally understood to contain a recommendation component as distinguished from the mere giving of factual, objectively-determinable information.¹⁵³

Regarding the provision of general information, commenters made general and specific suggestions regarding the types of information that should not require registration as a municipal advisor. For example, one commenter suggested that the provision of general information should not be defined, in any instance, as municipal advisory activities that would give rise to a fiduciary duty.¹⁵⁴ More specifically, other commenters suggested that broker-dealers be permitted to provide general market, transactional or financial information,¹⁵⁵ attorneys be permitted to provide general educational information to clients and non-clients,¹⁵⁶ and insurance companies be permitted to provide certain general information of an educational nature regarding retirement plans without being required to register as a municipal advisor.¹⁵⁷ With respect to municipal derivatives, one commenter asked for clarification that the following activities do not constitute advice for purposes

¹⁵² NABL Letter (emphasis in original).

¹⁵³ Letter from John J. Wagner, Kutak Rock, dated February 21, 2011 (“Kutak Rock Letter”).

¹⁵⁴ See letter from Anthony A. Kuznik, Vice President and General Counsel, Honeywell Building Solutions, Honeywell International Inc., dated February 22, 2011 (“Honeywell Letter”).

¹⁵⁵ See letter from Brad Wings, Head of Fixed Income Sales and Trading, Piper Jaffray & Co. and Rebecca S. Lawrence, Assistant General Counsel, Principal, Piper Jaffray & Co., dated March 18, 2011 (“Piper Jaffray Letter”).

¹⁵⁶ See letter from Sherman & Howard L.L.C., dated February 22, 2011 (“Sherman & Howard Letter”).

¹⁵⁷ See letter from Jeffrey W. Rubin, Chair of the Committee on Federal Regulation of Securities, Business Law Section, American Bar Association, dated March 1, 2011 (“ABA Letter”).

of the municipal advisor definition: (i) the provision of research, general market information, and product information that is not specific to a particular client and is provided to the bank's customers as part of its ordinary communications with clients or the public; and (ii) the provision of information describing product alternatives that may meet the needs of a client without giving a recommendation that the client engage in any specific transaction.¹⁵⁸

Additionally, several commenters recommended that advice be defined in accordance with its commonly understood meaning – a recommendation to act.¹⁵⁹ One of these commenters further recommended that the Commission clarify that a communication constitutes advice only when “it is provided with respect to and directly relates to an enumerated municipal financial product or the issuance of municipal securities, and it is a recommendation that is particularized to the needs and circumstances of the recipient such that, under the prevailing facts and circumstances, a municipal entity or obligated person would reasonably expect that it could rely and take action, without further input, based upon such communication.”¹⁶⁰ Another commenter suggested that registration be required only if a communication constitutes a recommendation that the municipal entity take an action and the recommendation is particularized to the entity's needs and is distinct from normal sales efforts.¹⁶¹

The Commission agrees with commenters that clarifying guidance on what constitutes advice solely for the purposes of the municipal advisor definition will provide greater clarity regarding the applicability of the municipal advisor registration requirement. The Commission does not however believe that the term “advice” is susceptible to a bright-line definition. Instead, the

¹⁵⁸ See BNY Letter.

¹⁵⁹ See, e.g., BNY Letter; American Bankers Association Letter I; and SIFMA Letter I. See also Kutak Rock Letter.

¹⁶⁰ SIFMA Letter I.

¹⁶¹ See American Bankers Association Letter I.

Commission believes that “advice” can be construed broadly and that, therefore, the determination of whether a person provides advice to or on behalf of a municipal entity or an obligated person regarding municipal financial products or the issuance of municipal securities depends on all the relevant facts and circumstances.¹⁶² Accordingly, to address comments, the Commission is adopting Rule 15Ba1-1(d)(1)(ii), which provides that advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues.¹⁶³

¹⁶² In contexts outside of the municipal advisor definition, whether certain activities constitute advice also is dependent on the facts and circumstances.

For example, in the context of broker-dealer regulation, Commission staff has described that, although not a bright-line test, “[t]he more individually tailored the communication is to a particular customer or targeted group of customers, the more likely it will be viewed as a recommendation.” Study on Investment Advisers and Broker-Dealers (January 2011), available at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf> (“Study on Investment Advisers and Broker-Dealers”) at 124.

In the context of investment adviser regulation, the determination of whether a particular communication rises to the level of investment advice depends on the facts and circumstances and is construed broadly. For example, Commission staff has interpreted the definition of investment adviser to include persons who advise clients concerning the relative advantages and disadvantages of investing in securities in general as compared to other investments. See, e.g., Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092 (October 8, 1987).

The Commission discusses below, with respect to its interpretation of the term “municipal advisor” and the various exclusions and exemptions therefrom, whether certain activities would be advice in the context of the municipal advisor registration regime.

¹⁶³ The Commission is providing this clarifying guidance regarding “advice” only with respect to municipal advisors and solely for purposes of the municipal advisor definition. The Commission further notes that, by establishing certain parameters for advice, Rule 15Ba1-1(d)(1)(ii) clarifies not only the type of information or communications that may constitute advice, but also the persons who may be subject to the municipal advisor definition in Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78o-4(e)(4)). For example, the Commission believes that an individual performing by contract clerical or ministerial services for a municipal entity or obligated person as part of performing these services

The Commission agrees with commenters that the provision of certain general information does not constitute advice for purposes of the municipal advisor definition. For example, the Commission believes that advice does not include provision of the following general information:

- Information of a factual nature without subjective assumptions, opinions, or views;
- Information that is not particularized to a specific municipal entity or type of municipal entity;
- Information that is widely disseminated for use by the public, clients, or market participants other than municipal entities or obligated persons; or
- General information in the nature of educational materials.

The Commission believes that educational materials constitute general information if the content is limited to instructional or explanatory information, such as materials that describe the general nature of financial products or strategies, do not include past or projected performance figures (including annualized rate of return), do not include a recommendation to purchase or sell any product or utilize any particular strategy, and to the extent additional disclosure is available about a product (such as a prospectus), the materials contain information about how to obtain such additional information.¹⁶⁴

Conversely, the definition of advice under Rule 15Ba1-1(d)(1)(ii), as adopted, does not exclude information that involves a recommendation¹⁶⁵ regarding municipal financial products or

would generally not be providing advice, as defined in adopted Rule 15Ba1-1(d)(1)(ii). Accordingly, such person would not be required to register as a municipal advisor.

¹⁶⁴ The Commission has similarly interpreted “educational materials” in other contexts. See, e.g., Securities Act Release No. 6426 (September 16, 1982), 47 FR 41950 (September 23, 1982) (adopting Rule 134a under the Securities Act to permit the preparation and dissemination of certain educational materials concerning options and options trading without deeming such materials to be a prospectus).

¹⁶⁵ Whether a “recommendation” has taken place is not susceptible to a bright line definition,

the issuance of municipal securities. Further and more precisely, the Commission believes that, for purposes of the municipal advisor definition, advice includes, without limitation, a recommendation that is particularized to the specific needs, objectives, or circumstances of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, based on all the facts and circumstances. As discussed above and consistent with the FINRA approach to what constitutes a recommendation, for purposes of the municipal advisor definition, the Commission believes that the determination of whether a

but turns on the facts and circumstances of the particular situation. See Securities Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396, 42415 (July 18, 2011) (“Business Conduct Standards Proposal for Security-Based Swaps”). “This is consistent with the FINRA approach to what constitutes a recommendation. In the context of the FINRA suitability standard, factors considered in determining whether a recommendation has taken place include whether the communication ‘reasonably could be viewed as a ‘call to action’ and ‘reasonably would influence an investor to trade a particular security or group of securities.’ The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a ‘recommendation.’” Business Conduct Standards Proposal for Security-Based Swaps, 76 FR at 42415, note 133 and accompanying text (citing FINRA Notice to Members 01-23 (March 19, 2001), and Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook, Securities Exchange Act Release No. 62718A (August 20, 2010), 75 FR 52562 (August 26, 2010)).

FINRA suitability guidance has long provided that the determination of whether a “recommendation” has been made is an objective rather subjective inquiry. See FINRA Notice to Members 01-23 (March 19, 2001). In guidance relating to FINRA rules 2090 and 2111, FINRA reiterated this prior guidance, stating that an important factor in this inquiry “is whether – given its content, context and manner of presentation – a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.” See FINRA Regulatory Notice 11-02 (Know Your Customer and Suitability), January 2011, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>.

The MSRB has provided similar guidance for dealers in connection with MSRB Rule G-19. See <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-19.aspx?tab=2>.

recommendation has been made is an objective rather than a subjective inquiry.¹⁶⁶ An important factor in this inquiry is whether, considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person take action or refrain from taking action regarding municipal financial products or the issuance of municipal securities.¹⁶⁷

While the determination of whether a person provides advice depends on all the relevant facts and circumstances, the more individually tailored the information to a specific municipal entity or obligated person or a targeted group of municipal entities or obligated persons that share common characteristics, such as school districts or hospitals, with respect to municipal financial products or the issuance of municipal securities, the more likely it will be a recommendation that constitutes advice under the municipal advisor definition, which would require registration as a municipal advisor, absent the application of an exemption or exclusion from registration.¹⁶⁸ For example, whether information describing municipal financial product alternatives constitutes advice under the municipal advisor definition generally depends on how individually tailored the information is to a particular municipal entity, obligated person, or targeted group of municipal entities or obligated persons that share common characteristics, as well as the content, context, and manner of presentation of the information communicated.

¹⁶⁶ See supra note 165. See also Michael Frederick Siegel v. Securities and Exchange Commission, 592 F.3d 147, 156 (D.C. Cir. 2010) (in sustaining the Commission's finding that Siegel, a broker, recommended an "investment" within the meaning of NASD rule 2310, the court held that the SEC properly considered the "content, context and presentation" of the communications and whether, as an "objective matter," the communication could reasonably have been viewed as a "call to action" and reasonably would influence an investor to trade a particular security or group of securities).

¹⁶⁷ See supra note 165.

¹⁶⁸ See supra notes 162 and 165.

ii. Municipal Entity

Exchange Act Section 15B(e)(8) provides that the term “municipal entity” means “any State, political subdivision of a State, or municipal corporate instrumentality of a State, including – (A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.”¹⁶⁹ In the Proposal, the Commission proposed to clarify that, with respect to clause (B) of the definition of “municipal entity,” the definition includes, but is not limited to, public pension funds, LGIPs, and other state and local governmental entities or funds, as well as participant-directed investment programs or plans such as 529, 403(b), and 457 plans.¹⁷⁰

In the Proposal, the Commission requested comment on whether the proposed interpretation of municipal entity for purposes of the proposed definition of municipal advisor is appropriate, and whether additional clarification is necessary.¹⁷¹ The Commission received approximately 20 comment letters regarding the scope of the Commission’s interpretation of the term “municipal entity.” Based on consideration of the comments received, as further discussed below, the Commission is making one change to its interpretation.

Several commenters suggested that the definition of “municipal entity” should be limited to issuers of municipal securities¹⁷² because the phrase “any other issuer of municipal securities” in

¹⁶⁹ 15 U.S.C. 78o-4(e)(8).

¹⁷⁰ See *infra* note 191 (defining 403(b) and 457 plans).

¹⁷¹ See Proposal, 76 FR at 835.

¹⁷² See NABL Letter; letters from Hon. Kelly Schmidt, President, National Association of State Treasurers, dated February 16, 2011 (“National Association of State Treasurers Letter”); Gail Schubert, Chair, Alaska Retirement Management Board, dated February 18, 2011

Section 15B(e)(8)(C) would otherwise be unnecessary.¹⁷³ In connection with these comments, one commenter stated that the text and legislative history of the Dodd-Frank Act “are devoid of any indication that its provisions addressing municipal securities were intended to grant the [Commission] general prudential authority over State and local fiscal matters.”¹⁷⁴ This commenter further stated that the “Dodd-Frank Act references to municipal securities were intended to address securities (primarily municipal bonds) issued by ‘municipal entities’ to the class of nongovernmental investors that the [Commission] is charged with protecting.”¹⁷⁵ Another commenter, however, suggested that the definition, as proposed, should extend to public pension funds, LGIPs, other government asset pools, and investor-directed governmental plans only to the extent that they are political subdivisions of a state, or corporate instrumentalities of a state, that issue municipal securities in the public market.¹⁷⁶ This commenter also stated that LGIPs, tax-sheltered annuities, and deferred compensation plans should not be deemed to be municipal entities, because they do not issue securities in the public municipal securities market.¹⁷⁷ Finally, another commenter suggested that the definition of municipal entity should include obligated persons, because the definition includes issuers of municipal securities, and obligated persons can be issuers

(“Alaska Retirement Management Board Letter”).

¹⁷³ See, e.g., NABL Letter; National Association of State Treasurers Letter; Alaska Retirement Management Board Letter.

¹⁷⁴ National Association of State Treasurers Letter. See also NABL Letter (stating that Section 975 was not intended to address advice to an entity based on a mere possibility that it would become an issuer of municipal securities in the public market place, and that it was not intended to address advice concerning a municipal entity’s fiscal affairs generally, except to the extent that such affairs relate directly to its issuance or administration of municipal securities).

¹⁷⁵ National Association of State Treasurers Letter.

¹⁷⁶ See NABL Letter.

¹⁷⁷ See *id.*

of municipal securities pursuant to other provisions of the federal securities laws.¹⁷⁸

One commenter stated that, although Congress specifically referred to states, counties, cities, and other political subdivisions, Congress did not refer to their pension or retirement plans when it enacted Section 975 of the Dodd-Frank Act. This commenter further argued that governmental retirement plans are separate legal entities from the municipal entities and are not ordinarily funded by, or involved in, the types of transactions contemplated by Section 975 or the proposed rules.¹⁷⁹

¹⁷⁸

According to this commenter, “municipal entity” is defined under the Dodd-Frank Act to include “any other issuer of municipal securities,” and “issuer of municipal securities” is defined under Exchange Act Rule 15c2-12 to mean “the governmental issuer specified in section 3(a)(29) of the Act and the issuer of any separate security.” See letter from Chapman and Cutler, dated February 22, 2011 (“Chapman and Cutler Letter”). Further, this commenter stated that “municipal securities” is defined in the Exchange Act to include both governmental bonds and tax-exempt “industrial development bonds.” This commenter stated that, since the Commission has interpreted the term “obligated person” to have the same meaning as in Exchange Act Rule 15c2-12, conduit borrowers under tax exempt bond issues would be “issuers of separate securities” that are also “issuers of municipal securities.” As a result, the commenter suggested that obligated persons under tax-exempt bond issues are “municipal entities.”

The Commission does not agree. Although the Commission believes that the definition of obligated person for purposes of municipal advisor registration should be consistent with the definition of obligated person for purposes of Rule 15c2-12, the Commission is not applying the definition of “issuer of municipal securities” in Rule 15c2-12 for purposes of interpreting the definition of “municipal entity” in Exchange Act Section 15B(e)(8). The Commission does not believe that the definition of “municipal entity” should be interpreted to include obligated persons, because the Dodd-Frank Act amended Exchange Act Section 15B to separately define “municipal entity” (15 U.S.C. 78o-4(e)(8)) and “obligated person” (15 U.S.C. 78o-4(e)(10)).

¹⁷⁹

See letter from Daniel J. Wintz, Fraser Stryker, dated February 21, 2011 (“Fraser Stryker Letter”). For example, this commenter stated that assets of plans qualified under Internal Revenue Code Section 401(a) must be held in trust for the benefit of employees and their beneficiaries, and qualified plan trusts maintained by governmental employers are prohibited from engaging in transactions such as self-dealing with the plan sponsor. The commenter also provided that 403(b) plans are typically funded with employee and employer contributions, which are used to purchase annuity contracts or are deposited in custodial accounts, the assets of which are invested in mutual funds. Finally, the commenter stated that 457 plans allow employees of political subdivisions to defer compensation. All amounts deferred under the plan, all property and rights purchased with the amounts, and all income attributable to such amounts, property, or rights, must be held in trust for the exclusive benefit of the participants and their beneficiaries. See also letter from Clifford E.

Another commenter questioned whether a public retirement system would be a municipal entity, a municipal financial product, or both.¹⁸⁰

Other commenters suggested that the definition of municipal entity should exclude public pension plans or participant-directed plans.¹⁸¹ One commenter stated that these plans have nothing to do with raising funds for a municipal entity or investing proceeds from an offering of municipal securities.¹⁸² This commenter also stated that once the funds are contributed to a governmental retirement plan, they are no longer the property or held for the benefit of the municipal entity that established the plan.¹⁸³ Further, this commenter stated that the definition of municipal entity should not include individual participants in a governmental retirement plan.¹⁸⁴

One commenter stated that the Commission should clarify that municipal entity only includes entities that are controlled by, or established for the benefit and enjoyment of, a state or

Kirsch, Michael B. Koffler, and Susan S. Krawczyk, Sutherland Asbill & Brennan LLP, for the Committee of Annuity Insurers, dated February 22, 2011 (“Committee of Annuity Insurers Letter I”).

¹⁸⁰ See letter from Richard K. Matta, Groom Law Group, on behalf of the State Board of Administration of Florida, dated February 28, 2011 (“State Board of Administration of Florida Letter”). This commenter expressed this concern, because it is unsure as to how the employee exclusion from the definition of municipal advisor would apply to public retirement systems.

¹⁸¹ See, e.g., Alaska Retirement Management Board Letter; Committee of Annuity Insurers Letter I; Fraser Stryker Letter.

¹⁸² See Committee of Annuity Insurers Letter I. This commenter stated that, if the Commission were to modify the definition of “municipal entity” so it did not include 457 plans and 403(b) plans, its concerns regarding the impact of the proposed rules on separate accounts, broker-dealers and investment advisers for insurance contracts would be mooted. See infra notes 386 and 405 and accompanying text.

¹⁸³ See Committee of Annuity Insurers Letter I.

¹⁸⁴ See id. As such, this commenter asked the Commission to clarify that the municipal advisor registration regime does not apply to persons providing investment advice to individual plan participants or investment education provided to plan participants.

any of its constituent political subdivisions or municipal corporations.¹⁸⁵ This commenter noted that some public pension plans, “sponsored or established” by states or their political subdivisions or municipal corporations, are not controlled by the sponsoring governmental unit but are instead controlled by trustees with plenary authority.¹⁸⁶ This commenter also suggested that private pension funds, mutual funds, and insurance companies recognized under state law as such entities as a result of a filing with a state official and issuance of a certificate of formation should not be included within clause (B) of the definition of municipal entity as a “plan, program or pool of assets sponsored or established by the State....”¹⁸⁷

The Commission has carefully evaluated comments received on its proposed definition of “municipal entity” and continues to believe that the definition of “municipal entity” should not be limited to issuers of municipal securities.¹⁸⁸ The Commission believes that the phrase “any other issuer of municipal securities” does not limit clauses (A) and (B) of the definition to entities that can issue municipal securities. Many of the plans, programs and pools of assets included in clause (B) of Section 15B(e)(8) do not issue municipal securities. Further, the definition of municipal entity does not otherwise limit itself to those entities that issue municipal securities. To limit the entities listed in clause (A) and (B) of Section 15B(e)(8) to issuers of municipal securities would also limit the definitions of “municipal financial products” (and therefore “municipal derivatives”) and “solicitation of a municipal entity” to encompass only those entities that issue municipal securities. Under such a limited definition, advice with respect to municipal derivatives, for example, would

¹⁸⁵ See NABL Letter.

¹⁸⁶ See id.

¹⁸⁷ See id. The commenter expressed concern that the Commission’s proposed interpretation that the definition of municipal entity includes “participant-directed investment programs or pools” could be interpreted to include private plans established by an entity chartered by a state.

¹⁸⁸ See supra notes 173-176 and accompanying text.

not subject advisors to registration unless the municipal entity entering into a swap¹⁸⁹ was also an issuer of municipal securities. This limited definition would also allow third parties to solicit various public pension funds and LGIPs on behalf of brokers, dealers, investment advisers, and municipal advisors without registering as municipal advisors. The Commission believes that such entities should have the protections provided by municipal advisor registration.¹⁹⁰

The Commission believes public employee retirement systems and public employee benefit plans or public pension plans (including participant-directed plans, 403(b), and 457 plans)¹⁹¹ fall

¹⁸⁹ Unless the context otherwise requires, for purposes of the discussion in this release, swap refers to swaps and security-based swaps.

¹⁹⁰ The Commission notes that Section 15B(b) of the Exchange Act, as amended by the Dodd-Frank Act, requires, among other things, that the MSRB adopt rules to effect the purposes of the Exchange Act with respect to, among other things, “advice provided to or on behalf of municipal entities or obligated persons by ... municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.” See Section 15B(b)(2) of the Exchange Act. At a minimum, the rules of the MSRB, with respect to municipal advisors, must, among other things: “(i) prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor’s fiduciary duty to its clients; (ii) provide continuing education requirements for municipal advisors; [and] (iii) provide professional standards.” See Section 15B(b)(2)(L) of the Exchange Act.

¹⁹¹ In this release, the Commission uses the term “public employee benefit plan” to refer to a “pension plan” that is a “governmental plan” (as such terms are described below). Such plans include “participant-directed plans,” “403(b) plans,” and “457 plans” (as such terms are described below), and may be plans, funds, or programs (also described below). The Commission also uses the term “public employee retirement system.” As described below, a public employee retirement system is a special purpose government, and therefore, a public employee pension plan or a public employee retirement system may itself be a municipal entity. The Commission uses the term “private employee benefit plan” to refer to a pension plan that is not a governmental plan.

The term “governmental plan” includes a plan established or maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. See Section 3(32) of ERISA, 29 U.S.C. 1002(32).

The term “employee benefit plan” or “plan” means an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. See Section 3(3) of ERISA, 29 U.S.C. 1002(3).

within the statutory definition of municipal entity. The Commission believes that each of these plans constitutes a “plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof.”¹⁹²

Further, the Commission believes that such plans should be afforded the protection granted to municipal entities by the statute. The Commission notes that the solicitation of public pension

The terms “employee pension benefit plan” and “pension plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program – (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. See Section 3(2) of ERISA, 29 U.S.C. 1002(2).

Pursuant to the Governmental Accounting Standards Board (“GASB”), “public employee retirement system” means a special-purpose government that administers one or more pension plans. Public employee retirement systems also may administer other types of employee benefit plans, including postemployment healthcare plans and deferred compensation plans. See GASB Statement No. 28: Accounting and Financial Reporting for Pensions.

A “participant-directed plan” is a plan that provides for the allocation of investment responsibilities to participants or beneficiaries. See U.S. Department of Labor, Fact Sheet: Final Rule to Improve Transparency of Fees and Expenses to Workers in 401(k)-Type Retirement Plans (February 2012), available at <http://www.dol.gov/ebsa/pdf/fsparticipantfeerule.pdf>.

A “403(b) plan” is a tax-sheltered retirement plan, similar to a 401(k) plan, offered by public schools and certain 501(c)(3) tax-exempt organizations. See Internal Revenue Service, IRC 403(b) Tax-Sheltered Annuity Plans, available at [http://www.irs.gov/Retirement-Plans/IRC-403\(b\)-Tax-Sheltered-Annuity-Plans](http://www.irs.gov/Retirement-Plans/IRC-403(b)-Tax-Sheltered-Annuity-Plans).

A “457 plan” is a deferred compensation plan as described in IRC section 457, which is available for certain state and local governments and non-governmental entities tax exempt under IRC section 501. See Internal Revenue Service, IRC 457(b) Deferred Compensation Plans, available at <http://www.irs.gov/retirement/article/0,,id=172437,00.html>.

¹⁹²

15 U.S.C. 780-4(e)(8) (defining “municipal entity”).

plans¹⁹³ in connection with investment advisory services has been subject to multiple Commission enforcement actions. For example, in 2009, the Commission charged a former New York State official and top political advisor with allegedly defrauding the New York State Common Retirement Fund by causing the fund to invest billions of dollars with private equity funds and hedge fund managers who paid millions of dollars in the form of sham “finder” or “placement agent” fees.¹⁹⁴

The Commission notes, however, that individual natural person participants in a public employee benefit plan do not fall within the definition of municipal entity, because such persons would not be a state, political subdivision of a state, or municipal corporate instrumentality. Similarly, private employee benefit plans, mutual funds, and insurance companies that are not sponsored or established by a state, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof, do not fall within the statutory definition of municipal entity.¹⁹⁵ Such funds and entities are not “established or sponsored by” a state merely because they file with a state official or are issued a certificate of formation by a state.

As noted above, three commenters¹⁹⁶ stated that funds contributed to a governmental plan are no longer the property of, or held for the benefit of or controlled by, the municipal entity that

¹⁹³ See *infra* Section III.A.1.b.x. (discussing “solicitation of a municipal entity or obligated person”).

¹⁹⁴ See *SEC v. Henry Morris*, Litigation Release No. 20963 (March 19, 2009).

As another example, the Commission charged the former CEO of the California Public Employees’ Retirement System and his close personal friend with allegedly scheming to defraud an investment firm into paying \$20 million in fees to the friend’s placement agent firms. See *SEC Charges Former CalPERS CEO and Friend With Falsifying Letters in \$20 Million Placement Agent Fee Scheme*, available at <http://www.sec.gov/news/press/2012/2012-73.htm>.

¹⁹⁵ See *supra* note 187 and accompanying text.

¹⁹⁶ See *Fraser Stryker Letter* and *Committee of Annuity Insurers Letter I*. See also *NABL Letter* (making a similar argument that the term “municipal entity” should only include entities that are controlled by or established for the benefit and enjoyment of a state or any of its political subdivisions or municipal corporations).

established the plan, and that such plans are not ordinarily funded by or involved in the types of transactions contemplated by Congress. These commenters argued that, as a result, these plans should be excluded from the definition of municipal entity. The Commission does not agree. Such a plan is “sponsored or established” by the municipal entity and, therefore, falls within the statutory definition of municipal entity.

One commenter suggested that the phrase “any State, political subdivision of a State, or municipal corporate instrumentality of a State” in the interpretation of the definition of “municipal entity” would be clearer if it were revised to read “any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State.”¹⁹⁷ The commenter noted, for example, that a charter school may be organized as an “instrumentality of a political subdivision of a State.”

Because states delegate powers to their political subdivisions and one of the powers that may be delegated to political subdivisions is the ability of political subdivisions to create corporate instrumentalities,¹⁹⁸ the Commission believes that a municipal entity organized as a municipal corporate instrumentality of a political subdivision of a state is properly considered a municipal corporate instrumentality of a state. Accordingly, the Commission is adopting Rule 15Ba1-1(g) to reflect such interpretation and define municipal entity to include municipal corporate instrumentalities of political subdivisions of states.¹⁹⁹

¹⁹⁷ NABL Letter.

¹⁹⁸ See, e.g., MCL 117.40:
[http://www.legislature.mi.gov/\(S\(p3jhrzzb5hbiew45wy2fmz45\)\)/mileg.aspx?page=getobject&objectname=mcl-117-40](http://www.legislature.mi.gov/(S(p3jhrzzb5hbiew45wy2fmz45))/mileg.aspx?page=getobject&objectname=mcl-117-40) (authorizing cities in the state of Michigan to form nonprofit corporations under that state’s nonprofit corporation act if they are organized for valid public purposes).

¹⁹⁹ See Rule 15Ba1-1(g), which defines municipal entity to mean “any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including: (1) [a]ny agency, authority, or instrumentality of the State,

iii. Obligated Person

Exchange Act Section 15B(e)(10) provides that the term “obligated person” means “any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.”²⁰⁰ In the Proposal, in response to a commenter’s request for clarification,²⁰¹ the Commission stated its belief that the definition of obligated person for purposes of the definition of municipal advisor should be consistent with the definition of obligated person for purposes of Rule 15c2-12.²⁰² The Commission therefore proposed to exempt from the definition of obligated person providers of municipal bond insurance, letters of credit, or other liquidity facilities.²⁰³ In the Proposal, the Commission stated its belief that this interpretation would not conflict with the goals of the Dodd-Frank Act to provide further protections for certain entities that participate in borrowings in the municipal securities market and would help ensure uniformity among rules

political subdivision, or municipal corporate instrumentality; (2) [a]ny plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (3) [a]ny other issuer of municipal securities.”

²⁰⁰ 15 U.S.C. 78o-4(e)(10). Obligated persons can include entities acting as conduit borrowers, such as private universities, non-profit hospitals, and private corporations.

²⁰¹ See Proposal, 76 FR at 829, note 88 and accompanying text.

²⁰² Rule 15c2-12 defines the term “obligated person” to mean “any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations on the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).” See 17 CFR 240.15c2-12(f)(10). “Offering” as used in this definition is defined in Rule 15c2-12(a). See 17 CFR 240.15c2-12(a). See also Securities Exchange Act Release No. 34961 (November 10, 1994), 59 FR 59590 (November 17, 1994).

²⁰³ See proposed Rule 15Ba1-1(i) and 17 CFR 240.15c2-12(f)(10).

relating to such market, including uniformity relating to the definition of obligated persons.²⁰⁴ The Commission noted that providers of municipal bond insurance, letters of credit, or other liquidity facilities are generally non-governmental providers of credit enhancements.²⁰⁵ As providers of credit enhancements, these entities are not borrowing funds through a municipal entity. Therefore, the Commission stated in the Proposal its belief that they do not require the type of protection that should be provided to those who, in municipal securities transactions, borrow funds through municipal entities.

The Commission received approximately ten comment letters with regard to the definition of “obligated person” and the application of the proposed rules to such persons.

Definition of “Obligated Person”

Generally, most commenters agreed that the definition of “obligated person” should be consistent with the definition of that term in Rule 15c2-12,²⁰⁶ or otherwise expressed support for the proposed definition of obligated person.²⁰⁷ Consequently, the Commission is adopting the definition substantially as proposed, but with modifications for general consistency with the application of the term in Rule 15c2-12²⁰⁸ and certain clarifying modifications to address concerns raised by commenters. Specifically, Rule 15Ba1-1(k) provides that obligated person “has the same meaning as in section 15B(e)(10) of the Act (15 U.S.C. 78o-4(e)(10)); provided, however, the term obligated person shall not include: (1) a person who provides municipal bond insurance, letters of credit, or other liquidity facilities; (2) a person whose financial information or operating data is not

²⁰⁴ See Proposal, 76 FR at 830.

²⁰⁵ See *id.*

²⁰⁶ See, e.g., Kutak Rock Letter; NABL Letter. See also ABA Letter; BNY Letter.

²⁰⁷ See letter from Michael G. Bartolotta, Chairman, MSRB, dated February 22, 2011 (“MSRB Letter I”).

²⁰⁸ See Rule 15Ba1-1(k). See also *supra* note 202.

material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement; or (3) the federal government.”

The Commission believes that there is no reason to differentiate the definition of obligated person for purposes of municipal advisor registration from the definition of obligated person for other Exchange Act purposes. As discussed in the Proposal and herein, the Commission believes that such definition will provide further protections for certain entities that participate in borrowings in, and help ensure uniformity among rules relating to, the municipal securities market. The continued use of a consistent definition will also provide clearer guidance to market participants.

Although most commenters supported the proposed definition, some commenters asked for clarification. One commenter suggested that the definition should exclude persons who might otherwise be deemed to be an obligated person solely on the basis of a commitment to support payment of the underlying assets that secure such issue, other than a borrower, lessee, or installment purchaser who is contractually responsible for payments that exceed a specified and substantial materiality standard, or a guarantor of such a payment obligation, who is not otherwise excluded from the definition of obligated person.²⁰⁹ One commenter specifically stated that guaranty

²⁰⁹ See NABL Letter. The commenter stated that the interpretive guidance with respect to Rule 15c2-12 leaves open the possibility that some persons who are not directly committed to support payment of a municipal securities issue may nonetheless be deemed to be obligated persons by reason of their commitment to support payment of the underlying assets securing the issue, based upon a factual analysis of their relationship to the issue. See *id.* See also letter from Brett E. Lief, President, National Council of Higher Education Loan Programs, dated February 16, 2011 (“National Council of Higher Education Loan Programs Letter”). Another commenter stated that, according to the proposed rules, while some of its members would fall within the definition of obligated person in each of its capital market financings, under the materiality standard of Rule 15c2-12 under the Exchange Act, the commenter only designates as obligated persons those members participating in the projects being financed that have a significant percentage of the financial obligation that supports the debt service on the commenter’s bonds. See letter from Robert W. Trippe, Senior Vice President and Chief Financial Officer, American Municipal Power, Inc., dated February 21, 2011 (“American Municipal Power Letter”).

agencies for loans under the Federal Family Education Loan Program ("FFELP") should not be deemed obligated persons.²¹⁰ Another commenter stated that companies registered under the Exchange Act, the federal government and its instrumentalities, foreign governments and their instrumentalities, religious organizations, and entities already subject to substantial oversight and regulation, such as banks, credit unions, regulated investment companies, and insurance companies, should be exempt from the definition of obligated person.²¹¹

The Commission has carefully considered these comments. The Commission continues to believe that there is no reason to differentiate the definition of obligated person for purposes of municipal advisor registration from the definition of obligated person for purposes of Rule 15c2-12. The Commission, however, is modifying the rule text of Rule 15Ba1-1(k) to clarify that the definition of obligated person excludes persons whose financial information or operating data is not material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement.

The continuing disclosure requirements of Rule 15c2-12 exclude certain obligated persons whose financial information or operating data is not material to the issuance of municipal securities.²¹² Therefore, consistent with Rule 15c2-12, the Commission is clarifying that an entity

²¹⁰ See National Council of Higher Education Loan Programs Letter.

²¹¹ See Kutak Rock Letter.

²¹² For example, Rule 15c2-12 requires a written agreement or contract to provide ongoing information (1) with respect to any obligated person for whom financial information or operating data is presented in the final official statement or (2) for each obligated person meeting the objective criteria specified in the undertaking and used to select the obligated persons for whom financial information or operating data is presented in the final official statement, except that in the case of pooled obligations the undertaking shall specify such objective criteria. See Rule 15c2-12(b)(5)(i)(A). The issuer and the other participants determine at the time of preparation of the official statement which obligated persons are material to the offering. See Securities Exchange Act Release No. 34961 (November 10, 1994), 59 FR 59590, 59596 (November 17, 1994).

whose financial information or operating data is not material to an issuance of municipal securities would not be an obligated person under Rule 15Ba1-1(k). Any advisor to such entity would not be required to register as a municipal advisor, because such person would not be a municipal advisor within the meaning of Rule 15Ba1-1(d).²¹³ In addition to promoting consistency, the Commission believes that the materiality standard for secondary market disclosure in Rule 15c2-12 also serves as an appropriate standard to identify those obligated persons that should have the protections afforded by Section 15B of the Exchange Act. Using a similar approach ensures uniformity, provides municipal market participants with existing guidance about how the rules should be applied, and limits the application of the definition to only those persons whose financial information or operating data is material to a municipal securities offering and for whom registration provides significant benefits to the municipal marketplace.

While the definition of obligated person in the Proposal excluded only providers of municipal bond insurance, letters of credit, or other liquidity facilities, the Commission understands that credit enhancement for municipal securities is not necessarily limited to those three categories and that many municipal securities may be credit enhanced indirectly. Prior guidance from Commission staff provides that “[e]ntities that insure or guarantee performance of assets that have been pledged to secure the repayment of the municipal obligation may fall within the definition of ‘obligated person’ . . . unless such insurance or guarantee has been obtained prior to and not in contemplation of any offering of municipal securities, the insurance or guarantee relates only to the individual pledged assets, and the insurance or guarantee exists independent of the existence of a

²¹³ A person advising a guarantor that is a municipal entity (such as a state credit enhancer) must separately determine whether its advice to that municipal entity would trigger the municipal advisor registration requirement.

municipal obligation.”²¹⁴ Consistent with this prior guidance from Commission staff, the Commission is adopting a definition of “obligated person” for purposes of Rule 15Ba1-1(k), which provides that the ultimate determination as to whether an insurer or guarantor is an obligated person under Rule 15c2-12 depends on the relationship to the financing itself, which is a factual analysis.²¹⁵ Similarly, a determination of whether a guarantor or insurer falls within the exclusion from the definition of obligated person for the purposes of the municipal advisor registration regime also depends on the particular facts and circumstances.²¹⁶

In addition, the Commission notes that although the federal government and its instrumentalities, as providers of credit enhancement, could fall within the definition of obligated person under Rule 15c2-12, the federal government does not require the type of protection that should be applicable generally to those who borrow funds through municipal entities in municipal securities transactions.²¹⁷ Accordingly, for purposes of the municipal advisor registration regime, the Commission is interpreting the definition of obligated person to exclude the federal government. Therefore, advisors to the federal government and its instrumentalities providing credit enhancements in connection with issuances of municipal securities are not required to register as municipal advisors.

Another commenter stated that buyers of municipal securities rely on the letter of credit and

²¹⁴ Response to Question 9 in letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, Commission to John S. Overdorff, Chair, Securities Law and Disclosure Committee, NABL, dated September 19, 1995.

²¹⁵ See id.

²¹⁶ See id.

²¹⁷ The federal government, as a credit enhancer, would not be borrowing any funds through a municipal entity, and would therefore be in a position similar to that of providers of municipal bond insurance, letters of credit, or other liquidity facilities that are excluded from the definition of “obligated person” in Rule 15c2-12. In addition – unlike for the definition of special entity – Congress did not include the federal government in the definition of municipal entity. See infra note 275 (noting differences in the two definitions).

the credit rating of the lender issuing the bonds rather than the “ultimate borrower,” and the security or collateral provided by a borrower goes to the lender or letter of credit issuer, not bondholders.²¹⁸

The commenter stated that the real borrower-lender relationship is between the borrower and the bank issuing the letter of credit.²¹⁹ This commenter noted that these and other factors distance conduit borrowers²²⁰ from direct obligations to bondholders, but they nonetheless would be obligated persons under the Proposal.

The Commission understands this commenter to be suggesting that such conduit borrowers should not be considered obligated persons, such that their advisors would not have to register as municipal advisors. The Commission, however, has taken the position that, regardless of whether an obligated person obtains a letter of credit from a bank to guarantee the payment of municipal securities, an obligated person has an obligation to investors.²²¹ The Commission has long been of the view that the presence of credit enhancements generally would not be a substitute for material disclosure concerning the primary obligor on municipal bonds.²²² Thus, an advisor to an obligated person that has obtained a letter of credit from a bank to guarantee the payment of municipal securities should not be treated differently from an advisor to an obligated person that has not

²¹⁸ See letter from Andrew S. Rose, dated April 10, 2011 (“Rose Letter”).

²¹⁹ See *id.*

²²⁰ Many commenters used the term “conduit borrower” in their letters. Although the term “conduit borrower” and “obligated person” do not have identical meanings, for purposes of this release, the Commission is treating the comments regarding “conduit borrowers” as applying to “obligated persons.”

²²¹ See Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799, note 89 (July 10, 1989). See also Securities Exchange Act Release No. 62184A (May 27, 2010), 75 FR 33100, 33107 (June 10, 2010) (stating: “As noted in [Securities Exchange Act Release No. 60332 (July 17, 2009), 74 FR 36831 (July 24, 2009)], the Commission believes that information regarding conduit borrowers is material to investors in credit enhanced offerings and therefore should be included in the official statements”).

²²² See Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799, 28812 (July 10, 1989).

obtained such credit enhancements, and would therefore have to register as a municipal advisor.²²³

Application of Rules to Advisors to Obligated Persons

One commenter suggested generally that the proposed rules should be more strictly applied to advisors dealing with municipal entities than to advisors dealing with obligated persons. The commenter asserted that there is less public interest in regulating advice to private entities, and such regulation is better handled outside of municipal markets regulation.²²⁴ As stated above, obligated persons assume the same role as municipal entities in an issuance of municipal securities, because obligated persons are committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities. Further, defaults by private entity obligated persons with respect to municipal securities can have negative consequences for municipal entities.²²⁵ Section 15B of Exchange Act (as amended by the Dodd-Frank Act), moreover, provides

²²³ The text of Rule 15Ba1-1(k) has also been clarified to provide that the definition of obligated person excludes persons whose financial information or operating data is not material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement.

²²⁴ See letter from Kendra York, Public Finance Director, State of Indiana, dated February 22, 2011 ("State of Indiana Letter"). This commenter stated that it is unrealistic to expect board members, attorneys, and accountants of obligated persons to be aware that their activities would be subject to Commission regulation. The commenter stated that it seems more appropriate to regulate improvident and risky usage of derivatives by unsophisticated borrowers by focusing on suitability rules applicable to the providers of these services, rather than focusing on their use in the municipal market.

²²⁵ According to a Standard and Poor's study of municipal bond defaults in the 1990s, bonds for the three major types of conduit bond issues (healthcare, multi-family housing, and industrial development) accounted for more than 70% of defaulted principal. More recent reports have also indicated that non-governmental conduit borrowers account for more than 70% of municipal bond defaults. For example, a 2011 report stated that the largest share of modern era defaults consists of industrial development revenue bonds, followed by bonds supporting healthcare and housing. The report states that these three sectors accounted for 67% of all defaulting issues during the period of 1980 to 2011. See 2012 Report on the Municipal Securities Market, *supra* note 45, at 24.

for the protection of both municipal entities and obligated persons.²²⁶ Accordingly, the Commission believes that the municipal advisor registration regime should generally apply in the same manner to advisors of obligated persons as to advisors of municipal entities.²²⁷

As described more fully below, however, the Commission is providing an exemption from the definition of municipal advisor for persons providing advice with respect to certain “investment strategies,” which will narrow the range of activities that would cause an advisor to an obligated person to meet the definition of municipal advisor.²²⁸ Also as described more fully below, the Commission is limiting the scope of its definition of the term “municipal derivative” and its interpretation of the term “solicitation of a municipal entity or obligated person” as each applies to obligated persons, such that an obligated person must be acting in its capacity as such and the relevant activity is in connection with municipal securities (or, in the case of a solicitation, municipal financial products).²²⁹

When Does a Person Become an Obligated Person?

One commenter asked when a client would become an obligated person.²³⁰ Specifically, the commenter asked whether it would be rendering advice as a municipal advisor if it was engaged to consider a client’s options regarding conventional versus conduit financing, but the client

²²⁶ See 15 U.S.C. 78o-4(b)(2)(C).

²²⁷ The Commission notes, however, that the Exchange Act, as amended by the Dodd-Frank Act, imposes a fiduciary duty on municipal advisors when advising municipal entities. See 15 U.S.C. 78o-4(c)(1). The statute does not impose a fiduciary duty with respect to advice to obligated persons. See also *supra* note 100.

²²⁸ See *infra* Section III.A.1.b.viii.

²²⁹ See *infra* note 236 and accompanying text.

²³⁰ See letter from Jonathan Roberts, Principal, Roberts Consulting, LLC, dated February 18, 2011 (“Roberts Consulting Letter”).

subsequently chose not to engage in conduit financing.²³¹ In addition, the commenter asked whether only registered municipal advisors can solicit clients that are eligible to use conduit financing.²³² Lastly, the same commenter asked whether a financial advisor would be required to register as a municipal advisor if a client is examining its debt alternatives, among which is conduit financing.²³³

Whether a financial advisor that advises clients about conduit financing or other financing options would be required to register as a municipal advisor would depend on the facts and circumstances. A person will not be a municipal advisor to an obligated person until the obligated person has begun the process of applying to, or negotiating with, a municipal entity to issue conduit bonds on behalf of the obligated person. Activity that never results in solicitation of or actual contact with a municipal entity does not have a sufficient nexus to municipal financial products or the issuance of municipal securities to require registration as municipal advisor. Merely advising a client on debt financing alternatives that include conduit financing is not a municipal advisory activity, because the client would not be sufficiently close to being an obligated person with respect to an issuance of municipal securities.²³⁴ If a client is only considering conduit financing, the client is not an obligated person. However, if the client applies to, or negotiates with, the municipal entity to issue conduit bonds, the person advising the conduit borrower would be required to be registered as a municipal advisor, regardless of whether or not the financing successfully closes.

One commenter argued that a person that is an obligated person does not remain an

²³¹ See id.

²³² See id.

²³³ See id.

²³⁴ Conversely, providing advice to a client who is a municipal entity regarding debt financing alternatives would constitute a municipal advisory activity.

obligated person indefinitely and is not an obligated person with respect to unrelated matters.²³⁵

The Commission agrees and has limited the scope of the rules as applied to advice concerning municipal financial products used by, and third-party solicitations of, obligated persons as described herein.²³⁶

The same commenter also argued that a person should not be deemed an obligated person if it is not the initial obligor, but rather comes to support the payment of obligations on municipal securities after the offering, through an assumption or other arrangement, and asked the Commission to clarify that any relationship between an obligated person and its advisor will only be considered a municipal advisory relationship to the extent that it directly involves a transaction in which the person is an obligated person.²³⁷ The Commission does not agree. It is the Commission's view that such a person would be an obligated person if the municipal securities remain outstanding after the substitution of the obligated person, and such a person is an obligated person for purposes of Rule 15c2-12. The obligated person's responsibilities and need for protection would be similar regardless of whether it was an initial obligor or a subsequent obligor. The Commission notes that, as discussed, a person is only a municipal advisor to an obligated person if it provides advice to, or on behalf of, the obligated person "with respect to municipal

²³⁵ See SIFMA Letter I.

²³⁶ See *infra* Section III.A.1.b.v. (discussing the definition of "municipal derivatives" and its scope with respect to obligated persons) and Section III.A.1.b.x. (discussing the definition of "solicitation of a municipal entity or obligated person" and its scope with respect to obligated persons).

²³⁷ See SIFMA Letter I. Further, another commenter stated that if an entity related to a borrower agrees to guarantee, or be jointly obligated, on a borrowing, it should be treated as the primary borrower and not as a municipal advisor. See letter from Kasey Kesselring, President, South Lake County Hospital District, dated February 16, 2011 ("South Lake County Hospital Letter"). The Commission notes that such an entity is not acting as an advisor to its affiliated borrower merely by agreeing to guarantee or be jointly obligated on a borrowing.

financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues” or that meets the definition for “solicitation” of such obligated person.²³⁸ The Commission also notes that Exchange Act Section 15B(e)(10) defines obligated person to mean, among other things, “any person... who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.”²³⁹

Charter Schools

In the Proposal, the Commission noted that a charter school would generally fall under the definition of municipal entity, but may, in certain circumstances, fall under the definition of obligated person.²⁴⁰ With respect to municipal financial products or the issuance of municipal securities, the Commission asked in what circumstances should charter schools be considered municipal entities or obligated persons.²⁴¹ Further, the Commission asked how the treatment of charter schools under different state laws affects their classification as municipal entities or

²³⁸ See 15 U.S.C. 78o-4(e)(4).

²³⁹ See 15 U.S.C. 78o-4(e)(10).

²⁴⁰ 15 U.S.C. 78o-4(e)(8). See also *infra* note 241.

²⁴¹ See Proposal, 76 FR at 835.

In the Proposal, the Commission clarified, in response to a commenter, that charter schools are considered to be public schools and generally derive their charter from a political subdivision of a state (for example, local school boards, state universities, community colleges, or state boards of education) and, therefore, would fall under the definition of municipal entity. See *id.*, at 829, notes 83-85 and accompanying text.

Charter schools, or persons that operate charter schools, such as charter school management organizations that are organized as non-profit corporations, may issue municipal securities through a municipal entity for capital needs, such as facilities that are not provided for by state funding. In that instance, the charter school, or charter school management organization, would be an obligated person with respect to the issuance of municipal securities and any related municipal financial products. See *id.*, at 829, note 85.

obligated persons.²⁴²

One commenter stated that charter schools that have bonds issued on their behalf by a local financing governmental entity are classic examples of obligated persons.²⁴³ This commenter suggested that, if a charter school receives tax money from a state or school district, the school should be treated as a municipal entity.²⁴⁴ Otherwise, the school should be treated as an obligated person.²⁴⁵ Another commenter stated that a charter school should be considered a municipal entity if it is organized as a political subdivision of a state or an instrumentality of a political subdivision of a state.²⁴⁶ This commenter stated that, in other circumstances when providing for payment of municipal securities, a charter school should be considered an obligated person.²⁴⁷

As stated in the Proposal, the Commission continues to believe that charter schools are generally municipal entities, because they are public schools and derive their charter from a political subdivision of a state. While charter schools generally receive a portion of their funds from the state, they may also raise funds through conduit borrowing, and may pledge funds other than state money for the payment on the conduit borrowing. Thus, a charter school is an obligated person under Section 15B(e)(10) and Rule 15Ba1-1(k) when it engages in conduit borrowing using and/or pledging solely monies derived from sources other than the state or political subdivision of a state.²⁴⁸ A municipal entity that is an obligated person on bonds issued by another municipal entity

²⁴² See id., at 835.

²⁴³ See Kutak Rock Letter.

²⁴⁴ See id.

²⁴⁵ See id.

²⁴⁶ See NABL Letter.

²⁴⁷ See id.

²⁴⁸ See also supra note 241 and accompanying text (recognizing that a charter school may be an obligated person).

is still a municipal entity for purposes of this rule, and advisors to such municipal entities are subject to a statutory fiduciary duty.²⁴⁹

iv. Municipal Financial Products

Exchange Act Section 15B(e)(5) defines “municipal financial product” to mean “municipal derivatives, guaranteed investment contracts, and investment strategies.”²⁵⁰ The Commission proposed to incorporate into the rule the statutory definition of municipal financial product.²⁵¹ The Commission received approximately ten comment letters regarding the proposed definition. The issues raised by these commenters are discussed below in the “Municipal Derivatives,” “Guaranteed Investment Contracts,” and “Investment Strategies” sections. The Commission is adopting the definition of “municipal financial product” as proposed.²⁵²

v. Municipal Derivatives

As discussed in the Proposal, Exchange Act Section 15B does not define the term “municipal derivatives.” Accordingly, the Commission proposed Rule 15Ba1-1(f) to define the term to mean any swap²⁵³ or security-based swap²⁵⁴ to which a municipal entity is a counterparty or to which an obligated person, acting in its capacity as an obligated person, is a counterparty.²⁵⁵ Thus, as stated in the Proposal, the Commission included in the definition of municipal derivatives

²⁴⁹ See 15 U.S.C. 78o-4(c).

²⁵⁰ 15 U.S.C. 78o-4(e)(5).

²⁵¹ See proposed Rule 15Ba1-1(g) (providing that “municipal financial product” has the same meaning as in Section 15B(e)(5) of the Exchange Act).

²⁵² See Rule 15Ba1-1(i).

²⁵³ As proposed and adopted, the definition specifies that “swap” is as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and Section 3(a)(69) of the Exchange Act (15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder.

²⁵⁴ As proposed and adopted, the definition specifies that “security-based swap” is as defined in Section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)), including any rules and regulations thereunder.

²⁵⁵ See proposed Rule 15Ba1-1(f).

the definitions of “swap” and “security-based swap,” as those terms are defined by statute (and any rules and regulations thereunder). In the Proposal, the Commission asked whether the proposed definition of municipal derivatives should be modified or clarified in any way.²⁵⁶

One commenter stated that the proposed definition of municipal derivatives is too broad, because it encompasses too many types of advisory entities and transactions and the definition goes beyond securities.²⁵⁷ The commenter expressed concern that a person must register as a municipal advisor regardless of the type of swap advice contemplated or the relationship between the municipal entity and the person seeking to offer the advice.²⁵⁸

Another commenter stated that there is no statutory basis or legislative history for the proposed expansion of the industry’s common usage of the term “municipal derivatives,” which is limited to derivatives of a municipal security.²⁵⁹ The commenter stated that the proposed definition would mean that any public plan (if not exempted from the definition of municipal entity) using swaps in the management of its overall portfolio would be dealing in municipal financial products, merely by virtue of being a counterparty to the swap.²⁶⁰

Additionally, one commenter stated that many municipal entities enter into commodity hedging transactions in connection with their operations to avoid mid-year operating budget disruptions and rate hikes. Accordingly, this commenter asked the Commission to confirm that hedging transactions by municipal entities related to their operations (rather than municipal

²⁵⁶ See Proposal, 76 FR at 836.

²⁵⁷ See David J. Tudor, President and CEO, ACES Power Marketing LLC, dated March 2, 2011 (“ACES Power Marketing Letter”).

²⁵⁸ See *id.*

²⁵⁹ See letter from Robert V. Newman, Executive Director, Utah Retirement Systems, dated February 22, 2011 (“Utah Retirement System Letter”).

²⁶⁰ See *id.*

securities) do not constitute municipal derivatives.²⁶¹

One commenter asked the Commission to clarify how a person engaging in a transaction or assignment with respect to a municipal derivative would determine that the person it is advising is “an obligated person, acting in its capacity as an obligated person.”²⁶² The commenter stated that the Commission should clarify that a person (presumably acting as a dealer or counterparty) must have actual knowledge that the counterparty is an obligated person acting as such and have actual knowledge that the municipal derivative implicates or is related to the underlying transactions or funds that make such person an obligated person.²⁶³ Further, the commenter stated that a person should not need to affirmatively inquire as to the counterparty’s or the funds’ status.²⁶⁴

Another commenter suggested narrowing the definition of municipal derivatives to only include debt-related derivatives entered into (a) by a municipal entity in connection with an issue of municipal securities or (b) by an obligated person as a pledged security or a source of payment for municipal securities.²⁶⁵ This commenter also stated that the phrase “in its capacity as an obligated person” is not sufficiently tailored, because it would include any derivative entered into by the obligated person to hedge a conduit borrowing, not merely those that “by contract or other

²⁶¹ See NABL Letter.

²⁶² See SIFMA Letter I.

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See NABL Letter. This commenter stated that by narrowing the definition of municipal derivatives accordingly, “swaps that are entered into by a municipal entity to hedge the interest rate on variable rate securities, or to hedge the value of municipal securities to be issued in the future, as well as swaps that are part of a structured municipal securities financing (e.g., a structured student loan or mortgage revenue bond issue) would be covered, but derivatives that are unrelated to municipal securities issues (e.g., swaps to hedge bank loans or fuel costs) or are entered into by a conduit borrower and [not] pledged as security or a source of payment for, the municipal securities issue would be excluded.”

arrangement... support the payment” of municipal securities.²⁶⁶ In addition, this commenter stated that, given the use of the term “municipal financial product,” Congress did not intend to regulate transactions with non-municipal entities that do not affect municipal entities or investors, simply because they result from a municipal securities transaction.²⁶⁷

In contrast, one commenter agreed with the Commission that municipal derivatives includes both swaps and security-based swaps to which a municipal entity or obligated person is a counterparty, but stated that this definition is too narrow.²⁶⁸ This commenter stated that, because the term “municipal derivatives” (rather than the term “swap”) was used in the definition of municipal financial products, Congress intended to “provide flexibility to address problems that may arise in the future in connection with the use of other existing or yet-to-be-developed forms of derivatives by municipal entities.”²⁶⁹

The Commission has carefully considered these comments and is adopting the definition of municipal derivatives substantially as proposed. The Commission, however, is clarifying herein the scope of application of the definition to obligated persons, in response to issues raised by commenters.²⁷⁰ Specifically, the Commission is adopting Rule 15Ba1-1(f), which now provides that the term “municipal derivatives” means “any swap (as defined in Section 1a(47) of the

²⁶⁶ See id.

²⁶⁷ See id.

²⁶⁸ See MSRB Letter I.

²⁶⁹ See id. See also infra note 271 (discussion of the definition of swap and security-based swap, which includes flexibility to address yet-to-be developed forms of derivatives).

The Commission also notes that on July 18, 2012, it adopted rules jointly with the CFTC to, among other things, further define the terms swap, security-based swap, and security-based swap agreement. See Securities Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (August 13, 2012) (Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement;” Mixed Swaps; Security-Based Swap Agreement Recordkeeping).

²⁷⁰ See Rule 15Ba1-1(f).

Commodity Exchange Act (7 U.S.C. 1a(47)) and section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder) or security-based swap (as defined in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)), including any rules and regulations thereunder) to which: (1) [a] municipal entity is a counterparty; or (2) [a]n obligated person, acting in such capacity, is a counterparty.”²⁷¹

As proposed and adopted, with respect to municipal entities, the Commission has determined not to qualify the definition of municipal derivatives as being limited to those entered into in connection with, or pledged as security or a source of payment for, existing or contemplated municipal securities. Municipal entities seeking advice with respect to municipal derivative transactions (including commodity hedging transactions in connection with their operations, which fall within the definition of municipal derivatives) are subject to risks, regardless of whether the municipal derivatives are entered into in connection with or pledged as security or a source of payment for existing or contemplated municipal securities, and should have the protections provided by municipal advisor registration.²⁷²

As proposed and adopted, with respect to obligated persons, the coverage of the registration requirement is limited to advice relating to derivatives entered into by an obligated person in its capacity as an obligated person with respect to municipal securities. Thus, with respect to obligated persons, municipal derivatives include those derivatives entered into by obligated persons in

²⁷¹ See *id.* The Commission notes that the definitions of swap and security-based swap are quite broad and that Section 712(d) of the Dodd-Frank Act gives the Commission and CFTC joint authority to further define such terms. Under the Commodity Exchange Act, as amended by the Dodd-Frank Act, the term “swap” is defined to mean, in part, any agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap. See 7 U.S.C. 1a(47). In addition, under the Exchange Act, as amended by the Dodd-Frank Act, the term “security-based swap” incorporates the definition of “swap” under the Commodity Exchange Act. See 15 U.S.C. 78c(a)(68).

²⁷² See *supra* note 190 and accompanying text.

connection with, or pledged as security or a source of payment for, existing municipal securities or municipal securities to be issued in the future.²⁷³ By contrast, advice with respect to other types of derivative transactions entered into by obligated persons outside of their capacity as obligated persons will not trigger the municipal advisor registration requirement. For example, a person advising a nonprofit hospital to hedge an interest rate swap entered into in connection with a variable rate conduit borrowing (by such hospital) would be a municipal advisor. However, a person would not be required to register as a municipal advisor if it is advising an airline company that is an obligated person with respect to airport revenue bonds about whether the airline company should hedge its exposure on aviation fuel costs with a derivatives transaction that is unrelated to any particular issuance of municipal securities and that is outside of its capacity as an obligated person. The Commission believes that this clarification with respect to obligated persons addresses the concerns of commenters regarding scope of the advisors' responsibilities to conduit borrowers and the ability to identify situations where advising obligated persons triggers a registration requirement.

The Commission notes that the Exchange Act and the Commodity Exchange Act, as amended by the Dodd-Frank Act, provide heightened protection to special entities, in connection with swaps and security-based swaps. The Commission interprets the term special entity to generally include municipal entities, because the definition of municipal entity is substantially

²⁷³ The Commission believes it is appropriate to refer to "existing or contemplated" municipal securities because an obligated person could enter into a swap or security-based swap before or after an issuance of municipal securities (e.g., a forward-starting interest rate swap as part of a synthetic advanced refunding). See also *supra* note 265 (discussing the comment in the NABL Letter that the definition of municipal derivatives should be narrowed in a way that would still cover, among other things, swaps entered into to hedge the value of municipal securities to be issued in the future).

similar to the definition of special entity in the Exchange Act and the Commodity Exchange Act.²⁷⁴

The heightened protection afforded by the Acts to special entities applies to all swaps and security-based swaps, irrespective of whether the swaps and security-based swaps are entered into in connection with or pledged as security or a source of payment for existing or contemplated securities.²⁷⁵ Accordingly, the Commission's determination not to qualify its interpretation of the

²⁷⁴ The Commission notes that there are some differences between the statutory definitions of municipal entity and special entity. In particular, the statutory definitions of special entity do not explicitly include authorities, instrumentalities or corporate instrumentalities of a state. The definition of municipal entity includes plans, programs, or pools of assets established by a state, political subdivision, or municipal corporate instrumentality (or any agency, authority, or instrumentality thereof), and therefore includes 529 Savings Plans and LGIPs, while the statutory definitions of special entity do not explicitly include such entities. Also, the statutory definitions of special entity include governmental plans as defined by ERISA. The Commission notes that the CFTC, in adopting rules to implement business conduct standards for swap dealers, included in the definition of "special entity" (for purposes of Commodity Exchange Act Section 4s): "A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State." See Standards for Swap Dealers and Major Swap Participants with Counterparties (January 11, 2012), 77 FR 9734 (February 17, 2012) (adopting rules proposed by the CFTC prescribing external business conduct standards for swap dealers and major swap participants) ("Business Conduct Standards for Swaps").

The CFTC's final rules state that all State and municipal special entities are municipal entities. See Business Conduct Standards for Swaps, 77 FR at 9739.

²⁷⁵ As discussed herein, with Title IX of the Dodd-Frank Act, Congress provided certain protections for municipal entities and obligated persons with respect to their interaction with certain advisors, including persons providing advice with respect to, among other things, municipal derivatives.

Moreover, with Section 764 of Title VII of the Dodd-Frank Act, by adding new Section 15F to the Exchange Act, Congress provided certain protections for special entities with respect to their interaction with security-based swap dealers and major security-based swap participants. See Pub. L. 111-203, 124 Stat. 1376, 1789-1792, §764(a) (adding Exchange Act Section 15F).

Among other things, Section 15F(h)(4) of the Exchange Act establishes that a security-based swap dealer that "acts as an advisor to a special entity shall have a duty to act in the best interests of the special entity" and "shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination" that any security-based swap recommended by the security-based swap dealer is in the best interests of the special entity...." Section 15F(h)(5) requires that security-based swap entities that offer to, or enter

term “municipal derivatives” with respect to municipal entities is designed to provide a level of protection to such entities with respect to swaps and security-based swaps that is consistent with the protection afforded to special entities and the Commission’s interpretation of that term with respect to obligated persons is intended to reflect the scope of the role of obligated persons with respect to municipal securities.

vi. Guaranteed Investment Contracts

Section 15B(e)(2) of the Exchange Act, as amended by the Dodd-Frank Act, defines “guaranteed investment contract” to include “any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, and also includes any agreement to supply investments on two or more future dates, such as a forward supply contract.”²⁷⁶

In the Proposal, the Commission proposed to include the statutory definition of guaranteed

into a security-based swap with, a special entity comply with any duty established by the Commission that requires a security-based swap entity to have a “reasonable basis” for believing that the special entity has an “independent representative” that meets certain criteria and undertakes a duty to act in the “best interests” of the special entity. See Pub. L. 111-203, 124 Stat. 1376, 1791 (to be codified at 15 U.S.C. 78o-10(h)(5)). This provision is intended to operate together with the municipal advisor regulatory scheme, which would apply to such an “independent representative” unless the representative is an employee of the municipal entity. Similarly, Section 731 of the Dodd-Frank Act amends the Commodity Exchange Act by adding Section 4s, which contains language parallel to Section 15F of the Exchange Act that applies to swap dealers and major swap participants. See Pub. L. 111-203, 124 Stat. 1376, 1789-1792, §731 (adding Commodity Exchange Act Section 4s).

The term “special entity” is defined to include a “State, State agency, city, county, municipality, or other political subdivision of a State.” This definition is consistent with, but not identical to, the statutory definition of “municipal entity” in Section 15B(e)(8). (“[T]he term ‘municipal entity’ means any State, political subdivision of a State, or municipal corporate instrumentality of a State, including – (A) any agency, authority or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority or instrumentality thereof; and (C) any other issuer of municipal securities[.]”).

²⁷⁶

15 U.S.C. 78o-4(e)(2).

investment contract in Rule 15Ba1-1(a).²⁷⁷

The Commission received one comment supporting the proposed definition.²⁷⁸ Another commenter, however, suggested that the definition does not include all guaranteed investment contracts entered into by municipal entities.²⁷⁹ Instead, this commenter stated that the statutory definition of guaranteed investment contracts refers only to those contracts related to issues of bonds and similar municipal securities.²⁸⁰ Another commenter stated that it is “cognizant of special issues arising in the investment of bond proceeds in guaranteed investment contracts, particularly in the tax area, but [is] unclear how the situation is improved ... by additional regulation of [guaranteed investment contract] providers by the SEC.”²⁸¹

The Commission has carefully considered these comments and is adopting a definition of guaranteed investment contract substantially as proposed but with changes designed to respond to commenters.²⁸² Specifically, the Commission is interpreting the statutory definition of guaranteed investment contract so that it “has the same meaning as in section 15B(e)(2) of the Act (15 U.S.C. 78o-4(e)(2)); provided, however, that the contract relates to investments of proceeds of municipal securities or municipal escrow investments.”²⁸³

For the same reasons that the Commission is narrowing the application of the term investment strategies as discussed further herein,²⁸⁴ the Commission is persuaded by commenters

²⁷⁷ See proposed rule 15Ba1-1(a).

²⁷⁸ See MSRB Letter. This commenter did not suggest any changes to the proposed definition.

²⁷⁹ See NABL Letter.

²⁸⁰ See *id.*

²⁸¹ See State of Indiana Letter.

²⁸² See Rule 15Ba1-1(a).

²⁸³ See *id.*

²⁸⁴ See Section III.A.1.viii.

that, at this time, it is appropriate to apply the definition of guaranteed investment contract more narrowly. Guaranteed investment contracts are investment products,²⁸⁵ and this more limited interpretation is consistent with the approach the Commission is adopting with respect to the application of “investment strategies,” which will be limited to plans or programs for the investment of proceeds of municipal securities and the recommendation of and brokerage of municipal escrow investments.²⁸⁶ A municipal entity could invest any funds held by or on behalf of such municipal entity, as opposed to just proceeds of municipal securities, in a guaranteed investment contract. Under the rule as adopted, a provider of a guaranteed investment contract is generally not a municipal advisor as long as such provider does not engage in municipal advisory activities, such as providing advice to the municipal entity or obligated person about the purchase of a guaranteed investment contract that relates to investments of proceeds of municipal securities or municipal escrow investments.²⁸⁷ The Commission, therefore, believes it is in the public interest and

²⁸⁵ The Commission notes that, by comparison, swaps and security-based swaps are not investment products, but instead are often used to hedge the risk from other financial transactions. Also, the Commission notes that the protections established by the Dodd-Frank Act with respect to swap and security-based swap transactions discussed above, are not applicable to guaranteed investment contracts or other investment strategies. See supra note 275 and accompanying text.

²⁸⁶ See infra Section III.A.1.b.viii. (discussing the term “investment strategies” and the exemption in Rule 15Ba1-1(d)(3)(vii)).

²⁸⁷ The Commission also notes that it has brought several enforcement actions involving investment of proceeds in guaranteed investment contracts. See, e.g., In the Matter of Banc of America Securities, now known as Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger, AP File No. 3-14153, Securities Exchange Act Release No. 63451 (December 7, 2010) (Banc of America Securities LLC agreed to settle Commission charges of securities fraud for allegedly engaging in improper practices in connection with the bidding of reinvestment instruments used by municipal entities) (“Banc of America Settlement”); Securities and Exchange Commission v. UBS Financial Services Inc., Civil Action No. 11-CV-2885 (D.N.J. May 4, 2011) (UBS agreed to settle Commission charges of securities fraud for allegedly fraudulently rigging over 100 municipal bond reinvestment transactions) (“UBS Settlement”); Securities and Exchange Commission v. J.P. Morgan Securities LLC., Civil Action No. 11-CV-3877 (D.N.J. July 7, 2011) (J.P. Morgan agreed to settle Commission charges of allegedly fraudulently rigging at least 93 municipal bond

consistent with the purposes of Section 15B to interpret the definition of guaranteed investment contract as described herein.

vii. Issuance of Municipal Securities

Section 15B(e)(4)(A) of the Exchange Act provides in relevant part that a municipal advisor includes a person that provides advice to or on behalf of a municipal entity or obligated person with respect to the “issuance of municipal securities,” including advice with respect to “the structure, timing, terms, and other similar matters” concerning such issues. Section 3(a)(29) of the Exchange Act defines the term “municipal securities.”²⁸⁸ The broad statutory language in Section 15B(e)(4)(A) of the Exchange Act regarding advice on “the structure, timing, terms and other similar matters” concerning such issues suggests that advice on a broad range of activities potentially may be included within advice with respect to the issuance of municipal securities.

The scope of the concept of an “issuance of municipal securities” is particularly relevant to

reinvestment transactions) (“JP Morgan Settlement”); Securities and Exchange Commission v. Wachovia Bank N.A., now known as Wells Fargo bank, N.A., successor by merger., Civil Action No. 2:11-cv-07135-WJM-MF (D.N.J. December 8, 2011) (Wachovia Bank N.A. agreed to settle Commission charges of allegedly fraudulently rigging at least 58 municipal bond reinvestment transactions) (“Wachovia Settlement”); and Securities and Exchange Commission v. GE Funding Capital Market Services, Inc., Civil Action No. 2:11-cv-07465-WJM-MF (D.N.J. December 23, 2011). The reinvestment transactions in these cases involved the reinvestment of municipal bond proceeds in reinvestment instruments, including guaranteed investment contracts, forward purchase contracts, and repurchase agreements.

²⁸⁸ Specifically, Section 3(a)(29) of the Exchange Act defines the term “municipal securities” to mean “securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954) the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs 4(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security.” See 15 U.S.C. 78c(a)(29) (emphasis added). Section 3(a)(10) of the Exchange Act defines the term “security.” See 15 U.S.C. 78c(a)(10).

the “advice” aspect of the municipal advisor definition, as discussed previously herein,²⁸⁹ because a person’s provision of advice to a municipal entity or obligated person only results in municipal advisor status if the subject of that advice involves either the “issuance of municipal securities” or “municipal financial products.”²⁹⁰ Several commenters recommended that the Commission provide guidance on the extent to which activities would be considered “advice with respect to the issuance of municipal securities.”²⁹¹ One commenter suggested that the municipal advisor registration provision in Section 975 of the Dodd-Frank Act is intended to cover advice on certain listed activities within broad categories, including certain “strategic services,” “transaction-related services, and “post-issuance related services.”²⁹² One commenter recommended that such advice should be construed broadly, from a timing perspective, to include “any advice provided in connection with a municipal securities issue ... at any point during the pre-issuance planning process as well as throughout the life of the issuance through final payment of principal and interest on the securities (by reason of maturity, earlier redemption, or otherwise, or for such longer period due to delayed payment such as the case of a payment default)...”²⁹³ Another commenter recommended that such advice should not extend to advice after the closing of a specific bond issue.²⁹⁴

The Commission generally agrees that activities covered by the subject of the “issuance of municipal securities” should be construed broadly as a matter of statutory construction and policy to ensure appropriate protection of municipal entities with respect to advice received relating in some

²⁸⁹ See supra Section III.A.1.b.i. (discussing the advice standard in general).

²⁹⁰ See supra Section III.A.1.b.iv. (discussing the term “municipal financial products”).

²⁹¹ See, e.g., MSRB Letter I and NAIPFA Letter I.

²⁹² See MSRB Letter II. Other commenters discussed whether the types of covered activities described by the MSRB should be narrower or broader in the context of the underwriter exclusion. See NAIPFA Letter II and Baum Letter.

²⁹³ See MSRB Letter I.

²⁹⁴ See NAIPFA Letter I.

way to the issuance of municipal securities and to limit the potential for circumvention of the municipal advisor registration provision. As discussed previously herein, however, the determination of whether any particular activity constitutes “advice” in the first instance for purposes of the municipal advisor definition depends on all the facts and circumstances.²⁹⁵ The Commission also agrees that “advice with respect to the issuance of municipal securities” should be construed broadly from a timing perspective to include advice throughout the life of an issuance of municipal securities, from the pre-issuance planning stage for a debt transaction involving the issuance of municipal securities to the repayment stage for those municipal securities. This interpretation would afford municipal entities and investors with the protections of the municipal advisor registration provision during a time frame that may involve advice on significant matters affecting issues of municipal securities. In this regard, municipal issuers may make significant decisions affecting the structure, timing, terms, or other similar matters concerning an issue of municipal securities early in the planning stages of a transaction and may make significant decisions affecting ongoing compliance, repayment, or refinancing throughout the term of an outstanding bond issue.

In addition, the scope of the concept of the issuance of municipal securities also is particularly relevant to the statutory exclusion to the municipal advisor definition for broker-dealers serving as underwriters, because the underwriting function involves certain activities that relate to the issuance of municipal securities. The exclusion for underwriters from the definition of municipal advisor is limited to activities that are within the scope of an underwriting of a particular issuance of municipal securities. For purposes of the underwriting exclusion to the municipal advisor definition, the function of serving as underwriter on a particular issuance of municipal

²⁹⁵ See supra Section III.A.1.b.i. (discussing the advice standard in general).

securities is more circumscribed and encompasses services on a particular transaction during a narrower time frame than the overall focus of the municipal advisor definition with respect to advice on the issuance of municipal securities (which involves a broader focus and longer time frame), as discussed further herein.²⁹⁶

viii. Investment Strategies

Exchange Act Section 15B(e)(3) provides that the term “investment strategies” “includes” plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.²⁹⁷ The Commission proposed to interpret the term to mean that it includes, without limitation, the investment of the proceeds of municipal securities and plans, programs, or pools of assets that invest any other funds held by, or on behalf of, a municipal entity.²⁹⁸ As such, under the proposed interpretation of the statutory definition, any person that provides advice with respect to such funds would have to register as a municipal advisor unless the person was covered by an exclusion or exemption.²⁹⁹

Plans or Programs for the Investment of the Proceeds of Municipal Securities

In the Proposal, the Commission asked whether its interpretation of the term “investment strategies” should be modified or clarified in any way.³⁰⁰ Specifically, the Commission asked whether it should exclude plans, programs, or pools of assets that invest funds that are not proceeds

²⁹⁶ See generally *infra* Section III.A.1.c.iv. (discussing the underwriter exclusion). The time frame for the underwriter role generally begins upon the municipal issuer’s engagement of the underwriter for a particular issuance of municipal securities and ends at the end of the underwriting period for that issuance. See *infra* notes 589-591 and accompanying text.

²⁹⁷ 15 U.S.C. 78o-4(e)(3).

²⁹⁸ See Proposal, 76 FR at 830.

²⁹⁹ See *id.*

³⁰⁰ See *id.*, at 835.

of the issuance of municipal securities.³⁰¹ The Commission also asked how it would determine when funds should no longer be considered “proceeds of municipal securities” if it were to limit investment strategies to “plans or programs for the investment of the proceeds of municipal securities (other than municipal derivatives and guaranteed investment contracts) or the recommendation of or brokerage of municipal escrow investments.”³⁰²

Commenters generally opposed the proposed interpretation of investment strategies. Many commenters stated that the proposed interpretation was too broad, because it covers any fund held by a municipal entity, regardless of its source.³⁰³ Some commenters asserted that the proposed interpretation is contrary to the language and intent of the Dodd-Frank Act³⁰⁴ and suggested that the definition be restricted so that it applies only to the statutorily-identified categories of investments

³⁰¹ See id.

³⁰² See id.

³⁰³ See, e.g., letter from Representative Kenny Marchant, dated March 11, 2011 (“Marchant Letter”); SIFMA Letter I; NABL Letter; American Bankers Association Letter I; letter from Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated February 22, 2011 (“Bond Dealers of America Letter”). See also letters from Representative Todd Russell Platts, dated April 7, 2011 (“Platts Letter”); Representatives Peter Welch, Thomas Petri and Bill Shuster, dated April 5, 2011 (“Welch Letter”); John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, dated May 24, 2011 (“OCC Letter”); Senator Tim Johnson, dated June 9, 2011 (“Johnson Letter”); Brian H. Graff, Craig P. Hoffman, Ilene H. Ferenczy, Judy A. Miller, Mark Dunbar, and James Paul, American Society of Pension Professionals & Actuaries and the National Tax Sheltered Accounts Association, dated April 15, 2011 (“American Society of Pension Professionals Letter”); Brian D. McCoubrey, President and Chief Executive Office, The Savings Bank, dated February 17, 2011 (“Savings Bank Letter”); Celeste Embrey, Assistant General Counsel, Texas Bankers Association, dated February 21, 2011 (“Texas Bankers Association Letter”). See also infra Section III.A.1.c.viii. (discussing an exclusion from the definition of “municipal advisor” for banks).

³⁰⁴ See, e.g., Marchant Letter; SIFMA Letter I; NABL Letter; Kutak Rock Letter; letter from Michael B. Koffler, Sutherland Asbill & Brennan LLP on behalf of Massachusetts Life Insurance Company, Nationwide Life Insurance Company and The Prudential Insurance Company of America, dated February 22, 2011 (“Insurance Companies Letter”). See also Platts Letter; Welch Letter; Johnson Letter; American Society of Pension Professionals Letter. Other than referring to statutory language, none of these letters offered other evidence of such intent.

of proceeds of municipal securities and recommendation of and brokerage of municipal escrow investments.³⁰⁵ One commenter stated that the “expanded definition” of investment strategies is not required or even implied by the Dodd-Frank Act and would subject a “vast swath of activity – which was not intended to be, and need not be, further regulated – to additional regulation.”³⁰⁶

On the other hand, one commenter agreed with the Commission that the use of the word “includes” in the statutory definition of investment strategies suggests that the term is not limited to plans or programs for the investment of the proceeds of municipal securities.³⁰⁷ This commenter stated its belief, however, that Congress intended the definition to be limited to investment activities that relate to the securities and securities-like vehicles of a municipal entity, rather than all investment activities of municipal entities.³⁰⁸

In a similar vein, commenters suggested that the definition should encompass only plans or programs for investments in financial instruments, as opposed to investments in, for example, infrastructure, real estate, social welfare, and other non-financial investments.³⁰⁹ Another commenter stated that, with respect to the funds held by or on behalf of a municipal entity, whether a person is providing advice regarding the “investment of” those funds, not other expenditure or use of the funds for non-investment purposes, is the determining factor for deciding that a person is a

³⁰⁵ See, e.g., SIFMA Letter I; NABL Letter; ABA Letter; Bond Dealers of America Letter; letter from Karrie McMillan, General Counsel, Investment Company Institute, dated February 22, 2011 (“ICI Letter”). See also Marchant Letter and Platts Letter.

³⁰⁶ SIFMA Letter I. See also NABL Letter.

³⁰⁷ See MSRB Letter.

³⁰⁸ See *id.*

³⁰⁹ See NABL Letter. See also SIFMA Letter I (stating that “the [Commission] should clarify that the term [investment strategies], in any case, does not include local government investment pools, purchases of real estate or expenditures for, among others, infrastructure, equipment and personnel, which often are described as ‘infrastructure investments’”).

municipal advisor.³¹⁰

One commenter stated that a “plan or program,” as used in the statutory definition of investment strategies, is a series of investment related actions that would be generally akin to a financial plan, not merely advice incidental to a particular trade or investment.³¹¹ Another commenter urged the Commission to limit investment strategies to advice articulated as a part of the investment plan for the proceeds of a municipal securities offering at or before the time the proceeds are received.³¹²

Some commenters asserted that public pension plans, participant directed investment programs or plans such as 529 Savings Plans and 403(b) and 457 plans were not intended to be regulated under the Exchange Act or the Dodd-Frank Act and should not be covered under the definition of investment strategies.³¹³ According to these commenters, the Dodd-Frank Act was intended to regulate those who provide advice regarding the issuance of municipal bonds and the investment of offering proceeds.³¹⁴ Therefore, these commenters argue, all governmental

³¹⁰ See SIFMA Letter I.

³¹¹ See SIFMA Letter I. See also American Bankers Association Letter I (stating that the term “investment strategy” by definition “contemplates a series of steps to reach a particular investment goal”) and Financial Services Institute Letter.

³¹² See James S. Keller, Chief Regulatory Counsel, The PNC Financial Services Group, Inc., dated February 22, 2011 (“PNC Financial Services Letter”).

³¹³ See, e.g., Utah Retirement Systems Letter; letter from Jeffrey W. States, State Investment Officer, Nebraska Investment Council, dated February 15, 2011 (“Nebraska Investment Council Letter”); letter from Lisa Tate, Vice President, Litigation & Associate General Counsel, dated February 22, 2011 (“ACLI Letter”); letter from Gary A. Sanders, Vice President – Securities & State Government Relations, National Association of Insurance and Financial Advisors, dated June 13, 2011 (“National Association of Insurance and Financial Advisors Letter”); letter from Ethan E. Kra, Vice President, Pension Practice Council and William R. Hallmark, Chair, Public Plans Subcommittee, American Academy of Actuaries, dated June 15, 2011 (“American Academy of Actuaries Letter”).

³¹⁴ See American Society of Pension Professionals Letter; American Academy of Actuaries Letter; Fraser Stryker Letter.

retirement plans should be excluded from the definition of investment strategies. Alternatively, one commenter suggested that, at the very least, governmental retirement and savings plans that are funded exclusively through the contribution of the employees as participants should be excluded.³¹⁵ Another commenter stated that the phrase “plans or programs for the investment of proceeds of municipal securities” implies that the purpose of the plan or program is to invest proceeds of municipal securities, whereas the purpose of public pension plans is to provide retirement benefits.³¹⁶ Another commenter suggested that municipal securities regulation was originally intended to regulate the issuance of investment instruments by a municipal entity under which the municipal entity is required to pay the investor in accordance with the terms of the investment.³¹⁷ The commenter stated that state employee pension plans, 529 Savings Plans, and assets invested by the state are not investment instruments issued by the state to investors.³¹⁸ As such, the commenter stated that they were never intended to be, nor should they now be, regulated under the Exchange Act or the Dodd-Frank Act.³¹⁹

One commenter stated that governmental retirement plans should not be considered investment strategies unless the employer funds such plans with proceeds from the issuance of pension obligation bonds. See Fraser Stryker Letter.

³¹⁵ See American Society of Pension Professionals Letter.

³¹⁶ See American Academy of Actuaries Letter.

³¹⁷ See Nebraska Investment Council Letter.

³¹⁸ See id.

³¹⁹ See id. This commenter pointed out that the terms “securities” and “municipal securities” were not changed by the Dodd-Frank Act. As such, this commenter stated that, “[w]ith respect to the grant of authority to the [Commission] over the ‘issuance of municipal securities,’ there has been no change under the Dodd-Frank Act to justify the expansion of the [Commission’s] authority.” Further, the commenter noted that the statutory definition of investment strategies indicates that plans and programs that are intended to be covered must relate to the proceeds of municipal securities. The commenter argued that the definition of municipal entity was not intended to expand the types of assets regulated by the Commission and stated that “[t]he underlying notion that the [Commission] is still regulating ‘municipal securities’ should not be disregarded without a clear Congressional

On the other hand, one commenter stated that the term “investment strategies” should include any type of investment strategy or advice relating to the investment of funds of investors or other vested persons held in any plan, program, or pool of assets sponsored or established by a state, political subdivision, or municipal corporate instrumentality, or any agency, authority, or instrumentality thereof, such as those created in connection with municipal fund securities, including but not limited to 529 Savings Plans and state and local government investment pools.³²⁰ This commenter further stated that public defined contribution pension plans should also fall within the definition, because these plans share many of the same potential impacts on third-party beneficiaries and are generally exempt from the protections afforded by ERISA to private pension funds.³²¹

The same commenter stated that funds should cease to be subject to the definition of investment strategies once their investment is no longer governed by legal documents or covenants governing the use of such funds.³²² Similarly, another commenter stated that proceeds should mean proceeds raised in securities offerings, until they are used for the purposes described in the use of proceeds section in the offering document, or otherwise commingled with the general funds of the

mandate, which must necessarily include a change to the definition of ‘municipal security.’” Additionally, this commenter stated that, since government plans are specifically exempt from ERISA, “[t]he proposed rule seems to be an end-run around ERISA, now subjecting the fiduciaries of these state plans to federal oversight without a Congressional directive to do so.” But see infra note 320 and accompanying text (discussing the MSRB Letter, which argues that some 529 Savings Plans are municipal fund securities).

³²⁰ See MSRB Letter.

³²¹ See *id.*

³²² See *id.* This commenter stated that professionals advising on, or executing investments of, public funds that are not subject to specific restrictions or covenants, other than municipal derivatives or guaranteed investment contracts, would instead be subject to existing applicable investment adviser, broker-dealer, or bank regulations governing such transactions.

municipal entity.³²³ Additionally, one commenter suggested that “proceeds” should not extend to “replacement proceeds” such as pledge funds.³²⁴

The Commission has carefully considered the issues raised by commenters on the Proposal. As noted above, Exchange Act Section 15B(e)(3) defines investment strategies to include plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.³²⁵ In response to comments on the proposed definition of “investment strategies,” the Commission is adopting Rule 15Ba1-1(b), which defines “investment strategies” as having “the same meaning as in section 15B(e)(3) of the Act (15 U.S.C. 78o-4(e)(3)), and includes plans or programs for the investment of proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.”³²⁶

While the Commission continues to believe that the term “includes” is not limiting,³²⁷ the Commission is adopting a definition of “investment strategies” that, as compared to the definition in

³²³ See ABA Letter.

³²⁴ See NABL Letter.

³²⁵ The application of the term “municipal financial products” to “municipal derivatives” and “guaranteed investment contracts” is discussed above. See *supra* Sections II.A.1.b.v. and vi., respectively. The term “municipal escrow investments” is described in more detail below in this Section III.A.1.b.viii.

³²⁶ While the definition of “investment strategies” in Rule 15Ba1-1(b), as adopted, is consistent with the definition of “investment strategies” in Section 15B(e)(3) of the Act, this definition, as adopted, clarifies the Commission’s interpretation that investment strategies specifically excludes municipal derivatives and guaranteed investment contracts, as these products are expressly included in the definition of municipal financial product, as defined by Section 15B(e)(5) of the Act and Rule 15Ba1-1(i), as adopted. This interpretation is consistent with the Commission’s interpretation in the Proposal. See Proposal, 76 FR at 830-831.

³²⁷ Section 15B(e)(3) of the Exchange Act uses the word “including” as expanding or illustrative, not as exclusive or limiting.

the Proposal, focuses more narrowly on the statutorily-identified categories of “proceeds of municipal securities” and “municipal escrow investments.” In this regard, the Commission is adopting Rule 15Ba1-1(d)(3)(vii), which will effectively narrow the focus of the term “investment strategies” to investments of proceeds of municipal securities and the recommendation of and brokerage of municipal escrow investments. Specifically, Rule 15Ba1-1(d)(3)(vii), as adopted, exempts from the definition of municipal advisor any person that provides advice to a municipal entity or obligated person with respect to municipal financial products to the extent that such person provides advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.

Pursuant to Section 15B(a)(4) of the Exchange Act, the Commission may exempt any class of municipal advisors from any provision of Section 15B or the rules and regulations thereunder, if it finds that such an exemption is consistent with the public interest, the protection of investors, and the purposes of Section 15B.³²⁸ The Commission believes that providing the exemption described above is consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act. The exemption tailors protection of municipal entities to those activities related to the investment of the proceeds of municipal securities and related municipal escrow investments, which are the specific categories of activities that Congress identified in the statutory definition of the term “investment strategies” and that the Commission believes have the most direct nexus to municipal securities and the protection of investors and municipal issuers in furtherance of the purposes of Section 15B.

In the Proposal, the Commission asked how it should determine when funds should no

³²⁸ See 15 U.S.C. 78o-4(a)(4).

longer be considered proceeds of municipal securities, if it were to limit investment strategies to proceeds of municipal securities or the recommendation of or brokerage of municipal escrow investments.³²⁹ While the Exchange Act does not define the term “proceeds of municipal securities,” the Federal tax laws provide a longstanding, known definition of “proceeds” of tax-exempt bonds issued by State and local governments, including related definitions of various types of proceeds (including “gross proceeds,” “sale proceeds,” “investment proceeds,” and “transferred proceeds”) under Section 148 of the Internal Revenue Code of 1986, as amended,³³⁰ and Section 1.148-1 through 1.148-11 of the Regulations³³¹ for the purpose of the arbitrage³³² investment restrictions applicable to investments of proceeds of tax-exempt municipal securities. The arbitrage

³²⁹ See Proposal, 76 FR at 835.

³³⁰ 26 U.S.C. 148.

³³¹ 26 CFR 148.1-148.11.

³³² Arbitrage, in the municipal securities context, is the profit earned by the municipal entity from borrowing funds in the tax-exempt market and investing them in the taxable market. The arbitrage rules have two main branches. The yield restriction branch of the rules generally limit the yield permitted on investments of proceeds of tax-exempt municipal securities to a yield that is not materially higher than the yield on the municipal securities; provided, however, specific exceptions permit unrestricted investment during certain temporary periods. The second branch of the arbitrage rules, the rebate branch, requires that any arbitrage that the municipal entity earns, including during a temporary period, must be rebated to the federal government, unless one of the several specific exceptions to the rebate requirement applies to the issue of municipal securities. Any issue of tax-exempt municipal securities can be subject to yield restriction, rebate, or both. The arbitrage rules and the various exceptions are important factors in the structuring of any tax-exempt issue of municipal securities. Under the arbitrage rules, gross proceeds include amounts covered by the following interrelated definitions. Sale proceeds are the gross cash amount paid by the purchasers for the securities at the initial sale of the issue. Investment proceeds are the amounts received from investing the proceeds of the issue. If proceeds of a refunding issue are used to pay off a prior issue, any remaining proceeds of the prior issue become, for tax purposes, transferred proceeds of the refunding issue. Proceeds, then, are sales proceeds plus investment proceeds plus transferred proceeds. Replacement proceeds are amounts that may be used to pay debt service. Gross proceeds are defined as proceeds plus replacement proceeds. See Frederic L. Ballard, Jr., ABCs of Arbitrage: Tax Rules for Investment of Bond Proceeds by Municipalities (Section of State and Local Government Law, American Bar Association, 2007) (“Ballard, ABCs of Arbitrage”).

rules apply as long as the tax-exempt municipal securities are outstanding, and non-compliance with the arbitrage rules can result in the loss of the tax-exempt status of the interest on the municipal securities retroactively to the date of issuance. The Commission believes that the well-developed concept of proceeds of tax-exempt municipal securities under the arbitrage rules is well-known to issuers and to the professional participants in the municipal marketplace.

Some commenters that discussed “proceeds of municipal securities” did so by reference to Federal tax regulations and terms defined therein.³³³ Because the arbitrage rules governing the investment of bond proceeds are central to an issue of tax-exempt municipal securities and well-known in the municipal market, the Commission has determined to define proceeds of municipal securities in a similar manner and to apply the term to tax-exempt municipal securities and also to taxable³³⁴ municipal securities. Therefore, for purposes of the application of the definition of investment strategies and in response to comments raised on this issue,³³⁵ the Commission is adopting Rule 15Ba1-1(m)(1), which defines “proceeds of municipal securities” as (i) monies derived by a municipal entity from the sale of municipal securities, (ii) investment income derived

³³³ See, e.g., NABL Letter. In addition, as discussed below, some commenters suggested that a municipal entity should have the responsibility for tracking and characterizing proceeds because it is already required to do so under certain tax laws, implying that the definition of proceeds of municipal securities should be consistent with such definition under tax laws. See *infra* notes 361-362 and accompanying text.

³³⁴ Municipal issuers sometimes issue small amounts of taxable bonds in combination with tax-exempt bonds in the same offerings to finance costs that are ineligible for tax-exempt bond financing. The most significant recent type of taxable municipal securities was the temporary stimulus “Build America Bond” program, with respect to which approximately \$181 billion were issued in 2009-2010 and the arbitrage rules on bond proceeds notably applied directly to those taxable municipal securities due to a Federal subsidy. The taxable bond sector of the municipal securities market represents a relatively small portion of the overall municipal securities market. For example, less than 9% of new issues in the municipal securities market in 2012 were taxable bonds, according to Thomson-Reuters data.

³³⁵ See *supra* note 333 and accompanying text.

from the investment or reinvestment of such monies, (iii) any monies of a municipal entity or obligated person held in funds under legal documents for the municipal securities that are reasonably expected to be used as security or a source of payment for the payment of the debt service on the municipal securities, including reserves, sinking funds, and pledged funds created for such purpose,³³⁶ and (iv) the investment income derived from the investment or reinvestment of monies in such funds.³³⁷ Further, consistent with the general definition of proceeds under the arbitrage rules, Rule 15Ba1-1(m)(1) also provides that when such monies are spent to carry out the authorized purposes of municipal securities, they cease to be proceeds of municipal securities.

Rule 15Ba1-1(m), however, establishes an exception from the definition of proceeds of municipal securities. The exception provides that, solely for purposes of Rule 15Ba1-1(m), monies derived from a municipal security issued by an education trust established by a State under Section 529(b) of the Internal Revenue Code are not proceeds of municipal securities.³³⁸ Although interests in 529 Savings Plans may be municipal fund securities, and therefore municipal securities, monies derived from a municipal security issued by an education trust established under Section 529(b) come from individuals making investments for the purpose of prepaying or accumulating savings for higher education costs, and do not come from municipal entities. Because these monies are derived from individuals primarily for the benefit of these individuals and not municipal entities, the Commission does not believe persons engaged in activities with respect to these monies are

³³⁶ Such applicable legal documents include, for example, the indentures, ordinances, or resolutions of the issuer of the municipal securities, and the resolutions, leases, loan agreements, or other agreements of an obligated person.

³³⁷ See Rule 15Ba1-1(m)(1). See also *supra* notes 330-331 and accompanying text (discussing Federal tax laws and regulations related to the definition of proceeds).

³³⁸ See Rule 15Ba1-1(m)(2). See also *supra* notes 313-319 (discussing comments regarding the inclusion of certain plans under “investment strategies”).

appropriately governed by this registration regime.³³⁹

Rule 15Ba1-1(m) also states that in determining whether or not funds to be invested constitute proceeds of municipal securities for purposes of Rule 15Ba1-1(m), a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person has a reasonable basis for such reliance.³⁴⁰ This exemption is discussed in more detail below.

The Commission notes that the exemption from the definition of “municipal advisor” in Rule 15Ba1-1(d)(3)(vii) does not permit a person to avoid registering as a municipal advisor by stating that its advice is isolated or incidental and thus not within the meaning of “plan or program” in the definition of investment strategies. The Commission is not persuaded by commenters who have stated that “plan or program” means a series of investment decisions³⁴¹ and does not agree that this would be an appropriate interpretation of the statute. Any advice or recommendation with respect to the investment of proceeds not otherwise subject to an exclusion or exemption³⁴² would be a municipal advisory activity, even if such advice or recommendation is not part of a series of investment-related actions or articulated as part of the investment plan for the proceeds at or before

³³⁹ Because monies in accounts of 529 Savings Plans are not included in the definition of proceeds of municipal securities for purposes of Rule 15Ba1-1(m), persons providing advice with respect to the investment of monies in 529 Savings Plans will not be required to register as municipal advisors based on this prong of the municipal advisor definition to the extent their municipal advisory activities are limited to such advice. See note 338 and accompanying text. However, a person that advises a municipal entity with respect to how to structure a 529 Savings Plan may be required to register as a municipal advisor. Interests in 529 Savings Plans are municipal securities, and such a person would be engaging in municipal advisory activities to the extent he or she provides advice with respect to the structure, timing, terms, or other similar matters concerning such an issuance unless an exclusion or exemption applies.

³⁴⁰ See Rule 15Ba1-1(m)(3).

³⁴¹ See *supra* notes 311-312 and accompanying text.

³⁴² See, e.g., *infra* Section III.A.1.c.iv. (discussing an exemption for broker-dealers serving as underwriters).

the time the proceeds are received.³⁴³ For example, advice or a recommendation with respect to a single trade or investment not otherwise subject to an exemption would be a municipal advisory activity, and the person providing such advice would not be exempt from the definition of municipal advisor pursuant to Rule 15Ba1-1(d)(3)(vii).

Commingling of Proceeds of Municipal Securities with Other Funds and Proceeds Determinations Generally

In the Proposal, the Commission provided that commingled proceeds, regardless of when they lose their character as proceeds, would still constitute “funds held by or on behalf of a municipal entity,” but asked whether that interpretation was too broad.³⁴⁴ Additionally, the Commission asked what obligations parties other than a municipal entity should have in determining whether funds held by or on behalf of the municipal entity are proceeds of municipal securities.³⁴⁵

The Commission received a number of comments in response to these questions. One commenter stated “[t]he Commission’s proposed definition effectively reads out the statutory requirement to trace assets to the proceeds of municipal securities[,]” and “[t]hus, an adviser providing advice to a municipal entity with respect to any plan, program or pool of assets – even if the plan, program or pool of assets did not consist of the proceeds of municipal securities (such as, for example, 529 Savings Plans and public pension plans) – would be required to register with the Commission if no exclusion is available.”³⁴⁶ Some commenters stated that once the proceeds of a

³⁴³ See supra notes 311-312 and accompanying text.

³⁴⁴ See Proposal, 76 FR at 836.

³⁴⁵ See id., at 835.

³⁴⁶ See ICI Letter. See also American Bankers Association Letter I and American Society of Pension Professionals Letter (stating that the Proposal indicated that the expansive definition of “investment strategies” avoids the need to trace the investment of proceeds of municipal securities commingled with other public funds and that this “regulatory shortcut” exceeds

municipal offering are commingled with other funds, they lose their character as proceeds.³⁴⁷

Commenters also stated that subsequent investments of proceeds are not proceeds of municipal securities, unless the subsequent investment is part of the plan or program that was developed at the time of, and in connection with, the initial investment.³⁴⁸

One commenter stated that a person should not be considered to be providing advice with respect to an investment strategy if he reasonably believes that the relevant funds are not from an account specifically for the proceeds of municipal securities issuances, unless the municipal entity or obligated person communicated otherwise.³⁴⁹ This commenter also stated that, depending on the Commission's interpretation of investment strategies, the adviser should only be considered a municipal advisor if the funds invested are proceeds of municipal securities, the adviser is aware of this fact, and there is no evidence of a sham.³⁵⁰ Another commenter further suggested that a municipal entity should have the responsibility for tracking and characterizing municipal proceeds.³⁵¹ This commenter suggested that advisors should be entitled to reasonably rely on the municipal entity's representation since it is already required to track proceeds under certain state

the authority granted under the Dodd-Frank Act).

³⁴⁷ See, e.g., SIFMA Letter I; NABL Letter; letter from Catherine McClellan, Legal & Regulatory Affairs, SunTrust Banks, Inc., dated February 22, 2011 ("SunTrust Letter"); and Financial Services Roundtable Letter.

³⁴⁸ See SIFMA Letter I. See also American Bankers Association Letter I.

³⁴⁹ See SIFMA Letter I. See also BNY Letter (stating that "the Commission should clarify that a person would not be considered to provide advice that triggers municipal advisor status if the person reasonably believes that the funds for the financial activity on which the person is advising are from an account of the municipal entity or obligated person other than an account specifically for the proceeds of municipal securities or escrow funds that contains [sic] funds from multiple sources other than the initial proceeds of a municipal security").

³⁵⁰ See SIFMA Letter I.

³⁵¹ See Kutak Rock Letter. See also Financial Services Roundtable Letter.

and Federal tax laws.³⁵²

One commenter stated that, in the context of obligated persons, only the investment of the proceeds of municipal securities, and not all monies of the obligated person, could be considered proceeds of municipal securities, even if the proceeds may be commingled with other monies for investment purposes.³⁵³ Further, another commenter urged the Commission to exclude investments of bond proceeds for the accounts of obligated persons when the investment is not pledged as security for a municipal securities issue.³⁵⁴ On the other hand, a different commenter stated that in no event should the definition of investment strategies apply to engagements with obligated persons, because obligated persons' funds are not held in plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity.³⁵⁵

As discussed above, in response to comments, the Commission is adopting a definition of "proceeds of municipal securities" for purposes of the term "investment strategies," which is consistent with Federal tax laws and regulations related to the definition of proceeds. This definition provides that when monies are spent to carry out the authorized purposes of the municipal

³⁵² See Kutak Rock Letter (stating that commingled proceeds are required by federal tax laws (applicable to tax-exempt bonds) and state laws to be traced for use and investment purposes). Another commenter suggested that municipal entities, and not their municipal advisors, should have the responsibility for identifying any assets in accounts maintained at banks or broker-dealers that should be deemed proceeds. See Financial Services Roundtable Letter.

³⁵³ See Kutak Rock Letter.

³⁵⁴ See NABL Letter. This commenter argued that, "[s]ince only a small portion of an obligated person's investible assets may represent unspent proceeds of a municipal securities issue, and since it would not be apparent to investment advisors whether private entities are obligated persons unless the Commission limits municipal financial products to those pledged as security for a municipal securities issue, any more expansive reading of the term would impose an impossible diligence burden on corporate investment advisors." Id.

³⁵⁵ See SIFMA Letter I.

securities, they cease to be proceeds of municipal securities.³⁵⁶ Under this definition and except as otherwise noted below, the mere fact that proceeds are commingled with other funds generally does not cause such monies to lose their character as proceeds. However, once the proceeds are spent to carry out an authorized purpose of the issuance of municipal securities, and the applicable legal documents or any other agreement pertaining to the investment of proceeds of municipal securities are no longer in effect, such funds will no longer constitute proceeds of municipal securities.

The Commission does not agree with those commenters who argued that once the proceeds of a municipal offering are commingled with other funds, they lose their character as proceeds.³⁵⁷ The adopted definition of “proceeds of municipal securities” and the treatment of commingled proceeds are familiar concepts to market participants because they are consistent with Federal tax laws and regulations related to the definition of proceeds. The Commission believes this treatment of commingled proceeds will help to ensure that municipal advisors are registered and regulated as such until commingled proceeds are spent to carry out the authorized purposes of the municipal securities. Further, as discussed above, to assist a person in determining whether or not funds to be invested constitute proceeds of municipal securities, such person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.³⁵⁸ As noted below, municipal entities and obligated persons generally already track investments and ultimate expenditures of proceeds of tax-exempt municipal securities for authorized purposes in order to comply with certain state and tax Federal laws and governing legal documents pertaining to the investment of proceeds of

³⁵⁶ See Rule 15Ba1-1(m)(1).

³⁵⁷ See supra note 347 and accompanying text.

³⁵⁸ See Rule 15Ba1-1(m)(3).

municipal securities.³⁵⁹

With respect to the tracing of proceeds after commingling, Federal tax arbitrage rules provide that if amounts of proceeds constituting investment earnings (excluding those of municipal escrow investments) on certain tax-exempt municipal securities (particularly governmental bonds and certain governmentally-owned private activity bonds) are deposited in a commingled fund with substantial tax or other revenues from governmental operations of the municipal issuer and the amounts are reasonably expected to be spent for governmental purposes within six months from the date of the commingling, those proceeds are treated as spent at the time of commingling.³⁶⁰ This Federal tax arbitrage rule mainly benefits general purpose municipal entities (e.g., States, cities, and counties) with respect to very short-term investment practices involving their general fund accounts. The Commission likewise considers proceeds as spent at the time of such commingling in the context of municipal advisors because, as noted above, arbitrage rules governing the investment of bond proceeds are central to an issue of tax exempt municipal securities and are well-known in the municipal market. Because the approach the Commission is taking today is consistent with Federal tax arbitrage rules, it should be consistent with the current practice of municipal entities and obligated persons related to tracing proceeds of municipal securities. Further, because such proceeds are reasonably expected to be spent for governmental purposes within six months from the date of commingling, the Commission believes these proceeds involve shorter term investments and therefore are subject to lower risk. As a result, they raise less concern.

The Commission believes that any person that does not satisfy the conditions for an exclusion or exemption from the definition of municipal advisor should know whether the person it is advising is a municipal entity or obligated person and whether the relevant funds constitute

³⁵⁹ See infra note 361 and accompanying text.

³⁶⁰ See Treas. Reg. § 1.148-6(d)(6).

proceeds of municipal securities. As commenters stated, municipal entities and obligated persons generally already track investments and ultimate expenditures of proceeds of tax-exempt municipal securities for authorized purposes in order to comply with certain state and Federal tax laws and governing legal documents pertaining to the investment of proceeds of municipal securities.³⁶¹ Thus, with respect to the tracing of proceeds of municipal securities to investments and expenditures for authorized purposes, the Commission does not believe that the municipal advisor registration regime will impose any significant additional burden on municipal entities, obligated persons, or municipal advisors.³⁶²

Reasonable Reliance on Representations for Proceeds Determinations

As set forth in Rule 15Ba1-1(m)(3), in determining whether or not relevant funds constitute proceeds of municipal securities for purposes of Rule 15Ba1-1(m), a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided the person has a reasonable basis for such reliance.³⁶³ Under Rule 15Ba1-1(m)(3), a person need not obtain a separate written representation each time an investment is made, and can instead rely on a prior written representation if the person has a reasonable basis for reliance. The Commission believes that a determination of whether or not a person has a reasonable basis to rely on a written representation requires reasonable diligence, based on all the facts and circumstances, including review of the written representation and other relevant information reasonably available to the

³⁶¹ See Kutak Rock Letter. See also Financial Services Roundtable Letter.

³⁶² See, e.g., Kutak Rock Letter (noting that “[a]dvisors should be entitled to reasonably rely on a municipal entity’s tracking and characterization of the proceeds of municipal securities, as they are already entitled to do so under state and federal tax laws”).

³⁶³ See Rule 15Ba1-1(m)(3).

person. For example, a person should not ignore information³⁶⁴ in the person's possession as a result of which such person would know that the representation is inaccurate. In such a circumstance, the person seeking to rely on the representation should make further inquiry to verify the accuracy of the representation in order to show a reasonable basis for the reliance. However, a person relying on a written representation generally need not independently verify all the information underlying the representation. Depending on the particular facts and circumstances, however, a person seeking to rely on such representations should take into account other information, including, but not limited to, information that is reasonably available to such person either as a result of the person's relationship with the municipal entity or obligated person or that is provided by other parties to the relevant transaction.³⁶⁵

Municipal Escrow Investments

Section 15B(e)(3) of the Exchange Act provides that the term investment strategies includes, in part, "the recommendation of and brokerage of municipal escrow investments."³⁶⁶ However, Section 15B(e) of the Exchange Act does not define the term "municipal escrow investments."

Several commenters discussed the term "municipal escrow investments" as used in the

³⁶⁴ For example, such person may have acquired other information as a result of its interaction with the municipal entity or obligated person, either in connection with the transaction with respect to which it received the written representation or otherwise.

³⁶⁵ The Commission notes that it has in other contexts expressed similar views on whether a person's reliance on information is reasonable. For example, under Regulation R, a bank or a broker-dealer satisfies its customer eligibility requirements if the bank or broker-dealer "has a reasonable basis to believe that the customer" is an institutional customer or high net worth customer before the time specified in the rule. See 17 CFR 247.701. When adopting Regulation R, the Commission stated that a bank or broker-dealer would have a "reasonable basis to believe" if it obtains a signed acknowledgment that the customer met the applicable standards, unless it had information that would cause it to believe that the information provided by the customer was or was likely to be false. See Definitions of Terms and Exemptions Relating to the "Broker" Exceptions for Banks, Securities Exchange Act Release No. 56501 (September 28, 2007), 72 FR 56514 (October 3, 2007).

³⁶⁶ 15 U.S.C. 78o-4(e)(3).

context of investment strategies and some asked for further Commission guidance on the meaning of this term.³⁶⁷ For example, one commenter stated that Congress intended the term to be limited to accounts holding the proceeds of municipal securities pending deployment.³⁶⁸ Another commenter stated that municipal escrow investments means investments deposited in an escrow account to “defease”³⁶⁹ municipal securities.³⁷⁰ Another commenter stated that municipal escrow investments are investments of funds in a segregated escrow account established by the municipal entity or obligated person to hold funds that have been allocated for satisfying a specific and identified obligation of the municipal entity or obligated person and maintained by an escrow agent for the municipal entity or obligated person.³⁷¹ One commenter stated that the Commission should recognize that the term “municipal escrow investments” has a different and narrower meaning than

³⁶⁷ See, e.g., ABA Letter and SIFMA Letter I.

³⁶⁸ See letter from Charles W. Cary, Jr., Chief Investment Officer, Division of Investment Services, Employees’ Retirement System of Georgia and Teachers Retirement System of Georgia, dated February 21, 2011 (“Teachers Retirement System Letter”).

³⁶⁹ The MSRB provides the following definition for “defeasance” or “defeased” – “Termination of certain of the rights and interests of the bondholders and of their lien on the pledged revenues or other security in accordance with the terms of the bond contract for an issue of securities. This is sometimes referred to as a ‘legal defeasance.’ Defeasance usually occurs in connection with the refunding of an outstanding issue after provision has been made for future payment of all obligations related to the outstanding bonds, sometimes from funds provided by the issuance of a new series of bonds. In some cases, particularly where the bond contract does not provide a procedure for termination of these rights, interests and lien other than through payment of all outstanding debt in full, funds deposited for future payment of the debt may make the pledged revenues available for other purposes without effecting a legal defeasance. This is sometimes referred to as an ‘economic defeasance’ or ‘financial defeasance.’ If for some reason the funds deposited in an economic or financial defeasance prove insufficient to make future payment of the outstanding debt, the issuer would continue to be legally obligated to make payment on such debt from the pledged revenues.” See definition of “Defeasance” or “Defeased” in Glossary of Municipal Securities Terms, MSRB (3d ed. 2013), available at <http://msrb.org/glossary.aspx> (“MSRB Glossary”).

³⁷⁰ See Kutak Rock Letter.

³⁷¹ See SIFMA Letter I.

“proceeds of municipal securities” and is limited to investments held in an escrow account.³⁷² This commenter also suggested that the Commission should clarify that merely providing brokerage of municipal escrow investments does not make a person a municipal advisor.³⁷³

The Commission has carefully considered the issues raised by commenters on the Proposal and has determined to provide a definition for “municipal escrow investments.”³⁷⁴ For purposes of the definition of investment strategies, the Commission is defining “municipal escrow investments” as proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium, if any, and interest on one or more issues of municipal securities.³⁷⁵ Because it is a separate component of the statutory definition of investment strategies, the Commission agrees with the comments that “municipal escrow investments” does not necessarily have the same meaning as “proceeds.”³⁷⁶ At the same time, however, municipal escrow investments generally are funded with proceeds raised from the issuance of municipal securities in refunding or refinancing transactions to be used to provide for repayment of prior outstanding issues of municipal securities and these escrows also may include certain other funds, such as an issuer’s cash contribution derived from revenues.³⁷⁷ In addition, municipal escrow investments may be

³⁷² See ABA Letter.

³⁷³ See *id.* Rather, the commenter asserted that providing advice with respect to the recommendation of, and brokerage of, municipal escrow investments makes a person a municipal advisor.

³⁷⁴ See Rule 15Ba1-1(h).

³⁷⁵ See Rule 15Ba1-1(h)(1).

³⁷⁶ See Rule 15Ba1-1(m) (defining proceeds of municipal securities).

³⁷⁷ See, e.g., Ballard, *ABCs of Arbitrage* at 169 (“A refunding escrow is any fund that contains proceeds of a refunding issue for use in paying principal or interest on a prior issue. Normally, an issuer will contribute either revenues or unspent prior issue proceeds to a refunding escrow in addition to proceeds of the refunding issue.”). See also Treas. Reg. § 1.148-1(b), which defines a “refunding escrow” generally to mean “one or more funds established as part of a single transaction or a series of related transactions, containing

funded in part from equity-type funds which may be viewed as equity or as a broad category of proceeds as a result of their escrow pledge to secure the outstanding municipal securities to be refinanced and their attendant close nexus to those municipal securities.³⁷⁸ The definition of municipal escrow investments provided herein, consistent with Rule 15Ba1-1(d)(3)(vii), protects funds that are used for payment of the municipal securities issue, whether or not they are derived from the sale of municipal securities.

The Commission believes that this definition of municipal escrow investments is appropriate in order to protect both investors in municipal securities and municipal entities for reasons discussed further below. These municipal escrow investments typically involve investments of significant amounts of proceeds of municipal securities for long periods of time linked to call restrictions or maturities of refunded debt. These features make municipal escrow investments particularly vulnerable to abuse, and in fact significant investment pricing abuses have occurred in the area of municipal escrow investments in the past and the potential for future pricing abuses continues to exist in this area.³⁷⁹ In one particularly notable historic example, pricing abuses involving municipal escrow investments were the subject of a major joint enforcement initiative involving the Commission, the Internal Revenue Service, and the U.S. Attorney for the Southern District of New York that affected a large number of major broker-dealers with respect to artificially high prices on U.S. Treasury securities charged by such dealers in sales of such securities

proceeds of a refunding issue and any other amounts to provide for payment of principal or interest on one or more prior issues.”)

³⁷⁸ See Treas. Reg. § 1.148-1(b) (definitions of “proceeds” and “replacement proceeds,” respectively).

³⁷⁹ See generally Robert A. Fippinger, The Securities Law of Public Finance (3rd Ed. 2012) at § 14:12 entitled “Markup Fraud: Yield Burning.”

to municipal entities to fund municipal escrow investments.³⁸⁰

The Commission notes that a person merely providing brokerage of municipal escrow investments would not be a municipal advisor if such person does not provide advice with respect to such investments.³⁸¹ The purchase and sale of escrow investments upon the direction of an obligated person or its financial advisor without rendering advice is merely a provision of brokerage services and does not render such person a municipal advisor. It is the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal escrow investments that renders a person a municipal advisor.³⁸²

Also, consistent with the definition of proceeds of municipal securities that the Commission is adopting, the Commission is including a written representation component in the definition of municipal escrow investments. Accordingly, Rule 15Ba1-1(h)(2) states that, in determining whether or not funds to be invested or reinvested constitute municipal escrow investments for purposes of Rule 15Ba1-1(h), a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested or reinvested regarding the nature of such investments, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.³⁸³ As with the written representation component under the definition of proceeds of municipal securities, under Rule 15Ba1-1(h), a

³⁸⁰ See SEC Press Release No. 2000-45 (April 6, 2000), in which the SEC announced a global settlement with 17 broker-dealers with respect to pricing abuses in municipal escrow investments. The artificial pricing practices are known as “yield-burning” and this settlement is known as the “global yield-burning settlement.”

³⁸¹ See *infra* Section III.A.1.c.iv. at notes 642-645 and accompanying text (discussing that certain routine selling activities would not constitute municipal advisory activities).

³⁸² See also *infra* notes 637-641 and accompanying text (discussing when advice given by a broker-dealer is considered to be “solely incidental” to the conduct of his business as a broker or dealer).

³⁸³ See Rule 15Ba1-1(h)(2).

person need not obtain a separate written representation each time an investment is made, and can instead rely on a prior written representation if the person has a reasonable basis for reliance. For this purpose, the same standard and principles apply in determining whether a person has a reasonable basis for such reliance as discussed previously with respect to reliance on representations regarding proceeds determinations.³⁸⁴

Other Comments on the Scope of the Proposed Interpretation of "Investment Strategies"

In addition to responses to specific requests for comment, the Commission received a number of other comments regarding its proposed interpretation of the statutory definition of investment strategies. For example, one commenter requested that the Commission clarify that the term "investment strategies" does not include separate accounts supporting insurance contracts or their underlying investment vehicles.³⁸⁵ The commenter reasoned that the funds invested in such insurance contracts are not proceeds of municipal securities, but are employer and employee contributions.³⁸⁶ Another commenter argued that the term "municipal financial product" should not include "an insurance product tailored to a municipal entity," because "such products . . . are

³⁸⁴ See supra notes 364-365 and accompanying text.

³⁸⁵ See Committee of Annuity Insurers Letter I.

³⁸⁶ See id. The commenter explained that variable annuity contracts issued by its members are supported by insurance company separate accounts. Insurance company separate accounts could be limited to insurance contracts issued only to governmental retirement plans. The commenter noted that, if the Commission adopts its proposal to define municipal entity as including 457 plans and 403(b) plans, these insurance company separate accounts could then be viewed as pooled investment vehicles limited to municipal entity investors (i.e., 457 plans and 403(b) plans). The commenter noted that the definition of investment strategies could be read to imply that an insurance company separate account, whose assets are limited to contributions from insurance contracts held by governmental retirement plans, is an investment strategy. The commenter stated that it has found no indication in the legislative history that Congress intended this result. The commenter noted that the funds invested in these insurance contracts are not proceeds of municipal securities, but rather employer and employee contributions. In the case of employee contributions from salary deduction arrangements, such salary funds are equity funds of the employees upon receipt, regardless of the source of those salaries, and thus are not proceeds of municipal securities.

already quite well regulated.”³⁸⁷

The Commission agrees that employee contributions are not proceeds of municipal securities because these funds are derived from salary deduction arrangements with individual employees and not from the issuance of a municipal security. Therefore, a person providing advice with respect to such contributions would be exempt from the definition of municipal advisor to the extent their municipal advisory activities are limited to such advice. Whether a person providing advice with respect to employer contributions will be exempt, however, will depend upon whether such funds are proceeds of municipal securities. In general, public pension plans do not include proceeds of municipal securities because proceeds of tax-exempt municipal securities generally cannot be spent to fund investments for pension liabilities.³⁸⁸ Further, the Commission agrees that a person providing advice with respect to other insurance products tailored to a municipal entity would not be engaged in municipal advisory activities if the insurance products do not involve the investment of proceeds of municipal securities because the final rules narrow the focus of the term “investment strategies” to those involving investments of proceeds of municipal securities and municipal escrow investments with a new exemption in Rule 15Ba1-1(d)(3)(vii).

ix. Pooled Investment Vehicles

As discussed above, the Commission proposed to interpret the statutory definition of the term “investment strategies” to include “pools of assets that invest funds held by or on behalf of a municipal entity.”³⁸⁹ Further, as part of the discussion of the term “investment strategies,” the Commission noted in the Proposal that, to the extent a person is providing advice to certain pooled investment vehicles in which a municipal entity has invested funds along with other investors, such

³⁸⁷ See Kutak Rock Letter.

³⁸⁸ See 26 U.S.C. § 148(a)(2) and Treas. Reg. § 1.148-1(e) (investment property definition).

³⁸⁹ See supra Section III.A.1.b.viii. See also proposed Rule 15Ba1-1(b).

pooled investment vehicles would not be considered funds “held by or on behalf of a municipal entity.”³⁹⁰ Consequently, a person providing advice to such vehicle would not have to register as a municipal advisor. However, the Commission noted that, to the extent that the pooled investment vehicle is a LGIP, the pooled investment vehicle would be considered to be funds “held by or on behalf of” a municipal entity and a person providing advice with respect to a LGIP would have to register as a municipal advisor, absent eligibility for some other exclusion or exemption.³⁹¹

The Commission requested comment on whether it should modify or clarify its proposed interpretation of the circumstances under which a pooled investment vehicle would be considered to involve funds “held by or on behalf of a municipal entity,” including whether the proposed interpretation should no longer apply if municipal entities are not considered to be the “primary investors” in the pooled investment vehicle or if funds of municipal entities exceed a certain threshold in the pooled investment vehicle.³⁹² The Commission received several comment letters addressing the interpretation.

One commenter supported the Commission’s proposed interpretation, without further request for modification.³⁹³ Two commenters opposed any approach to determine municipal

³⁹⁰ See Proposal, 76 FR at 830.

³⁹¹ See *id.*, at note 98.

³⁹² See *id.*, at 835.

³⁹³ See American Bankers Association Letter I. This commenter urged the Commission to reiterate its position in the final rules and clarify that the interpretation applies to collective investment funds. A collective investment fund (“CIF”) is a bank-administered trust that holds commingled assets that meet specific criteria established by 12 CFR 9.18. The bank acts as a fiduciary for the CIF and holds legal title to the fund’s assets. CIFs allow banks to avoid costly purchases of small lot investments for their smaller fiduciary accounts. See Office of the Comptroller of the Currency, Collective Investment Funds, available at <http://www.occ.treas.gov/topics/capital-markets/asset-management/collective-investment-funds/index-collective-investment-funds.html>. The Commission notes that a CIF would have to contain no proceeds of municipal securities or fall within an exclusion or exemption

advisory status based on whether municipal entities were the “primary investors” in the pooled vehicle, citing the difficulty of making such a determination on an ongoing basis.³⁹⁴ Another commenter urged the Commission to reiterate that an adviser to a pooled investment vehicle in which a municipal entity or obligated person invests is not a municipal advisor by virtue of providing advice to such a vehicle, and that purchasing an interest in a vehicle does not create an advisory engagement between the investor and the vehicle’s adviser.³⁹⁵ This commenter suggested that, “so long as there is at least one bona fide investor that is not a municipal entity or obligated person, the adviser to the vehicle should not be a municipal advisor.”³⁹⁶ The commenter also stated that not exempting advisors to pooled vehicles would particularly limit investment choices for public pension funds.³⁹⁷

The Commission has carefully considered these comments and is not adopting its proposed

to not require municipal advisor registration. See infra Section III.A.1.c.viii. (discussing the bank exemption).

³⁹⁴ See letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, dated February 22, 2011 (“MFA Letter”) (stating that “imposing such an artificial threshold would create uncertainty for private fund managers, require burdensome, ongoing monitoring of the level of municipal entity investments, and limit or even prevent municipal entities from investing in private funds”). See also Kutak Rock Letter (suggesting that terminology involving the concept of “municipal entities are the primary investors” not be utilized, because “it is too difficult to determine just what ‘primary’ means[,]” and that too many difficult questions regarding an objective, numbers-based approach used to determine primary investorship would arise).

³⁹⁵ See SIFMA Letter I.

³⁹⁶ Id.

³⁹⁷ See id. Specifically, the commenter stated that absent the suggested exemptions, fewer pooled investment vehicles would be offered to municipal entities (particularly public pension plans) and obligated persons, which would disserve municipal entities and obligated persons by limiting their access to important vehicles for the long-term investment of their funds. The commenter also stated that local government investment pools are often the only available option for the short-term investment of operating funds and are subject to state laws, which often include a fiduciary duty. The commenter stated that the Proposal likely would reduce the number of local government investment pool options available to municipalities.

interpretation of when a pooled investment vehicle will be considered to be funds held by or on behalf of a municipal entity. It is also not adopting an interpretation that would tie the determination of whether a person providing advice to a pooled investment vehicle is a municipal advisor, to whether municipal entities are the primary investors in the pooled investment vehicle. Instead, consistent with the narrowed approach that the Commission is adopting for “investment strategies,” the Commission is interpreting a pooled investment vehicle to be an investment strategy, and an advisor to such a pool to be a municipal advisor, when the pooled investment vehicle contains proceeds of an issuance of municipal securities, regardless of whether all funds invested in the vehicle are funds of municipal entities.³⁹⁸ In such a case, an advisor to such a pooled investment vehicle will be required to register as a municipal advisor, unless an exclusion or exemption applies.

The Commission recognizes commenters’ concerns that requiring advisors to pooled investment vehicles that include funds of municipal entities to register as municipal advisors could have the effect of limiting investment choices for municipal entities, including investment choices for public pension funds. As noted above, however, the Commission is exempting from the definition of municipal advisor persons that provide advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.³⁹⁹ Contrary to the construction

³⁹⁸ See Rule 15Ba1-1(d)(1) (defining “municipal advisor”) and Rule 15Ba1-1(b) (defining “investment strategies” as including the statutorily identified items: “plans or programs for the investment of proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments”).

³⁹⁹ See supra Section III.A.1.b.viii. (discussing the exemption as it relates to the application of the statutory definition of “investment strategies”).

under the proposed definition of “investment strategies,”⁴⁰⁰ under the definition of “investment strategies” as adopted and the exemption in Rule 15Ba1-1(d)(3)(vii), whether or not the funds invested in a pooled investment vehicle are considered to be “funds held by or on behalf of a municipal entity” does not determine whether a person providing advice to such a vehicle is required to register as a municipal advisor. Rather, under the rule as adopted, the determination of whether a person providing advice to a pooled investment vehicle is required to register as a municipal advisor depends upon the narrower inquiry of whether the funds in the pooled investment vehicle constitute “proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.”⁴⁰¹ Also, the Commission notes that many advisors to pooled investment vehicles will be registered investment advisers or employees of municipal entities. Therefore, many advisors would or could be either exempted or excluded from registration as municipal advisors.⁴⁰² Moreover, the Commission believes that this approach to pooled investment vehicles appropriately focuses protection on those activities related to investment of the proceeds of municipal securities and related escrow investments, with respect to which there has been significant enforcement activity.⁴⁰³

One commenter expressed concern that pooled investment vehicles whose investors are limited to one or more municipal entities (e.g., a government retirement pension plan) would be

⁴⁰⁰ See supra note 389 and accompanying text.

⁴⁰¹ See Rule 15Ba1-1(b).

⁴⁰² See infra Sections III.A.1.c.v. and III.A.1.c.i. (discussing, respectively, the exclusion for registered investment advisers and their associated persons and an exemption for employees of municipal entities and obligated persons).

⁴⁰³ See supra note 287.

considered investment strategies under the Proposal.⁴⁰⁴ This commenter suggested that the term “investment strategies” should not include insurance company’s separate accounts supporting variable annuity contracts (and their underlying investment vehicles) offered to or held by municipal entities, even if the assets of the separate account are limited only to contributions from municipal entities.⁴⁰⁵

To the extent that an insurance company’s separate accounts supporting variable annuity contracts offered to or held by municipal entities do not include “proceeds of municipal securities,” persons providing advice with respect to such accounts would not be required to register as municipal advisors because they would be exempt with respect to such municipal advisory activity.⁴⁰⁶ Specifically, the Commission notes that, as a result of the exemption in Rule 15Ba1-1(d)(3)(vii) adopted today, a person providing advice with respect to investment strategies that are not “plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments” will be exempt from the definition of municipal advisor with respect to such activities. Further, the definition of “proceeds of municipal securities” is limited to the monies derived by a municipal entity from the sale of municipal securities, investment income derived from such monies, and other monies of a municipal entity (or obligated person) held in funds under legal documents for the municipal securities that are reasonably expected to be used as security or a source of payment for the debt service on the municipal securities, and investment income from the investment or reinvestment of such funds.⁴⁰⁷ If, however, such separate accounts supporting variable annuity contracts offered to or held by

⁴⁰⁴ See Committee of Annuity Insurers Letter I.

⁴⁰⁵ See *id.*

⁴⁰⁶ See Rule 15Ba1-1(d)(3)(vii).

⁴⁰⁷ See *supra* Section III.A.1.b.viii. (discussing the exemption pursuant to Rule 15Ba1-1(d)(3)(vii), and the terms “investment strategies” and “proceeds of municipal securities”).

municipal entities do include “proceeds of municipal securities,” advice with respect to such accounts would not be eligible for the exemption in Rule 15Ba1-1(d)(3)(vii) and such activity could be municipal advisory activity triggering the registration requirement.

x. Solicitation of a Municipal Entity or Obligated Person

The definition of municipal advisor in Exchange Act Section 15B(e)(4) includes a person that undertakes a solicitation of a municipal entity or obligated person on behalf of specified persons.⁴⁰⁸ Exchange Act Section 15B(e)(9) provides that the term “solicitation of a municipal entity or obligated person” means “a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in section 202 of the Investment Advisers Act of 1940 [15 U.S.C. 80b-2]) that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.”⁴⁰⁹

⁴⁰⁸ See 15 U.S.C. 78o-4(e)(4)(A)(ii). The Commission notes that the definition of municipal advisor under Section 15B(e)(4)(A) means, in part, a person that “undertakes a solicitation of a municipal entity.” Also, Section 15B(a)(1)(B), which establishes the registration requirement, specifically refers to solicitations of obligated persons. Notwithstanding the omission of the term “obligated person” in the definition of municipal advisor, the Commission interprets the definition of municipal advisor to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person for the reasons discussed above. See *supra* note 138 and accompanying text.

See also *supra* note 178 (citing Chapman and Cutler Letter and discussing that an obligated person does not become a municipal entity by virtue of issuing securities with respect to which it is an obligated person).

⁴⁰⁹ 15 U.S.C. 78o-4(e)(9).

In connection with the statutory definition, the Commission discussed in the Proposal its interpretation of “solicitation of a municipal entity or obligated person” and stated in the Proposal that, unless an exclusion applies, any third-party solicitor that seeks business on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser from a municipal entity must register as a municipal advisor.⁴¹⁰ The Commission noted that the determination of whether a solicitation of a municipal entity requires registration is not based on the number, or size, of investments that are solicited.⁴¹¹ The Commission also specifically stated that the exclusion from the definition of municipal advisor for a broker-dealer serving as an underwriter would not apply to a broker-dealer acting as a placement agent for a private equity fund that solicits a municipal entity

The Commission notes that Rule 15Ba1-1(n) (which, as adopted, provides that the term “solicitation of a municipal entity or obligated person” has the same meaning as Section 15B(e)(9) of the Exchange Act, with certain exemptions) is only applicable with respect to whether or not a person meets the definition of municipal advisor and therefore will be required to register with the Commission (unless an exemption or exclusion applies). The Commission is not otherwise altering its interpretation of “solicitation” as used in other contexts.

As the Commission has explained, the Commission generally views solicitation, in the context of broker-dealers, as including any affirmative effort intended to induce transactional business. See Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, 30017-18 (July 18, 1989) (explaining that solicitation includes, among other things, calls encouraging use of a party to effect transactions).

⁴¹⁰ See Proposal, 76 FR at 831. Thus, as stated in the Proposal, a third-party solicitor seeking business on behalf of an investment adviser from a municipal pension fund or LGIP would be required to register as a municipal advisor.

In addition, depending on the facts and circumstances, the third-party solicitor may also need to register as a broker-dealer pursuant to Section 15(a) of the Exchange Act. See 15 U.S.C. 78o(a)(1). See also supra note 409 (discussing solicitation in the context of broker-dealer regulation).

⁴¹¹ See Proposal, 76 FR at 831. As discussed in the Proposal, a solicitation of a single investment of any amount from a municipal entity would require the person soliciting the municipal entity to register as a municipal advisor.

or obligated person to invest in the fund.⁴¹²

The Commission received approximately 14 comment letters regarding the definition of “solicitation of a municipal entity or obligated person.” As discussed in more detail below, a number of commenters requested further clarification regarding the statutory definition of, and the Commission’s proposed interpretations of, that term. The Commission has carefully considered issues raised by commenters on its proposed interpretation and is adopting a rule⁴¹³ to define “solicitation of a municipal entity or obligated person.” The Commission’s interpretation of “solicitation of a municipal entity or obligated person” in Rule 15Ba1-1(n) is substantially the same as its proposed interpretation, and includes certain clarifications discussed below designed to address commenters’ concerns.⁴¹⁴ In addition, the Commission notes that, both in its proposed interpretation and adopted rule, a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser, soliciting on its own behalf, as explained below⁴¹⁵ – or an affiliate of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser soliciting on behalf of such entity – would not fall within the definition of “solicitation of a municipal entity or obligated person.” Accordingly, such person would not need to register as a municipal advisor.

⁴¹² See *id.*, at 832, note 108 and accompanying text.

The Commission also noted that including such activities within the scope of municipal advisory activities is consistent with the Exchange Act. See *id.* (citing Exchange Act Sections 15B(e)(4)(A) and (B) (including placement agents and solicitors that undertake a solicitation of a municipal entity in the definition of municipal advisor); S. Rep. No. 176 at 148, 111th Cong., 2d. Sess. 148 (2010) (noting that Section 975 would not prohibit solicitation of a municipal entity, but would subject solicitors to the registration requirement and MSRB regulation); and letter from Senator Christopher J. Dodd, U.S. Senate Committee on Banking, Housing and Urban Affairs, to Elizabeth M. Murphy, Secretary, Commission, dated February 2, 2010).

⁴¹³ See Rule 15Ba1-1(n).

⁴¹⁴ See *id.* See notes 419-420 and 446-447, and accompanying text (discussing Rule 15Ba1-1(n)).

⁴¹⁵ See text accompanying *infra* note 418.

Mailings, Advertisements, and Other General Information

Commenters stated that the Commission should explicitly exclude certain activities from the definition of solicitation of a municipal entity or obligated person. For example, one commenter recommended that “generic ‘mass mailing’ solicitations, or institutional advertising” should not be considered solicitation under the proposed rules, especially if such mass mailings are not targeted to a small group of particular municipal entities or obligated persons.⁴¹⁶ This commenter noted that the same argument would apply with respect to newspaper or periodical ads, brochures, TV, radio, or Internet ads.⁴¹⁷

The Commission agrees with commenters that advertisements⁴¹⁸ or solicitations do not trigger an obligation for a third-party to register as a municipal advisor, provided such activity is undertaken by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser on behalf of itself as opposed to on behalf of a third party. Accordingly, the Commission is adopting Rule 15Ba1-1(n) with a clarification to address advertising and the scope of the rule with respect to solicitation of obligated persons.⁴¹⁹ Specifically, Rule 15Ba1-1(n), as adopted, clarifies that “solicitation of a municipal entity or obligated person” does not include “advertising by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser.”⁴²⁰

⁴¹⁶ See Kutak Rock Letter.

⁴¹⁷ See id.

⁴¹⁸ See, e.g., FINRA Rule 2210(a)(5) (defining a “retail communication” as meaning “any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period”).

⁴¹⁹ See Rule 15Ba1-1(n).

⁴²⁰ Id.

The Commission notes, however, that while such communications would not trigger the requirement to register as a municipal advisor under the solicitation prong of the definition of “municipal advisor,” depending on the facts and circumstances, including the content of such communications, such activity may be considered to be advice for purposes of the

Assistance with Requests for Proposals

It is a relatively common industry practice for municipal entities to request that a financial advisor, bond counsel, or other market professional assist in the review of requests for proposals (“RFP”) for underwriter, financial advisory, or investment advisory services.⁴²¹ A person assisting a municipal entity or obligated person in selecting a broker-dealer, investment adviser, or financial advisor as part of an RFP process established by the municipal entity or obligated person would not be considered to be undertaking a solicitation for purposes of the definition of municipal advisor in Rule 15Ba1-1(d)(1), because such person would not be soliciting “on behalf of” such broker-dealer, investment adviser, or financial advisor.⁴²² Such person could, however, be engaging in other municipal advisory activities with respect to assistance in the selection process.⁴²³

Endorsement of Financial Products and Services by Associations

The Commission received approximately nine comment letters from various associations that endorse third parties offering products and services to the associations’ members (“endorsement arrangements”).⁴²⁴ According to commenters, in these endorsement arrangements,

registration requirement. See supra Section III.A.1.b.i. (discussing the advice standard in general).

⁴²¹ For example, one commenter expressed concern that an investment adviser providing advice to a client regarding the selection or retention of another investment manager could constitute a solicitation of a municipal entity or obligated person under Section 15B(e)(9) of the Exchange Act. See infra note 705 and accompanying text.

⁴²² See Rule 15Ba1-1(n) (defining solicitation of a municipal entity or obligated person).

⁴²³ See infra note 556 and accompanying text. See also infra Section III.A.1.c.ii. (discussing generally responses to RFPs and municipal advisor registration). Moreover, such activity may constitute investment advice under the Investment Advisers Act. See, e.g., SEC v. Bolla, 401 F.Supp.2d 43 (D.D.C. 2005), aff’d in relevant part, SEC v. Washington Investment Network, 475 F.3d 392 (D.C. Cir. 2007) (person selecting investment advisers for clients meets the Investment Advisers Act’s definition of “investment adviser”).

⁴²⁴ See, e.g., letters from James D. Campbell, CAE, Executive Director, Virginia Association of Counties, dated June 22, 2011 (“Virginia Association of Counties Letter”); Jeff Spartz, Executive Director, Association of Minnesota Counties, dated June 24, 2011 (“Association

the third parties, which typically include investment advisers, broker-dealers, and mutual fund companies, compensate the associations or their for-profit subsidiaries through a royalty arrangement or through a marketing or sponsorship fee, depending on the association's level of involvement in providing information to its members.⁴²⁵ The commenters expressed concern that the associations' compensated endorsement of investment advisory, municipal advisory, or broker-dealer businesses to their members, some of whom are municipal entities, could potentially be interpreted as solicitation of a municipal entity or obligated person.⁴²⁶ Many of these commenters believed that the Proposal did not provide sufficient guidance about the statutory definition of "solicitation." The statutory definition of solicitation includes "direct or indirect communication with a municipal entity or obligated person," thus creating uncertainty regarding the possible inclusion of such endorsements.⁴²⁷ One commenter noted that investment advisory, municipal advisory, or broker-dealer businesses that are endorsed by associations are not directed specifically at municipal entities, but rather are prepared and circulated without regard to whether the audience may include municipal entities.⁴²⁸

Two commenters recommended that the definition of solicitation exempt "advertisement, endorsement, sponsorship, and similar services offered by persons who are not municipal advisors,

of Minnesota Counties Letter"); Robert Hay, Jr., Manager, Public Policy, ASAE Center for Association Leadership, dated July 8, 2011 ("ASAE Center for Association Leadership Letter"); Steven R. Michaud, President, Maine Hospital Association, dated July 14, 2011 ("Maine Hospital Association Letter"); Anthony Burke, President and CEO, AHA Solutions, Inc., dated July 18, 2011 ("AHA Solutions Letter"); Paul McIntosh, Executive Director, California State Association of Counties, dated July 29, 2011 ("California State Association of Counties Letter").

⁴²⁵ See, e.g., ASAE Center for Association Leadership Letter.

⁴²⁶ See ASAE Center for Association Leadership Letter and Maine Hospital Association Letter.

⁴²⁷ See ASAE Center for Association Leadership Letter; Maine Hospital Association Letter; AHA Solutions Letter.

⁴²⁸ See ASAE Center for Association Leadership Letter.

brokers, dealers, municipal securities dealers, or similar persons engaged in the financial advisory service industry.”⁴²⁹ One stated that compliance with the registration rules would create a significant administrative burden and would not create any material public benefits.⁴³⁰ The other commenter requested that the Commission clarify the meaning of “indirect communication” within the definition of solicitation.⁴³¹ Similarly, other commenters stated that the Commission should exempt national and state associations representing state and local governments from municipal advisor registration.⁴³² These commenters argued that their staffs do not directly contact public employees or offer advice to public agencies or public employees.⁴³³

At this time, the Commission is not providing a general exemption for national and state associations that engage in endorsement arrangements. An organization that receives compensation for endorsing a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser

⁴²⁹ See Maine Hospital Association Letter; AHA Solutions Letter.

⁴³⁰ See Maine Hospital Association Letter.

⁴³¹ See AHA Solutions Letter.

⁴³² See Virginia Association of Counties Letter and California State Association of Counties Letter.

⁴³³ See Virginia Association of Counties Letter and California State Association of Counties Letter.

These commenters stated that they do not directly or indirectly engage in the offer or sale of particular products or services to government employees, do not make any product or investment recommendations to existing or prospective clients, give any investment advice on their own behalf or on behalf of any third party supplier, or accept any clients on behalf of any third party supplier. These commenters also stated that the cost of registration and compliance, along with unknown consequences of state required registration due to the rules promulgated by the Commission, would unfairly disadvantage associations representing public agencies.

One of the commenters stated that such associations should receive an exemption in order to offer their membership access to value-added education and services through publicly solicited contracts. The commenter noted that associations representing non-governmental organizations are not required to register under the proposed rule and yet are able to endorse programs for their memberships that meet their standards of approval. See Virginia Association of Counties Letter.

is soliciting a municipal entity or obligated person within the meaning of the statute. However, the Commission notes that its interpretation in Rule 15Ba1-1(n) with respect to excluding advertising from “solicitation of a municipal entity or obligated person” may apply to some of these associations. For example, if an association’s “endorsement” qualifies as “advertising” by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser, pursuant to Rule 15Ba1-1(n), it would not be required to register as a municipal advisor. Such a determination, however, would be based on the particular facts and circumstances.

The Commission does not believe at this time that it is appropriate to provide a blanket exemption to associations that are not able to take advantage of Rule 15Ba1-1(n), because these associations are being directly or indirectly compensated for recommending a broker, dealer, municipal advisor, or investment adviser to municipal entities or obligated persons. In addition, these associations may, in certain cases, be compensated in direct relation to the number of municipal entities that engage the endorsed product or service provider.

Uncompensated Recommendations

Some commenters stated that the Exchange Act and the Proposal are unclear about when uncompensated recommendations might be deemed to be solicitations for purposes of the rule.⁴³⁴ Several commenters stated that uncompensated recommendations should not be considered to be solicitations because the statutory text only refers to “direct or indirect compensation.”⁴³⁵ One commenter stated further that, if uncompensated recommendations are interpreted to be

⁴³⁴ See, e.g., letters from Joy A. Howard, Principal, WM Financial Strategies, dated February 21, 2011 (“Joy Howard WM Financial Strategies Letter”); John Dotson, Vice President and General Counsel, Chevron Energy Solutions, dated February 22, 2011 (“Chevron Letter”); Amy Natterson Kroll and W. Hardy Calcott, Bingham McCutchen LLP, on behalf of the National Association of Energy Service Companies, dated February 22, 2011 (“NAESCO Letter”); State of Indiana Letter.

⁴³⁵ See Chevron Letter; NAESCO Letter.

solicitations, it “will chill significantly the provision of information to municipal entities....”⁴³⁶

Other commenters suggested that the solicitation prong should not apply if the municipal entity or obligated person requests an introduction.⁴³⁷

The Commission notes that an introduction is not necessarily a solicitation. Moreover, whether an introduction is a solicitation does not depend on whether a municipal entity or obligated person requests an introduction or the introduction is provided without request. Rather, for purposes of Rule 15Ba1-1(n), the solicitation determination is based on whether the person providing the introduction receives direct or indirect compensation for providing the introduction.⁴³⁸ For example, a person could respond to a request from a municipal entity with a particular recommendation and then subsequently receive payment from the recommended entity. In this example, the solicitation would trigger the registration requirement.

The statutory definition of “solicitation of a municipal entity or obligated person” provides that the solicitation must be performed for “direct or indirect compensation.”⁴³⁹ Thus, persons that are not compensated for soliciting a municipal entity or obligated person would not be required to register as municipal advisors. The Commission notes, however, that Commission staff has broadly construed the term “direct or indirect compensation” in other contexts.⁴⁴⁰ In addition, as noted in

⁴³⁶ See NAESCO Letter.

⁴³⁷ See, e.g., letter from Deron S. Kintner, Executive Director, Indianapolis Local Public Improvement Bond Bank, dated February 22, 2011 (“Indianapolis Local Public Improvement Bond Bank Letter”) (stating that a person who solicits advice from individuals should be free to solicit advice and recommendations without having to either engage those individuals and compensate them or subject them to fiduciary duties).

⁴³⁸ See Rule 15Ba1-1(n) and 15 U.S.C. 780-4(e)(9) (which defines “solicitation of a municipal entity or obligated person” as “a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation” made on behalf of certain specified entities).

⁴³⁹ See 15 U.S.C. 780-4(e)(9).

⁴⁴⁰ For example, under the Investment Advisers Act, Commission staff has taken the position

the Proposal, other regulatory agencies have interpreted indirect compensation to include non-monetary compensation.⁴⁴¹

Solicitation of Obligated Persons

Exchange Act Section 15B(e)(9) provides, in part, that the term “solicitation of a municipal entity or obligated person” is “for the purpose of obtaining or retaining an engagement... of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products....”⁴⁴² One commenter asked the Commission to clarify that the meaning of “municipal financial products” with respect to the “solicitation of an obligated person” includes municipal derivatives, guaranteed investment contracts, and investment strategies of the municipal entity only, and not of the obligated person.⁴⁴³ The commenter stated that obligated persons may include large entities with numerous and varied funds and investments, many of which may have nothing to do with the transactions pursuant to which they have become obligated persons.⁴⁴⁴ In addition, the commenter stated that if the municipal advisor definition includes persons who advise obligated persons or solicit obligated persons with respect to the funds, securities, or investment strategies of the obligated person, “the reach of the registration requirement would expand in potentially unpredictable ways.”⁴⁴⁵

that compensation generally includes the receipt of any economic benefit, whether in the form of an advisory fee, some other fee relating to services rendered, a commission, or some combination of the foregoing. See *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, Investment Advisers Act Release No. 1092 (October 8, 1987).

⁴⁴¹ See Proposal, 76 FR at 832, note 113.

⁴⁴² 15 U.S.C. 78o-4(e)(9).

⁴⁴³ See ABA Letter.

⁴⁴⁴ See id.

⁴⁴⁵ Id.

The Commission agrees with the comment that solicitation with respect to an obligated person applies only when an obligated person is acting in its capacity as an obligated person.⁴⁴⁶ The Commission is, therefore, adopting Rule 15Ba1-1(n), which clarifies that, in the case of solicitation of an obligated person, the definition of “solicitation of a municipal entity or obligated person” does not include solicitation of an obligated person “if such obligated person is not acting in the capacity of an obligated person or the solicitation of the obligated person is not in connection with the issuance of municipal securities or with respect to municipal financial products.”⁴⁴⁷

As discussed above, with respect to the definition of obligated person, the Commission believes that the municipal advisor registration regime should apply in the same manner to advisors of obligated persons as to advisors of municipal entities.⁴⁴⁸ The Commission further notes that, because they are committed by contract or other arrangement to support the payment of all or part of the obligations on municipal securities, obligated persons serve the same role as municipal entities with regard to municipal securities.⁴⁴⁹ Therefore, pursuant to the Commission’s clarification in Rule 15Ba1-1(n), a person soliciting an obligated person with respect to the issuance of municipal securities or municipal financial products will not meet the definition of municipal advisor as a result of such activity unless the obligated person is acting in its capacity as such.⁴⁵⁰

One commenter asked when a person should know whether he or she is soliciting an obligated person. Specifically, with respect to the application of the proposed rules to persons who

⁴⁴⁶ The Commission also discusses above when a person is an “obligated person.” See supra Section III.A.1.b.iii.

⁴⁴⁷ See Rule 15Ba1-1(n). The solicitation could require the solicitor to register with the Commission as a broker-dealer. See generally Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013 (July 18, 1989) (discussing solicitation).

⁴⁴⁸ See supra note 227 and accompanying text.

⁴⁴⁹ See supra Section III.A.1.b.iii.

⁴⁵⁰ See id.

undertake a solicitation of an obligated person, the commenter stated that a person should be considered to have engaged in such activities only when it has actual knowledge that it is (a) soliciting an obligated person, acting in its capacity as an obligated person, and (b) engaging in solicitation with respect to the issuance of municipal securities or proceeds of municipal securities.⁴⁵¹ Further, this commenter stated that a person must be rendering services with respect to the types of activities or instruments that make a person a municipal advisor.⁴⁵² Lastly, the commenter suggested that a person need not affirmatively inquire as to the potential obligated person's status or the funds' status.⁴⁵³

The Commission believes that the commenter's suggestion, if adopted, would allow the municipal advisor registration regime to be too easily circumvented. An advisor could always argue that it did not have "actual knowledge" that it was soliciting an obligated person and therefore is not subject to regulation. The Commission instead believes that a person that is soliciting an obligated person should make a reasonable inquiry to a person in a position to know as to whether it is soliciting for services related to the issuance of municipal securities or municipal financial products, and whether the person being solicited is an obligated person. For example, a person may rely on the written representation of the obligated person, unless such person has information that would cause a reasonable person to question the accuracy of the representation.⁴⁵⁴ In such a case, a person could not ignore the information and would need to make further reasonable inquiry to verify the

⁴⁵¹ See SIFMA Letter I.

⁴⁵² See *id.*

⁴⁵³ See *id.*

⁴⁵⁴ See Rule 15Ba1-1(m). Also, a person would only be a municipal advisor as a result of soliciting an obligated person when such obligated person is acting in the capacity of an obligated person. See *supra* note 446 and accompanying text.

accuracy of the representation.⁴⁵⁵

Other Exclusions and Exemptions from the Definition of “Solicitation of a Municipal Entity or Obligated Person”

Some commenters stated that the Commission should explicitly exclude certain entities from the solicitation definition altogether. For example, several commenters stated that placement agents for pooled investment vehicles should not be considered solicitors.⁴⁵⁶ Another commenter recommended that an investment adviser’s employees who solicit municipal entities as part of their regular responsibilities should not be considered solicitors.⁴⁵⁷ The Commission has carefully considered issues raised by commenters and has determined not to provide specific exemptions from the definition of “solicitation of a municipal entity or obligated person.”⁴⁵⁸

Section 15B(e)(4)(A) of the Exchange Act states that the definition of municipal advisor includes a person that undertakes a solicitation of a municipal entity.⁴⁵⁹ Section 15B(e)(4)(B) of the Exchange Act states that the definition of municipal advisor includes a number of listed types of

⁴⁵⁵ See also supra Section III.A.1.b.viii. at note 363 and accompanying text (discussing the requirement to know when advice relates to the proceeds of municipal securities).

⁴⁵⁶ See, e.g., SIFMA Letter I (stating that Section 975 of the Dodd-Frank Act does not define “solicitation” to include solicitation of a municipal entity or obligated person by a placement agent for a pooled investment vehicle, such as a private equity fund, hedge fund, LGIP, or mutual fund, all of which involve the sale of securities by registered broker-dealers); ICI Letter (stating that a “placement agent soliciting a municipal entity to invest in a pooled investment vehicle acts on behalf of the pooled investment vehicle only, not on behalf of the adviser to the vehicle nor on behalf of any of the other four enumerated categories of persons contained in the definition”).

⁴⁵⁷ See letter from Monique S. Botkin, Assistant General Counsel, Investment Adviser Association, dated February 22, 2011 (“IAA Letter”) (stating that “[i]t would be illogical and contravene the statutory intent of the Dodd-Frank Act for such an exclusion to apply to an affiliate of an investment adviser and its employees soliciting on behalf of its affiliated adviser, but not for the same analysis to apply to an investment adviser and its own employees soliciting on their employer’s behalf”).

⁴⁵⁸ See infra note 465 and accompanying text.

⁴⁵⁹ See Exchange Act Section 15B(e)(9). See also Rule 15Ba1-1(n).

market participants (specifically financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors) if such persons otherwise meet the definition of a municipal advisor under Exchange Act Section 15B(e)(4)(A). In relevant part, Exchange Act Section 15B(e)(4)(A)(ii) provides that a municipal advisor includes a person that, on behalf of certain types of third-parties, undertakes a solicitation of a municipal entity to engage such parties to perform certain specified activities.⁴⁶⁰ In the case of placement agents, the Commission agrees with commenters that a placement agent for a pooled investment vehicle that is not a municipal entity (e.g., a hedge fund or mutual fund) and that “solicits” a municipal entity to invest in the fund does not, with respect to such activity, meet the statutory definition of the term “solicitation of a municipal entity or obligated person” in Exchange Act Section 15B(e)(9). Such a placement agent does not meet the statutory definition of the term because it is not soliciting on behalf of a third-party broker, dealer, municipal securities dealer, municipal advisor, or investment adviser to obtain or retain an engagement by a municipal entity or obligated person of such third-party broker, dealer, municipal securities dealer, municipal advisor, or investment adviser. Whether the placement agent otherwise meets the definition of “municipal advisor” with respect to any activity related to or in connection with its “solicitation” activity (that does not, as discussed above, meet the statutory definition of solicitation in Exchange Act Section 15B(e)(9)) would depend on the facts and circumstances.⁴⁶¹ By contrast, a placement agent that undertakes a solicitation of a municipal entity for the purpose of obtaining an engagement by the municipal entity of an unaffiliated investment adviser to provide investment advisory services to the municipal entity is a

⁴⁶⁰ See supra note 409 and accompanying text (setting forth the definition of “solicitation of a municipal entity or obligated person”).

⁴⁶¹ See infra notes 625-629 and accompanying text (discussing when a placement agent may be a municipal advisor and when it may, or may not, qualify for the exclusion for underwriters).

municipal advisor because it is soliciting on behalf of an unaffiliated adviser to provide investment advisory services.⁴⁶² The Commission also agrees with commenters that employees of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser that solicit municipal entities as part of their regular duties on behalf of their employer or an affiliate of such employer are not municipal advisors, if they are acting within the scope of their employment. Specifically, as provided in Exchange Act Section 15B(e)(9), the term “solicitation of a municipal entity or obligated person” means, in part, “a direct or indirect communication with a municipal entity or obligated person made by a person... on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser ... that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation... .”⁴⁶³ As such, the term applies only to third-party solicitors, and not to an entity acting on its own behalf or on behalf of its affiliate. Employees acting in their capacity as such on behalf of their employer are acting as the agent of their employer and, consequently, are not third-party solicitors that fall within the definition of municipal advisor as a result of their solicitation activity.

Pursuant to Rule 15Ba1-1(d)(3)(viii) and consistent with the exemption from the definition of municipal advisor under Rule 15Ba1-1(d)(3)(vii) for a person that provides advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal

⁴⁶² With respect to solicitations on behalf of investment advisers, the relevant portion of the definition of a “solicitation of a municipal entity or obligated person” in Exchange Act Section 15B(e) limits the scope of covered solicitations to those involving solicitations for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person “of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.” See also S. Rep. No. 111-176 at 148 (2010) (“Rather than effectively prohibiting such third-party solicitation for investment advisory services, this section would provide that activities of a municipal advisor, broker, dealer, or municipal securities dealer to solicit a municipal entity to engage an unrelated investment adviser to provide investment advisory services to a municipal entity... would be subject to regulation by the MSRB.”)

⁴⁶³ 15 U.S.C. 78o-4(e)(9).

securities or the recommendation of and brokerage of municipal escrow investments,⁴⁶⁴ the Commission is exempting from the definition of municipal advisor under Rule 15Ba1-1(d)(1) any person that undertakes a “solicitation of a municipal entity or obligated person” (as defined in Rule 15Ba1-1(n) (17 CFR 240.15Ba1-1(n))) for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent that such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.⁴⁶⁵ As with respect to the exemption in Rule 15Ba1-1(d)(3)(vii), the Commission believes that the exemption in Rule 15Ba1-1(d)(3)(viii) is consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, because the exemption tailors protection of municipal entities to those activities related to the investment of the proceeds of municipal securities and related escrow investments.⁴⁶⁶

Marketing of Insurance Contracts

One commenter stated that solicitation should not include the marketing of insurance contracts by broker-dealers to retirement plans established by municipal entities.⁴⁶⁷ The Commission agrees that the marketing of insurance contracts by broker-dealers is not solicitation for purposes of the municipal advisor definition if it is not performed on behalf of a third-party broker, dealer, investment adviser, municipal securities dealer, or municipal advisor. As described above, the definition of “solicitation of a municipal entity or obligated person” only applies to third-

⁴⁶⁴ See supra Section III.A.1.b.viii.

⁴⁶⁵ See Rule 15Ba1-1(d)(3)(viii).

⁴⁶⁶ See note 328 and accompanying text.

⁴⁶⁷ See Committee of Annuity Insurers Letter I.

party solicitations on behalf of these specific kinds of entities.⁴⁶⁸

c. Exclusions and Exemptions from the Definition of “Municipal Advisor”

In addition to the exemption described above for persons providing advice or soliciting engagements with respect to certain financial products, the Commission discusses below its interpretations of certain statutory exclusions, as well as specific activities-based exemptions it is granting from the definition of “municipal advisor.”⁴⁶⁹ Also, the Commission discusses below exemptions of general applicability to the extent a person is responding to an RFP or a request for qualifications (“RFQ”) or to the extent a municipal entity or obligated person is otherwise represented by a registered municipal advisor, subject to certain conditions.

i. Public Officials and Employees of Municipal Entities and Obligated Persons

Exchange Act Section 15B(e)(4)(A) provides that the term “municipal advisor” excludes employees of a municipal entity.⁴⁷⁰ As noted in the Proposal, one commenter suggested that the Commission clarify that this exclusion would include any person serving as an appointed or elected member of the governing body of a municipal entity, such as a board member, county commissioner or city councilman.⁴⁷¹ This commenter stated that, because these persons are not technically “employees” of the municipal entity (but rather “unpaid volunteers”), they would not fall within the

⁴⁶⁸ See *supra* note 463 and accompanying text. See also Rule 15Ba1-1(n).

⁴⁶⁹ For the exclusions and exemptions that were discussed in the Proposal and that the Commission is adopting today, the Commission has made minor, non-substantive changes to provide greater clarity and consistency throughout the rules related to exclusions and exemptions.

⁴⁷⁰ 15 U.S.C. 78o-4(e)(4)(A).

⁴⁷¹ See Proposal, 76 FR at 834, n.140 and accompanying text (citing letter from John P. Wagner, Kutak Rock LLP, to Elizabeth M. Murphy, Secretary, Commission, dated September 28, 2010).

exclusion from the definition of municipal advisor for “employees of a municipal entity.”⁴⁷²

The Commission stated in the Proposal that the exclusion from the definition of municipal advisor for “employees of a municipal entity” should include any person serving as an elected member of the municipal entity’s governing body to the extent that the person is acting within the scope of his or her role as an elected member. The Commission also stated that “employees of a municipal entity” should include a governing body’s appointed members to the extent such appointed members are ex officio members by virtue of holding an elective office.⁴⁷³ The Commission stated its concern that appointed members are not directly accountable for their performance to the citizens of the municipal entity.⁴⁷⁴

In the Proposal, the Commission requested comment on: (1) whether there are any persons who engage in uncompensated municipal advisory activities, or municipal advisory activities for indirect compensation, that the Commission should exclude from the definition of municipal advisor; (2) whether “employees of a municipal entity” should include elected members of a governing body of a municipal entity, and appointed members of a municipal entity’s governing body to the extent such appointed members are ex officio members of the governing body by virtue of holding an elective office, is appropriate; and (3) whether there are other persons associated with a municipal entity who might not be “employees” of a municipal entity but that the Commission should exclude from the definition of municipal advisor.⁴⁷⁵

The Commission received over 600 comment letters on its interpretation of “employee of a municipal entity.” Commenters represented a wide array of individuals and entities, including

⁴⁷² See id. See also 15 U.S.C. 780-4(e)(4)(A).

⁴⁷³ This would include persons appointed to fill the remainder of the term for an elective office.

⁴⁷⁴ See Proposal, 76 FR at 834.

⁴⁷⁵ See Proposal, 76 FR at 837.

representatives of: city and state governments;⁴⁷⁶ city and state retirement systems;⁴⁷⁷ state university systems;⁴⁷⁸ state housing, development, and port authorities;⁴⁷⁹ city transit authorities;⁴⁸⁰

⁴⁷⁶ See, e.g., letter from Stevan Gorcester, Association of Washington Cities, dated February 22, 2011; letter from William G. Dressel, Jr., Executive Director, New Jersey League of Municipalities, dated January 27, 2011; letter from Ken Miller, Oklahoma State Treasurer, dated February 7, 2011; letter from Steve Ritter, Assistant Finance Director, City of Huntsville, Texas, dated January 10, 2011; letter from Jim D. Dunaway, City Manager, City of Taylor, Texas, dated January 13, 2011; letter from Jacqueline M. Kovilaritch, Assistant City Attorney, City of St. Petersburg, Florida, dated January 19, 2011 (“City of St. Petersburg Letter”); letter from Judith Hetherly, Mayor, City of Lampasas, Texas, dated January 20, 2011; letter from Gary Herbert, Governor, State of Utah, Salt Lake City, Utah, dated February 17, 2011; and National Association of State Treasurers Letter.

⁴⁷⁷ See, e.g., Utah Retirement Systems Letter; letter from R. Dean Kenderdine, Executive Director and Secretary to the Board, Maryland State Retirement and Pension System, dated February 17, 2011; letter from Ann Fuelberg, Executive Director, Employees Retirement System of Texas, dated February 18, 2011; letter from Anthony B. Ross, Chairperson and Stephen C. Edmonds, Executive Director, City of Austin Employees Retirement System, dated February 18, 2011; and Alaska Retirement Management Board Letter.

⁴⁷⁸ See, e.g., letter from Frank T. Brogan, Chancellor, State University System of Florida, dated February 21, 2011; letter from Calvin J. Anthony, Chairman, Oklahoma State University/Agricultural and Mechanical Colleges Board of Regents, dated January 7, 2011 (“Oklahoma State University/Agricultural and Mechanical Colleges Board of Regents Letter”); letter from Francisco G. Cigarroa, M.D., Chancellor, The University of Texas System, dated February 7, 2011; letter from Michael D. McKinney, Chancellor, The Texas A&M University System and Kent Hance, Chancellor, Texas Tech University System, dated February 14, 2011; letter from Richard D. Legon, President, Association of Governing Boards of Universities and Colleges, dated February 15, 2011; letter from Dr. Brian McCall, Chancellor of the Texas State University System, dated February 17, 2011; and letter from Peter J. Taylor, Executive Vice President - Chief Financial Officer, The Regents of the University of California, dated February 18, 2011 (“UCLA Regents Letter”).

⁴⁷⁹ See, e.g., letter from Rebecca L. Peace, Chief Counsel, Pennsylvania Housing Finance Agency, Jayne B. Blake, Chief Counsel, Pennsylvania Infrastructure Investment Authority, Stephen M. Drizos, Executive Director, Pennsylvania Economic Development Financing Authority, Carol A. Longwell, Deputy Chief Counsel, Pennsylvania Economic Development Financing Authority, and Doreen A. McCall, Chief Counsel, Pennsylvania Turnpike Commission, dated February 15, 2011 (“Pennsylvania Housing Finance Agency Letter”); and letter from Tracy V. Drake, Chairman, Ohio Council of Port Authorities and CEO, Columbiana County Port Authority, dated February 4, 2011.

⁴⁸⁰ See, e.g., letter from Carol B. Keefe, General Counsel, Washington Metropolitan Area Transit Authority, Washington, District of Columbia, dated February 14, 2011; and letter from David Levinger, Chief Financial Officer, Dallas Area Rapid Transit, dated February 22, 2011.

special districts (such as healthcare, water, sanitation, and other districts);⁴⁸¹ public utility boards and associations;⁴⁸² airports, and airport authorities and commissions;⁴⁸³ and individual volunteer or appointed board members.⁴⁸⁴

The comments dealt predominantly with the Commission's proposed view that "employees of a municipal entity" should include elected members of a municipal entity's governing body, and appointed members, to the extent such appointed members are *ex officio* members of the governing body by virtue of holding an elective office. Many commenters asserted that the Commission's proposed interpretation of municipal advisor is overly broad or overreaching and should exclude all

⁴⁸¹ See, e.g., letter from John "Chip" Taylor, Executive Director, Colorado Counties Inc., Sam Mamet, Executive Director, Colorado Municipal League, and Ann Terry, Executive Director, Special District Association of Colorado, dated January 26, 2011; letter from Kathleen Durham, Chairman, South Broward Hospital District, dated February 8, 2011; letter from James F. Heekin, Counsel, Citrus County Hospital Board, Southeast Volusia Hospital District, West Orange Healthcare District, February 14, 2011; letter from Walt Sears, Jr., General Manager, Northeast Texas Municipal Water District, dated January 24, 2011; and letter from Robert M. Ball, A. A. E., Executive Director, Lee County Port Authority, dated February 18, 2011; and letter from Edward G. Henifin, General Manager and Steven G. deMik, Director of Finance, Hampton Roads Sanitation District, dated February 22, 2011.

⁴⁸² See, e.g., letter from David Modisette, California Municipal Utilities Association, dated February 22, 2011; letter from John S. Bruciak, Brownsville Public Utilities Board, dated February 18, 2011; letter from David H. Wright, City of Riverside, dated February 23, 2011; and letter from Susan N. Kelly, Senior Vice President of Policy Analysis and General Counsel and Diane Moody, Director, Statistical Analysis, American Public Power Association, dated February 22, 2011 ("American Public Power Association Letter").

⁴⁸³ See, e.g., letter from Jeffery P. Fegan, Chief Executive Officer, Dallas/Fort Worth International Airport, dated January 14, 2011, letter from Phillip N. Brown, A.A.E., Executive Director, Greater Orlando Aviation Authority, dated February 8, 2011; letter from Emily Neuberger, Senior Vice President & General Counsel, Wayne County Airport Authority, Michigan, dated February 14, 2011 ("Wayne County Airport Authority Letter"); letter from Elaine Roberts, President & CEO, Columbus Regional Airport Authority, dated February 16, 2011; letter from Thomas W. Anderson, General Counsel, Metropolitan Airports Commission, dated February 17, 2011; and letter from Breton K. Lobner, General Counsel, San Diego County Regional Airport Authority, dated February 22, 2011.

⁴⁸⁴ See, e.g., letter from Richard R. Vosburg, Chartered Financial Analyst, Germantown, Tennessee, dated January 24, 2011 ("Vosburg Letter"); and letter from William Dalton, dated February 28, 2011 ("Dalton Letter").

members of a municipal entity's governing board.

The majority of commenters stated, in particular, that appointed board members should not be treated differently from elected board members or officials and disagreed with the Commission's statement that appointed board members are not directly accountable. Many of the commenters asserted that state and local laws applicable to officials of a municipal entity do not distinguish between appointed or elected members and that all members are subject to the same legal obligations, including fiduciary duties, codes of conduct, open meeting laws, and conflicts of interest and ethics laws.⁴⁸⁵ For example, commenters asserted that appointed officials of municipal non-profit corporations, trusts, and pension funds have a duty to act in the interests of the corporation, trust, or the fund.⁴⁸⁶ Many commenters also asserted that appointed board members are accountable to the elected officials that appointed them or for whom they work.⁴⁸⁷ Many also noted

⁴⁸⁵ See, e.g., Darrell Buchbinder, The Port Authority of New York and New Jersey, dated February 18, 2011; National Association of State Treasurers Letter; Letter from Martin R. Hopper, General Manager, M-S-R Public Power Agency, dated February 18, 2011 ("M-S-R-Power Agency Letter"); letter from Meredith J. Jones, NYCEDC, dated February 18, 2011 ("NYCEDC Letter"); and UCLA Regents Letter; letter from Laura King, Minnesota State Colleges and Universities, dated February 22, 2011.

Many of these commenters also explained that certain municipal entity governing boards are established or operating pursuant to state or local statute. See *id.* See also letter from JoAnn E. Levin, Chief Solicitor, City of Baltimore, dated February 3, 2011; and letter from Mark Page, Director of Management and Budget, The City of New York, dated February 22, 2011 ("NYC Management and Budget Letter").

⁴⁸⁶ See, e.g., letter from Acting Governor Earl Ray Tomblin, Chairman of the Board; Glen B. Gainer, Auditor of the State of West Virginia and Roger Hunter, Chairman of the Investment Committee, and Guy Bucci, Chairman of the Legal Committee, West Virginia Investment Management Board, dated February 22, 2011; and letter from Joanne Handy, President and CEO, Aging Services of California, dated February 22, 2011; letter from Charles R. Noll, President, Pennsylvania Local Government Investment Trust, dated February 18, 2011 ("Pennsylvania Local Government Investment Trust Letter"); letter from Keith Bozarth, Executive Director, State of Wisconsin Investment Board, dated February 22, 2011; and letter from Peter H. Mixon, California Public Employees' Retirement System, dated February 22, 2011 ("CALPERS Letter").

⁴⁸⁷ See, e.g., letter from John Murphy, Executive Director, National Association of Local

that appointed board members may be removed for cause⁴⁸⁸ and are subject to civil suit.⁴⁸⁹ Others observed that appointed board members are more accountable than elected officials.⁴⁹⁰

Additionally, many commenters asserted that board members are the decision and policy makers who receive advice from third parties who are paid for providing services and that board members themselves are not “advisors.”⁴⁹¹ Many commenters asserted that members of governing

Housing Finance Agencies, dated January 27, 2011; NYC Management and Budget Letter; and letter from Bob A. Newmark, Housing Finance Authority, dated February 11, 2011.

⁴⁸⁸ See, e.g., letter from Gottlieb Fisher PLLC, on behalf of the Boards of Trustees for King County Rural Library District, Fort Vancouver Intercounty Rural Library District, Pierce County Rural Library District LaConner Rural Partial-County Library District, Sno-Isle Intercounty Rural Library District, Spokane County Rural Library District, Walla Walla County Rural Library District, and Whitman County Rural Library District, dated February 11, 2011 (“Gottlieb Fisher Letter”); letter from Linda Beaver, Nebraska Educational Finance Authority, dated February 16, 2011 (“Nebraska Educational Finance Authority Letter”); Alaska Retirement Management Board Letter; Robert W. Barnes, Idaho Falls Redevelopment Agency, dated February 18, 2011; and letter from Jeffrey W. Letwin, Esq., Partner, Schnader Harrison Segal Lewis LLP, Pittsburgh, Pennsylvania, dated February 8, 2011.

⁴⁸⁹ See, e.g., letter from Jeffrey W. Letwin, Esq., Partner, Schnader Harrison Segal Lewis LLP, Pittsburgh, Pennsylvania, dated February 8, 2011; letter from Gary Kimball, President, Specialized Public Finance, Inc., dated February 22, 2011 (“Specialized Public Finance Letter”); letter from Gary Parsons, General Manager, Texas Municipal Power Agency, dated February 22, 2011 (“Texas Municipal Power Agency Letter”); and letter from John W. Rubottom, General Counsel, Lower Colorado River Authority, dated February 15, 2011.

⁴⁹⁰ See, e.g., letter from Bill Lockyer, Treasurer, State of California, dated February 22, 2011 (“California State Treasurer’s Office Letter”); Texas Municipal Power Agency Letter; letter from John D. Clark, III, Executive Director/CEO, Indianapolis Airport Authority, dated February 22, 2011; and letter from Victor Vandergriff, Chairman, North Texas Tollway Authority, dated February 11, 2011.

⁴⁹¹ See, e.g., letter from Michael D. Nosler, General Counsel and Assistant Attorney General, Colorado State University System, dated February 21, 2011; letter from Barbara J. Thompson, Executive Director, National Council of State Housing Agencies, dated February 22, 2011; letter from Luther Strange, Attorney General, State of Alabama, dated February 22, 2011; CALPERS Letter; letter from Ronnie G. Jung, Executive Director, Teacher Retirement System of Texas, dated February 22, 2011; Stephanie L. Hamlett, Executive Director, Virginia Resources Authority, dated February 22, 2011; and Dalton Letter.

boards are the intended beneficiaries of the proposed regulation.⁴⁹² Further, some commenters asserted that the Proposal would usurp state laws governing duties and responsibilities of appointed board members of municipal entities.⁴⁹³ Many commenters also stated that, in its current form, the Proposal would deter much needed citizen volunteers from serving on governing boards of municipal entities or would chill the deliberative process of such boards. These commenters reasoned that volunteers would fear that their participation in votes on, or discussions of, financial matters will be deemed “advice” that would subject them to registration.⁴⁹⁴

Commenters also stated that the Proposal is unclear with respect to whether: (1) appointed, rather than elected, officials (such as city controllers, managers, and commissioners) would be “employees;”⁴⁹⁵ (2) the employee of one municipal entity (such as an employee of a municipal entity

⁴⁹² See, e.g., letter from David R. Fine, City Attorney, Denver, dated February 9, 2011 (“Denver Letter”); letter from James F. Zay, Chairman, Du Page Water Commission, dated February 11, 2011; letter from Angela I. Carmon, City Attorney, City of Winston-Salem, North Carolina, dated February 14, 2011; letter from David J. Kincaid, City Manager, City of Safford, Arizona, dated February 14, 2011 (“City of Safford Letter”); and letter from Donald Dicklich, County Auditor-Treasurer, Duluth, Minnesota, dated February 16, 2011.

⁴⁹³ See, e.g., letter from Steven J. Baumgardt, Finance Director, City of Tolleson, Arizona, dated March 3, 2011 (“City of Tolleson Letter”); letter from Joe Pizzillo, Vice Mayor, City of Goodyear, Arizona, dated February 14, 2011 (“City of Goodyear Letter”); letter from Patricia Branya, Director, Miami-Dade County, dated February 14, 2011; and letter from Elwood G. “Woody” Farber, President, New Mexico Educational Assistance Foundation, dated February 15, 2011. One commenter questioned whether, if an appointed member of a governing body is deemed a municipal advisor, the federal fiduciary obligations to the municipal entity override state and local law provisions for exculpation, indemnification, and other protections of board members. See NABL Letter.

⁴⁹⁴ See, e.g., City of Tolleson Letter; City of Goodyear Letter; letter from Richard D. Legon, President, Association of Governing Boards of Universities and Colleges, dated February 15, 2011; letter from Edward G. Henifin, General Manager and Steven G. deMik, Director of Finance, Hampton Roads Sanitation District, dated February 22, 2011; letter from Scott Jordan, Executive Office for Administration and Finance, dated February 22, 2011; letter from Granger Vinall, Chairman of the Board of Directors and Kevin J. Burns, Chief Executive Officer, UA Healthcare, Inc., dated February 22, 2011; and letter from Ronald H. Paydo, President, Medina County Port Authority, dated February 18, 2011.

⁴⁹⁵ See, e.g., Cynthia M. Davenport, Attorney at Law, Flynn & Davenport, LLC, Troy,

that is the sponsor of a pension plan) would be covered by the exclusion when serving as an appointed member of the board of another municipal entity (such as on the board of the sponsored pension plan) or otherwise performing services for other related municipal entities;⁴⁹⁶ and (3) board members that were “elected,” but were not elected by the citizens of the municipal entity, would be considered “employees of a municipal entity.”⁴⁹⁷ Some commenters stated that designees of board

Missouri, dated January 18, 2011; City of St. Petersburg Letter; Denver Letter; and City of Safford Letter.

⁴⁹⁶ See, e.g., letter from Michael Hairston, EFRC, dated February 22, 2011; NYC Management and Budget Letter; M-S-R- Power Agency Letter (explaining that the M-S-R Public Power Agency uses the services of employees of its member municipal entities to sit on standing committees of the agency and to fulfill the duties of offices of the agency; and commenting that employees of its members that are seconded to the agency should have the same exemption when they perform services for the agency as when the employees are acting within the scope of their employment responsibilities providing services for the benefit of the member entity); letter from Hawkins Delafield & Wood LLP, dated February 16, 2011 (commenting that “an employee of municipal entity A who provides services to, but is not an employee of, municipal entity B, should be exempt under Section 15B(e)(4)(A) if both entities operate for the benefit of the same governmental unit, whether at the state, county, or municipal level”); letter from Susan Combs, Texas Comptroller of Public Accounts, dated February 22, 2011 (describing that employees of Texas’s Office of the Comptroller may provide advice to other municipal entities within the state in connection with their duties to the Office of the Comptroller); and letter from Amadeo Saenz, Texas Department of Transportation, dated February 22, 2011 (commenting that employees of the Texas Department of Transportation that are appointed to the non-profit entity that issues bonds on behalf of the Texas Transportation Commission should be excluded because they are employees assuming a decision-making responsibility based on the duties of their employment).

One commenter also stated that the Proposal is unclear, in the case of a non-profit entity formed for the benefit of a municipal entity, whether employees of the municipal entity that sit on the board of such non-profit would be excluded from the definition of “municipal advisor” as “employees” of the municipal entity. See, e.g., letter from Angela I. Carmon, City Attorney on behalf of North Carolina Municipal Leasing Corporation, dated February 22, 2011.

The term “municipal entity” means, in part, “any State, political subdivision of a State, or corporate instrumentality.” See Rule 15Ba1-1(g). The Commission notes that such employees would be “employees of a municipal entity,” and therefore excluded from the definition of municipal advisor, to the extent the non-profit entity is itself a municipal entity (e.g., if the non-profit entity is a corporate instrumentality of a State).

⁴⁹⁷ See, e.g., Pennsylvania Local Government Investment Trust Letter.

members should also be covered by the exclusion.⁴⁹⁸ One commenter suggested that “employees and board members of a municipal entity should be excluded [from the definition of municipal advisor] to the extent they provide advice to an obligated person (and acting in the purview of their duties).”⁴⁹⁹

Many commenters also stated that boards of municipal entities are legally inseparable from the municipal entity.⁵⁰⁰ One commenter stated that if the governing body of a municipal entity, as a whole, is not a part of the “municipal entity,” then any third party soliciting or providing advice to the governing body with respect to municipal financial products or the issuance of municipal securities would not be subject to the registration requirements.⁵⁰¹

Additionally, some commenters asserted that the Proposal would restrict municipal entities from soliciting advice from citizens, and would subject to the registration requirements members of the general public submitting written comments or giving oral statements to the board of a municipal entity.⁵⁰² Another commenter stated that the Proposal would require registration of a former board member, if the Chairman of the current board contacts that former board member with questions about a prior issuance.⁵⁰³

⁴⁹⁸ See, e.g., NYC Management and Budget Letter; and letter from Tim Kenny, Nebraska Investment Finance Authority, dated February 22, 2011.

⁴⁹⁹ Kutak Rock Letter. This commenter was concerned that otherwise, the municipal entity and obligated person would not be able to coordinate with respect to a financing for the obligated person.

⁵⁰⁰ See, e.g., Utah Retirement Systems Letter; Nebraska Educational Finance Authority Letter; State of Indiana Letter; NABL Letter; and letter from Gregory W. Smith, General Counsel/Chief Operating Officer, Colorado Public Employees’ Retirement Association, dated February 22, 2011.

⁵⁰¹ See Utah Retirement Systems Letter.

⁵⁰² See, e.g., letter from Annise D. Parker, Mayor, City of Houston, Texas, dated February 22, 2011; Squire Sanders & Dempsey Letter.

⁵⁰³ See Indianapolis Local Public Improvement Bond Bank Letter.

After considering the comments, the Commission has determined to exempt from the definition of municipal advisor, pursuant to its authority under Section 15B(a)(4), all members of a municipal entity's governing body, its advisory boards and its committees, as well as persons serving in a similar official capacity with respect to the municipal entity, to the extent they are acting within the scope of their official capacity, regardless of whether such members or officials are employees of the municipal entity. Specifically, Rule 15Ba1-1(d)(3)(ii) exempts from the definition of municipal advisor "[a]ny person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person⁵⁰⁴ to the extent that such person is acting within the scope of such person's official capacity"⁵⁰⁵ and "any employee of a municipal entity or obligated person to the extent that such person is acting within the scope of such person's employment."⁵⁰⁶

The Commission agrees with commenters that like employees, a municipal entity's officials, as well as members of a municipal entity's governing body and other officials serving in a similar capacity (including members of advisory boards and committees), whether or not employed by a municipal entity, typically act on behalf of the municipal entity. The Commission also believes that if a local government official or appointed board member of a municipal entity, in the scope of his or her duties to that municipal entity, provides advice to another municipal entity, such advice would not require the person to register as a municipal advisor because such person would be acting within the scope of his or her duties to the municipal entity. Rule 15Ba1-1(d)(3)(ii) also clarifies the Commission's interpretation of the statutory exclusion from the definition of "municipal

⁵⁰⁴ Comments regarding the treatment of such governing persons and employees of obligated persons, and how this exemption addresses such comments, are separately discussed further below.

⁵⁰⁵ Rule 15Ba1-1(d)(3)(ii)(A).

⁵⁰⁶ Rule 15Ba1-1(d)(3)(ii)(B).

advisor” for employees of municipal entities by providing that such employees are exempt “to the extent that such person is acting within the scope of such person’s employment.”⁵⁰⁷ Consequently, as described above with respect to governing board members and officials, an employee of one municipal entity that provides advice, within the scope of his or her employment as such, to another municipal entity or obligated person would be exempt from the definition of “municipal advisor.”

The exemption in Rule 15Ba1-1(d)(3)(ii) would extend to all designees of public officials or members of a municipal entity’s governing body, to the extent such designation is made pursuant to existing rules of the municipal entity for designating or delegating authority. The Commission believes that under such scenario, the designee would be serving “in a similar official capacity”⁵⁰⁸ as the person for whom they are acting. Further, the Commission notes that the exemption from registration includes members of advisory boards⁵⁰⁹ and committees,⁵¹⁰ acting within the scope of their capacity as such⁵¹¹ because, as with respect to members of the governing body or other

⁵⁰⁷ See Rule 15Ba1-1(d)(3)(ii).

⁵⁰⁸ See *id.*

⁵⁰⁹ Commenters provided some examples of advisory board composition and activities. See, e.g., Combs Letter (describing that the “Comptroller’s Investment Advisory Board,” which advises the state’s trust company which in turn manages state funds, is unlike an investment adviser in that it doesn’t assist with the selection of specific investments or investment professionals; that it provides general guidance but has no control over what purchases and sales are made with state funds; and that although the board members have no fiduciary duty, they also have no decision-making power); and letter from Gregg Abbott, State of Texas, dated February 22, 2011 (“State of Texas Letter”) (noting that distinguishing between governing boards and advisory boards is unworkable as some advisory boards are subcommittees of governing boards, some are made up of a combination of governing board members and other citizen volunteers, and some have no governing board members).

⁵¹⁰ Some municipal entity boards also have committees that may or may not be comprised of members of the board. See, e.g., letter from Jerome Cochrane, University of Pittsburgh, dated February 22, 2011 (certain committees of the boards of certain Pennsylvania State universities include “non-voting committee members, representing members of the public, alumni, faculty, staff and student bodies”).

⁵¹¹ The Commission notes that the exemption for advisory board and committee members includes volunteer members of such boards and committees.

government officials, when acting within the scope of their official capacity such persons are acting on behalf of the municipal entity.

The Commission does not intend to impede the deliberative process that municipal entities engage in with their citizens. Accordingly, the registration requirement for municipal advisors does not apply to persons who comment on municipal financial products or the issuance of municipal securities by making use of public comment forums provided by municipal entities or other public forums. Additionally, responding to factual questions about a past issuance by a former board member would not constitute municipal advisory activities, because providing such information in response to questions under such circumstances is factual and therefore does not constitute advice with respect to such issuance.⁵¹²

The Commission agrees with commenters that individuals who engage in deliberative and decision-making functions with respect to municipal financial products or the issuance of municipal securities as part of their duties as members of a governing body should not have to register as municipal advisors. Such individuals represent the municipal entity that is the intended recipient of the protections of the municipal advisor registration regime, and the Commission does not consider such deliberative and decision-making functions to be advice. Additionally, board members and other officials (appointed and elected alike, as well as their duly appointed designees) may be subject to state and local law, including fiduciary duties and ethics laws, and the statutory qualifications for such members' board positions may be significant to the mission of the municipal entity. Accordingly, the Commission does not believe that imposing an additional layer of regulation, including the fiduciary duty imposed upon municipal advisors,⁵¹³ would provide a

⁵¹² See supra Section III.A.1.b.1. (discussing the advice standard in general).

⁵¹³ Section 15B(c)(1) of the Exchange Act (as amended by the Dodd-Frank Act) imposes a fiduciary duty on municipal advisors when advising municipal entities. See Proposal, 76 FR

significant additional benefit. The Commission agrees with commenters that whether a public official or other member of a governing body of a municipal entity is appointed or elected is not the sole factor in determining whether such individual is accountable to the municipal entity he or she serves. Board members, officials, and employees would be required to register, however, if they are engaged by other municipal entities or obligated persons to provide services as compensated advisors in addition to their normal duties as an employee, official, or board member of the municipal entity.⁵¹⁴

For the reasons described above, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity to the extent that such person is acting within the scope of such person's official capacity.⁵¹⁵ Accordingly, such persons are not required to register as municipal advisors.

Employees and Officials of Obligated Persons

Section 15B(e)(4) of the Exchange Act excludes from the definition of municipal advisor persons who are employees of a municipal entity, but does not extend such exclusion to employees of obligated persons. In the Proposal, the Commission asked whether employees of obligated persons should be excluded, to the extent they are providing advice to the obligated person, acting in its capacity as an obligated person, in connection with municipal financial products or the

at 827, note 60 and accompanying text.

⁵¹⁴ Compare with supra note 507 and accompanying text.

⁵¹⁵ See Rule 15Ba1-1(d)(3)(ii)(A).

issuance of municipal securities.⁵¹⁶ In addition, the Commission asked whether there are types of persons, other than employees of obligated persons, who should be excluded from the definition of municipal advisor.⁵¹⁷ In response, the Commission received several comments.

Some commenters stated that employees, officers, and directors of obligated persons should be excluded from the definition of municipal advisor when they provide advice to the obligated person with respect to municipal financial products or the issuance of municipal securities.⁵¹⁸ More specifically, some commenters stated that board members of obligated persons acting within the scope of their duties do not give “advice” and that it is the obligation of board members to communicate with fellow board members and staff.⁵¹⁹ For example, one commenter stated that municipal advisors typically have multiple clients, hold themselves out as advisors, and generally do not exercise decision making authority for the municipal entity or obligated person.⁵²⁰ On the other hand, according to this commenter, directors and employees of obligated persons act on behalf of and in the interest of entities with which they are affiliated and do not hold themselves out as

⁵¹⁶ See Proposal, 76 FR at 837.

⁵¹⁷ See *id.*

⁵¹⁸ See, e.g., NABL Letter; ABA Letter; letter from Duncan Gallagher, EVP and Chief Financial Officer, Allina Health System, dated February 22, 2011 (“Allina Health System Letter”); letter from Jeffrey S. Bromme, Senior Vice President and Chief Legal Officer and C. Robert Foltz, Associate Chief Legal Officer – Treasury, Adventist Health System Sunbelt Healthcare Corporation, dated February 11, 2011 (“Adventist Health System Letter”).

⁵¹⁹ See, e.g., letter from Charles A. Samuels, Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., on behalf of the National Association of Health & Educational Facilities Finance Authorities, dated February 17, 2011 (“National Association of Health & Educational Facilities Finance Authorities Letter”). See also Allina Health System Letter; Chapman and Cutler Letter; letter from Latham & Watkins, dated February 22, 2011 (“Latham & Watkins Letter”); and letter from David W. Lowden, Chair, the Committee on Non-Profit Organizations, Association of the Bar of the City of New York, dated February 14, 2011 (“New York City Bar Letter”).

⁵²⁰ See Latham & Watkins Letter.

advisors.⁵²¹ They act for obligated persons in connection with municipal offerings only as part of their responsibilities to the obligated person.⁵²² Other commenters stated that members of governing boards of obligated persons are already subject to state and federal laws, such as laws governing non-profit entities, conflict of interest laws, ethics laws, and open meeting laws.⁵²³ Commenters also made similar statements with respect to employees of obligated persons.⁵²⁴ Further, some commenters stated that officers, directors, and employees of obligated persons are no different from those of municipal entities,⁵²⁵ and an obligated person can only act through its board and employees.⁵²⁶ One commenter suggested, however, that individual board members and employees should not be exempt from registration if they are engaged to provide services for a nonprofit organization as compensated advisors.⁵²⁷

Several commenters stated that the MSRB Study,⁵²⁸ the legislative history of the Dodd-

⁵²¹ See id.

⁵²² See id.

⁵²³ See, e.g., Kutak Rock Letter; National Association of Health & Educational Facilities Finance Authorities Letter; Latham & Watkins Letter; letter from Susan Ellen Wagner, Executive Director, Healthcare Trustees of New York State, dated February 16, 2011 (“Healthcare Trustees of New York State Letter”); William C. Daroff, Vice President for Public Policy & Director of the Washington Office, Jewish Federations of North America, dated February 25, 2011 (“Jewish Federations of North America Letter”).

⁵²⁴ See, e.g., National Association of Health & Educational Facilities Finance Authorities Letter; Latham & Watkins Letter; New York City Bar Letter; and letter from Corinne Johnson, Executive Director, Colorado Health Facilities Authority, Cris White, Executive Director, Colorado Housing and Finance Authority, Jo Ann Soker, Executive Director, Colorado Educational and Cultural Facilities Authority, dated February 18, 2011 (“Colorado Health Facilities Letter”).

⁵²⁵ See, e.g., South Lake County Hospital District Letter. See also Latham & Watkins Letter.

⁵²⁶ See, e.g., Squire Sanders & Dempsey Letter. See also Latham & Watkins Letter; MSRB Letter.

⁵²⁷ See New York City Bar Letter.

⁵²⁸ In April 2009, the MSRB issued a study titled “Unregulated Municipal Market Participants: A Case for Reform,” in which the MSRB advocated for the regulation of intermediaries in

Frank Act, and the Proposal indicate that the term “municipal advisor” is meant to capture professionals that offer advisory services in a financial marketplace.⁵²⁹ One commenter stated that for decades, in regulating the market for financial advice, Congress and the Commission have expressly declined to regulate internal advice provided by employee to employer.⁵³⁰ The commenter stated that a departure from this established practice should not be inferred, absent a clear indication from Congress, and nothing in the language or history of the Dodd-Frank Act signals that Congress intended to affect a fundamental shift in policy.⁵³¹

Some commenters stated that the proposed rules would make it difficult for obligated persons to recruit and retain board members and employees,⁵³² discourage officers and board

the municipal securities market (such as swap advisors and financial advisors). This study was referenced by the Commission in the Proposal. See Proposal, 76 FR at 825, n.8.

⁵²⁹ See, e.g., letters from Michael B. Koffler and James K. Hasson, Jr., Sutherland Asbill & Brennan LLP on behalf of Universities, dated February 22, 2011 (“Universities Letter”); Richard D. Legon, President, Association of Governing Boards of Universities and Colleges, dated February 15, 2011 (“Association of Governing Boards of Universities and Colleges Letter”) (stating that board members and employees of obligated persons are not discussed in the preamble and cost estimates of the Proposal). See also letters from Molly Corbett Broad, President, American Council on Education, dated February 22, 2011 (“American Council on Education Letter”); Daniel G. Kirch, M.D., President and CEO, Association of American Medical Colleges, dated February 16, 2011 (“Association of American Medical Colleges Letter”).

⁵³⁰ See American Council on Education Letter (providing as an example in support of their statement that existing registration requirements, such as those under the Investment Advisers Act, cover firms and persons in the business of providing advice, and that the requirements do not regulate employment relationships). See also Association of Governing Boards of Universities and Colleges Letter (noting that Commission staff has taken the position, in the context of a No-Action Letter under the Investment Advisers Act, that internal relationships are unlike the commercial relationships between an investment adviser and its clients that the Investment Advisers Act was intended to regulate).

⁵³¹ See American Council on Education Letter.

⁵³² See, e.g., letter from Richard L. Clarke, DHA, FHFMA, President and CEO, Healthcare Financial Management Association, dated February 22, 2011 (“Healthcare Financial Management Association Letter”); Latham & Watkins Letter; and New York City Bar Letter.

members from engaging in matters that are traditionally within their purview,⁵³³ and disrupt the process of borrowing and operations of borrowers and issuers.⁵³⁴ Other commenters stated that the proposed rules could substantially increase the cost of financing⁵³⁵ and could cause a potential borrower to forego projects using the economic development options offered by states and avoid the issuance of municipal bonds.⁵³⁶

As discussed above, one commenter suggested that “employees and board members of a municipal entity should be excluded from regulation to the extent they provide advice to an obligated person (and acting in the purview of their duties).”⁵³⁷ Likewise, employees and board members of an obligated person should be excluded from regulation to the extent they provide advice to a municipal entity.⁵³⁸ On the other hand, another commenter stated that employees, officers, and directors of an obligated person should be exempt to the extent they provide advice solely to the obligated person and not to a municipal entity.⁵³⁹ One other commenter stated that when an obligated person solicits conduit issuers to issue bonds on behalf of the obligated person, such solicitation should not require the obligated person or its board members or employees to register as municipal advisors.⁵⁴⁰

⁵³³ See, e.g., Association of American Medical Colleges Letter; and New York City Bar Letter.

⁵³⁴ See, e.g., National Association of Health & Educational Facilities Finance Authorities Letter.

⁵³⁵ See, e.g., letter from Christopher B. Meister, Executive Director, Illinois Finance Authority, dated February 22, 2011 (“Illinois Finance Authority Letter”). See also SIFMA Letter I.

⁵³⁶ See, e.g., State of Indiana Letter; National Association of State Treasurers Letter; and New York City Bar Letter.

⁵³⁷ See supra note 499 and accompanying text.

⁵³⁸ See Kutak Rock Letter.

⁵³⁹ See ABA Letter.

⁵⁴⁰ See NABL Letter. See also letter from James E. Potvin, Chair and Robert W. Giroux, Executive Director, Vermont Educational and Health Buildings Financing Agency, dated

After considering the comments, the Commission agrees with commenters that board members, officers, and employees of obligated persons should be treated in the same manner as board members, officers, and employees of municipal entities and is using its statutory authority to provide an exemption for such persons that is parallel to the exemption with respect to municipal entities described above.⁵⁴¹ The Commission believes that this exemption is appropriate, because such individuals, when acting in the scope of their duty to the obligated person, are accountable to the obligated person. Further, board members, officers, and employees of obligated persons serve similar functions as board members, officers, and employees of municipal entities. Consequently, the Commission is exempting from the definition of municipal advisor any employee of an obligated person acting within the scope of such person's employment, as well as any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, an obligated person to the extent they are acting within the scope of their duties.⁵⁴² The Commission believes that, like municipal entities, obligated persons and persons who perform decision-making functions for, or otherwise act on behalf of, obligated persons, when fulfilling their duty to the obligated person, are also the intended beneficiaries of the protections afforded by the municipal advisor registration requirement. As with respect to municipal entities, board members, officials, and employees of obligated persons would be required to register, however, if they are engaged by other municipal entities or obligated persons

February 22, 2011 ("Vermont Educational and Health Buildings Financing Agency Letter"); and National Association of State Treasurers Letter; letter from Paul Goldstein, Vice President of Finance, Treasury/Accounting and Chief Financial Officer, Orlando Health, Inc., dated February 18, 2011 ("Orlando Health Letter"). Some commenters stated generally that obligated persons should not be required to register as municipal advisors. See, e.g., Latham & Watkins Letter.

⁵⁴¹ See Rule 15Ba1-1(d)(3)(ii); and supra notes 504-505 and accompanying text.

⁵⁴² See Rule 15Ba1-1(d)(3)(ii). See also notes 504 and 506 and accompanying text.

to provide services as compensated advisors in addition to their normal duties as an employee, official, or board member of the obligated person.⁵⁴³

For the reasons described above, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt any: (1) person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, an obligated person to the extent that such person is acting within the scope of such person's official capacity; and (2) employee of an obligated person to the extent that such person is acting within the scope of such person's employment.⁵⁴⁴

Accordingly, such persons are not required to register as municipal advisors.

With regard to the application of the rules to employees or governing body members of an obligated person who solicit conduit issuers to issue bonds on behalf of the obligated person, the Commission notes that these persons are not acting as advisors.⁵⁴⁵ Instead, they act as principals seeking an issuance of municipal securities by a municipal entity on behalf of the obligated person pursuant to an arm's-length loan (or similar) agreement under which the obligated person will be required to pay debt service and other costs upon bond issuance. The Commission notes that these individuals would not be required to register as municipal advisors, because they are not advising a municipal entity with respect to the issuance of municipal securities or soliciting a municipal entity

⁵⁴³ As described above, a local government official or appointed board member of a municipal entity would not be required to register as a municipal advisor if he or she provides advice, in the scope of his or her duties to that municipal entity employer, to another municipal entity. See supra notes and 496 and 507 accompanying text. In contrast, if such a person is engaged and compensated outside the scope of such duties, he or she would not be eligible for the exemption and would be required to register.

⁵⁴⁴ See Rule 15Ba1-1(d)(3)(ii).

⁵⁴⁵ See supra note 540 and accompanying text.

on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser for the purpose of obtaining or retaining an engagement for such person. However, an employee, governing board member or other official of an obligated person could still be deemed to be engaged in municipal advisory activities (which include solicitation activities) if his or her recommendations cannot be properly characterized as negotiations of the terms by which the obligated person is agreeing to engage in the borrowing through the municipal entity.⁵⁴⁶

Regardless of an individual's title as a member of a governing body, an employee, or other official (appointed or elected) of a municipal entity or obligated person, the Commission notes that the exemptions described above do not apply to the extent such individual acts outside of the scope of authority of his or her position.⁵⁴⁷

ii. Responses to Requests for Proposals or Requests for Qualifications

In the Proposal, the Commission requested comment about banks that respond to municipal entities' RFPs regarding investment products offered, such as money market mutual funds or other exempt securities.⁵⁴⁸ The Commission received a number of comments regarding responses to RFPs or RFQs by banks and other entities.⁵⁴⁹

Several commenters stated that responses to RFPs and RFQs should not require a person to

⁵⁴⁶ See supra Section III.A.b.i. (discussing the advice standard in general) and Section III.A.b.x. (discussing solicitation of a municipal entity or obligated person).

⁵⁴⁷ The exemption only applies "to the extent such person is acting within the scope of such person's official capacity" or "employment," as applicable. See Rule 15Ba1-1(d)(3)(ii).

⁵⁴⁸ See Proposal, 76 FR at 837.

⁵⁴⁹ See also supra notes 421-423 and accompanying text (discussing RFPs and RFQs in the context of the solicitation prong, including whether a market professional's activities assisting a municipal entity or obligated person in their selection of another market professional as part of an RFP process constitute municipal advisory activities); and infra Section III.A.1.c.vii. (discussing the treatment of responses by attorneys to RFPs from municipal entities and obligated persons).

register as a municipal advisor. For example, one commenter suggested that, with respect to municipal derivatives, responding to RFPs or RFQs from a municipal entity or obligated person does not constitute “advice.”⁵⁵⁰ Similarly, another commenter stated generally that certain activities should be expressly excluded from the definition of “advice,” including responding to RFPs or RFQs and providing terms on which a financial institution would be prepared to enter into a transaction or purchase securities issued by a municipal entity.⁵⁵¹ This commenter also stated that bid documents submitted in response to a municipal entity’s request for private financing proposals should not constitute advice.⁵⁵² Another commenter concurred that responses to RFPs should not be treated as advice.⁵⁵³

The Commission has carefully considered the issues raised by commenters on the Proposal and agrees that responses to RFPs or RFQs alone do not constitute municipal advisory activities.⁵⁵⁴ Therefore, the Commission is adopting Rule 15Ba1-1(d)(3)(iv), which exempts from the definition of municipal advisor “[a]ny person providing a response in writing or orally to a request for proposals or qualifications from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities; provided however, that such person does not receive separate direct or indirect compensation for advice provided as part of

⁵⁵⁰ See BNY Letter.

⁵⁵¹ See Letter from Nick Butcher, Senior Managing Director, Macquarie Capital Advisors, dated February 22, 2011 (“Macquarie Letter”).

⁵⁵² See Macquarie Letter.

⁵⁵³ See OCC Letter. This commenter stated, among other things, that banks respond to RFPs on a competitive basis, and many municipalities are required by statute to issue RFPs to banks for their operating accounts. See *id.*

⁵⁵⁴ For a discussion of RFPs and RFQs in the context of the solicitation prong, see *supra* notes 421-423 and accompanying text.

such response.”⁵⁵⁵

Responses to RFPs or RFQs are provided at the request of, and established by, a municipal entity or obligated person as part of a competitive process. Therefore, it is reasonable to believe that the municipal entity or obligated person would understand that service providers respond to RFPs and RFQs in order to obtain business and would not rely on such responses as it would on advice from its advisor. Further, persons who respond to RFPs or RFQs are likely to be already regulated entities, such as registered municipal advisors, brokers, dealers, or investment advisers. Accordingly, their responses may be subject to fair dealing, suitability, or other standards. Moreover, if a person is selected by a municipal entity or obligated person as a result of an RFP or RFQ, such person could be required to register as a municipal advisor for its subsequent activities.

For the same reasons discussed above for other RFPs, the exemption pursuant to Rule 15Ba1-1(d)(3)(iv) also includes responses to so-called “mini-RFPs” that might only be distributed to service providers that have been pre-screened or pre-qualified by the municipal entity or obligated person. For the exemption to apply, a person providing advice in response to an RFP or RFQ may not be separately compensated for advice given as part of the RFP or RFQ process. Further, the compensation such person receives, if hired as a result of the RFP or RFQ, is not direct or indirect compensation for the advice provided as part of the RFP or RFQ. However, assisting

⁵⁵⁵

The Commission notes that FINRA applies a similar approach in connection with the application of its suitability rule to broker-dealers. See FINRA Rule 2111. In a recent Regulatory Notice, FINRA explained that, where a registered representative makes a recommendation to purchase a security to a *potential investor*, the suitability rule would apply to the recommendation if that individual executes the transaction through the broker-dealer with which the registered representative is associated or the broker-dealer receives or will receive, directly or indirectly, compensation as a result of the recommended transaction. See FINRA Regulatory Notice 12-55. For purposes of the municipal advisor registration rules, if a person is selected as a result of an RFP or RFQ, any applicable law or rule (e.g., fair dealing, suitability, fiduciary duty) will apply to that person’s activities in the role for which the person was selected.

with the preparation of an RFP or RFQ on behalf of a municipal entity or obligated person, or assisting in the selection of a broker-dealer, investment adviser, or financial advisor as part of an RFP process, could constitute municipal advisory activity. Specifically, in assisting in the preparation of an RFP or RFQ, a person could provide advice with respect to the parameters of such RFP or RFQ, such as the potential use of municipal financial products or the issuance of municipal securities. Further, in assisting in the selection of a broker-dealer, investment adviser, or municipal advisor as part of an RFP process, a person could provide advice with respect to the responses to the RFP, including responses related to the use of municipal financial products or the issuance of municipal securities.⁵⁵⁶

For the foregoing reasons, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4)⁵⁵⁷ to exempt persons responding to RFPs and RFQs from the definition of municipal advisor, subject to the limitations described above.

iii. Municipal Entity or Obligated Person Represented by an Independent Municipal Advisor

In the Proposal, the Commission sought comment on whether it should provide other

⁵⁵⁶ A person assisting a municipal entity or obligated person in selecting a broker-dealer, investment adviser, or financial advisor as part of an RFP process established by the municipal entity or obligated person would not, however, be considered to be undertaking a solicitation for purposes of the definition of municipal advisor in Rule 15Ba1-1(d)(1), because such person would not be soliciting “on behalf of” such broker-dealer, investment adviser, or financial advisor. See *supra* Section III.A.1.b.x. (discussing generally solicitation of a municipal entity or obligated person). See also Rule 15Ba1-1(n) (defining solicitation of a municipal entity or obligated person).

⁵⁵⁷ Pursuant to Section 15B of the Exchange Act, the Commission may exempt any class of municipal advisors from any provision of Section 15B or the rules and regulations thereunder, if it “finds that such exemption is consistent with the public interest, the protection of investors, and the purpose of [Section 15B].” See 15 U.S.C. 78o-4(a)(4).

exclusions from the definition of municipal advisor.⁵⁵⁸ Several commenters suggested that a person providing advice with respect to municipal financial products or the issuance of municipal securities should not be regulated as a municipal advisor if the municipal entity or obligated person is otherwise represented by a municipal advisor with respect to the transaction.⁵⁵⁹ One commenter argued that the Commission should provide that a person will not be regulated as a municipal advisor to a municipal entity or obligated person if such municipal entity or obligated person is or will be represented by an “independent advisor” that is a registered municipal advisor (or that is eligible for an exception) and any relevant documentation states that: (1) the person is not acting as an “advisor;” and (2) the municipal entity or obligated person is not relying on any advisory communications from such person.⁵⁶⁰ According to another commenter, “when a municipality has engaged an independent financial advisor in connection with a proposed transaction, unaffiliated counterparties or potential counterparties to the transaction should not be deemed to be providing advice to the municipality as it has already elected an entity to fulfill that role.”⁵⁶¹ Another commenter stated that, in most cases where a bank is “providing a municipal derivative or other bank products and services to a municipal entity or obligated person, a third party advisor is providing advice on the transaction to the municipal entity or obligated person.”⁵⁶² This commenter suggested that the existence of such a third party relationship should be viewed as evidence that the

⁵⁵⁸ See Proposal, 76 FR at 838.

⁵⁵⁹ See, e.g., SIFMA Letter I; letter from Adella M. Heard, Senior Vice President and Assistant General Counsel, First Tennessee Bank National Association, dated February 18, 2011 (“First Tennessee Bank National Association Letter”); BNY Letter.

⁵⁶⁰ See SIFMA Letter I.

⁵⁶¹ See First Tennessee Bank National Association Letter.

⁵⁶² See BNY Letter.

municipal entity or obligated person is not relying on the bank for advice.⁵⁶³

The Commission has carefully considered these comments and is adopting Rule 15Ba1-1(d)(3)(vi), which exempts from the municipal advisor definition any person engaging in municipal advisory activities in a circumstance in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities, provided that the following requirements are met.⁵⁶⁴ First, an independent registered municipal advisor must be providing advice with respect to the same aspects of the municipal financial product or issuance of municipal securities as the person seeking to rely on Rule 15Ba1-1(d)(3)(vi).⁵⁶⁵ For purposes of Rule 15Ba1-1(d)(3)(vi), the term “independent registered municipal advisor” means a municipal advisor registered pursuant to Section 15B of the Exchange Act and the rules and regulations thereunder and that is not, and within at least the past two years was not, associated⁵⁶⁶ with the person seeking to rely on Rule 15Ba1-1(d)(3)(vi). The Commission believes that a two year cooling-off period represents an appropriate period of time to help remove any actual or perceived influence over a municipal advisor’s ability to exercise independent judgment when engaging in municipal advisory activities.⁵⁶⁷ Second, a person seeking to rely on this exemption must receive from the municipal

⁵⁶³ See BNY Letter.

⁵⁶⁴ See Rule 15Ba1-1(d)(3)(vi).

⁵⁶⁵ See Rule 15Ba1-1(d)(3)(vi)(A).

⁵⁶⁶ For purposes of the definition of “independent registered municipal advisor” in Rule 15Ba1-1(d)(3)(vi), the criteria for association set forth in Section 15B(e)(7) (15 U.S.C. 78o-4(e)(7)) will apply. See Rule 15Ba1-1(d)(3)(vi)(A).

⁵⁶⁷ A two-year period is also used to determine whether an individual is a “public representative” for purposes of MSRB Board membership. Specifically, for purposes of determining whether an individual is a public representative, the MSRB defined the term “no material business relationship” to mean that, at a minimum, the individual is not and, within the last two years, was not associated with a municipal securities broker, municipal securities dealer, or municipal advisor, and that the individual does not have a relationship

entity or obligated person a representation in writing that it is represented by, and will rely on the advice of, an independent registered municipal advisor, and such person has a reasonable basis for relying on the representation.⁵⁶⁸ Third, such person must provide the required disclosures to the municipal entity or obligated person, and provide a copy of such disclosures to the municipal entity's or obligated person's independent registered municipal advisor. With respect to a municipal entity, such person must disclose in writing to the municipal entity that, by obtaining such representation from the municipal entity, such person is not a municipal advisor and is not subject to the fiduciary duty established in Section 15B(c)(1) of the Exchange Act with respect to the municipal financial product or issuance of municipal securities.⁵⁶⁹ With respect to an obligated person, such person must disclose in writing to the obligated person that, by obtaining such representation from the obligated person, such person is not a municipal advisor with respect to the municipal financial product or issuance of municipal securities.⁵⁷⁰ The rule also requires that each such disclosure must be made at a time and in a manner reasonably designed to allow the municipal

with any municipal securities broker, municipal securities dealer, or municipal advisor, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the individual. See Securities Exchange Act Release No. 63025 (September 30, 2010), 75 FR 61806, 61808 (October 6, 2010) (SR-MSRB-2010-08). Further, Rule 206(4)-5(a)(1) under the Investment Advisers Act prohibits investment advisers from receiving compensation for providing advice to a "government entity" within two years after a "contribution" to an "official" of the government entity has been made by the investment adviser or by any of its "covered associates." See 17 CFR 275.206(4)-5(a)(1). In adopting this rule, the Commission stated that the two-year time out is intended to discourage advisers from participating in pay-to-play practices by requiring a cooling off period during which the effects of a political contribution on the selection process can be expected to dissipate. See Political Contributions Final Rule, 75 FR at 41026.

⁵⁶⁸ See Rule 15Ba1-1(d)(3)(vi)(B). The same standards and principles apply in determining whether a person has a reasonable basis for reliance as discussed previously with respect to reliance on representations regarding proceeds determinations. See supra notes 364-365 and accompanying text.

⁵⁶⁹ See Rule 15Ba1-1(d)(3)(vi)(C)(1).

⁵⁷⁰ See Rule 15Ba1-1(d)(3)(vi)(C)(2).

entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities.⁵⁷¹ The level and timing of disclosure required may vary according to the issuer's knowledge or experience.⁵⁷²

The requirement that a copy of the disclosure be provided to the independent registered municipal advisor is not intended to alter the nature of the duty owed by the municipal advisor to its municipal entity or obligated person client or the nature of such municipal advisor's engagement.

The Commission believes that exempting persons advising a municipal entity or obligated person from the definition of municipal advisor when the municipal entity or obligated person is represented by an independent registered municipal advisor is consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act. The Commission believes that Rule 15Ba1-1(d)(3)(vi) will allow parties to a municipal securities transaction and

⁵⁷¹ See Rule 15Ba1-1(d)(3)(vi)(C)(3). The CFTC's business conduct standards for swap dealers and major swap participants contain similar standards for disclosure to counterparties. Specifically, CFTC Rule 23.431(a) states that: "At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess [risks, characteristics, and conflicts of interest related to the swap.]" 17 CFR 23.431(a).

⁵⁷² The Commission believes that some municipal advisors are already familiar with this disclosure level and timing standard. See Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (August 2, 2012), available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2> (stating that "[t]he level of disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter"); MSRB Notice 2013-08 (March 25, 2013) MSRB Answers Frequently Asked Questions (FAQs) Regarding an Underwriter's Disclosure Obligations to State and Local Government Issuer Under Rule G-17, available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-08.aspx> (referencing the requirement under the Interpretive Notice Concerning the Application of MSRB Rule G-17 that the arm's length nature of the relationship be provided "At the earliest stages of the relationship, generally at or before a response to a request for proposals or promotional materials are delivered to an issuer.").

others who are not registered municipal advisors to share advice with municipal entities and obligated persons so long as the municipal entity or obligated person is represented by an independent registered municipal advisor. A municipal entity represented by an independent registered municipal advisor will have the benefits associated with the regulation of municipal advisors. Such benefits include, but are not limited to, standards of conduct, training, and testing for municipal advisors that may be required by the Commission or the MSRB, other requirements unique to municipal advisors that may be imposed by the MSRB,⁵⁷³ and fiduciary duty. While independent registered municipal advisors do not owe a fiduciary duty to obligated persons, the Commission notes that they have a duty to deal fairly with obligated persons under MSRB Rule G-17.⁵⁷⁴ Also, as noted by commenters, the engagement by a municipal entity or obligated person of an independent registered municipal advisor indicates that the municipal entity or obligated person intends to rely on the advice of that advisor. Rule 15Ba1-1(d)(3)(vi) requires that this intention be further evidenced by a written representation that the municipal entity or obligated person will rely on the advice of an independent registered municipal advisor. Further, Rule 15Ba1-1(d)(3)(vi) requires the person receiving such representation to have a reasonable basis for relying on the representation.

So long as a municipal entity or obligated person is represented by and relies on an independent registered municipal advisor, the Commission believes it is appropriate to allow municipal entities and obligated persons to receive as much advice and information as possible from a variety of sources, even if the providers of such advice are not subject to a fiduciary duty. The Commission does not seek to curtail the receipt of important advice and information so long as the municipal entities and obligated persons are represented by and rely on independent registered

⁵⁷³ See supra note 190.

⁵⁷⁴ See MSRB Rule G-17.

municipal advisors who are subject to a fiduciary or other duties and who can help the municipal entities and obligated persons evaluate the advice and identify potential conflicts of interest. Further, the requirement that a person seeking to rely on this rule provide a copy of the disclosures under Rule 15Ba1-1(d)(3)(vi)(C) to the independent registered municipal advisor will help timely inform the independent registered municipal advisor that the municipal entity or obligated person is receiving advice from a person seeking to rely on Rule 15Ba1-1(d)(3)(vi).

In addition, certain persons that may engage in municipal advisory activities could also be counterparties to a municipal entity or obligated person, such as swap dealers and security-based swap dealers. The requirement for such persons to register as municipal advisors could be inconsistent with their roles as counterparties to the municipal entity or obligated person. While the Commission is separately providing certain exemptions for counterparties of municipal entities and obligated persons,⁵⁷⁵ such persons may also consider whether they can rely on this exemption.

iv. Broker, Dealer, or Municipal Securities Dealer Serving as an Underwriter

Exchange Act Section 15B(e)(4)(C) provides that the term “municipal advisor” does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in Section 2(a)(11) of the Securities Act) (the “underwriter exclusion”).⁵⁷⁶ In the Proposal, the Commission proposed to interpret this statutory underwriter exclusion to apply solely to a broker, dealer, or municipal securities dealer serving as an underwriter in connection with the issuance of municipal securities.⁵⁷⁷ Further, the Commission proposed that this exclusion would not apply

⁵⁷⁵ See, e.g., *infra* Section III.A.1.c.vi. (discussing an exemption for swap dealers).

⁵⁷⁶ See 15 U.S.C. 78o-4(e)(4)(C).

⁵⁷⁷ See Proposal, 76 FR at 832 and proposed Rule 15Ba1-1(d)(2)(ii). See also Temporary Registration Rule Release, 75 FR at 54467, note 19. In the Proposal, the Commission stated its belief that Congress excluded from the definition of municipal advisor a broker, dealer, or municipal securities dealer acting as an underwriter on behalf of a municipal entity or

when such persons are acting in a capacity other than as an underwriter, and that, for example, this exclusion would not apply to advice with respect to the investment of bond proceeds or municipal derivatives.⁵⁷⁸

In the Proposal, the Commission requested comment on whether its interpretation of the statutory exclusion from the definition of municipal advisor for a broker, dealer, or municipal securities dealer serving as an underwriter was appropriate.⁵⁷⁹ The Commission received approximately 20 comment letters addressing the scope of this underwriter exclusion. Most commenters suggested that this exclusion should cover broker-dealer activities already subject to regulation,⁵⁸⁰ and some commenters suggested that it should cover broker-dealer activities that are solely incidental to underwriting an issuance of municipal securities.⁵⁸¹ By contrast, other commenters supported a more limited scope for the underwriter exclusion, stating, for example, that “[u]nless the Commission recognizes and implements in an appropriate manner the narrow character of the underwriter definition referenced in the Dodd-Frank Act, the Commission will be diminishing otherwise important protections for municipal entities and obligated persons provided

obligated person in connection with the issuance of municipal securities because such activity is already subject to MSRB rules. See Proposal, 76 FR at 832, note 107.

⁵⁷⁸ See Proposal, 76 FR at 832.

⁵⁷⁹ See id., at 836.

⁵⁸⁰ See, e.g., letter from JoAnn Bourne, Senior Executive Vice President, Global Treasury Management, Union Bank, N.A., dated February 18, 2011 (“Union Bank Letter”) (stating the belief that, while the Dodd-Frank Act only provided an exclusion for brokers and dealers when they are serving as underwriters, Congress did not intend to impose an additional level of regulation on broker-dealers when they are providing advice that is already subject to regulation); SIFMA Letter I; and letter from Noreen Roche-Carter, Chair, Tax & Finance Task Force, Large Public Power Council, dated February 22, 2011 (“Large Public Power Council Letter”) (stating that “[b]y limiting that exemption to instances where the broker-dealer is acting as an underwriter, we are concerned this will limit the types of services provided to our members by broker-dealers compared to what has traditionally been provided to our members”).

⁵⁸¹ See infra note 637 and accompanying text.

in that Act.”⁵⁸² Another commenter suggested that the Commission clarify that an underwriter is not permitted to provide “advice” with respect to the structure, timing, or terms of the bond issue it seeks to purchase and distribute.⁵⁸³

The Commission has carefully considered comments submitted about the underwriter exclusion in the Proposal, as discussed further below, and is adopting its proposed interpretation of the statutory underwriter exclusion, with modifications and clarifications designed to address commenters’ concerns. Specifically, Rule 15Ba1-1(d)(2)(i) provides that the term “municipal advisor” shall not include a “broker, dealer, or municipal securities dealer serving as an underwriter of a particular issuance of municipal securities to the extent that the broker, dealer, or municipal securities dealer engages in activities that are within the scope of an underwriting of such issuance of municipal securities.”

Under the Commission’s modified interpretation of the underwriter exclusion, if a broker, dealer, or municipal securities dealer is serving as an underwriter of a particular issuance of municipal securities, the underwriter exclusion would include advice provided by that underwriter within the scope of underwriting and would generally include advice with respect to the structure, timing, terms, and other similar matters concerning that issuance of municipal securities.

It is important to note that the following advice would be outside the scope of an underwriting for purposes of this exclusion: (1) advice on investment strategies; (2) advice on municipal derivatives; and (3) advice otherwise identified by the Commission to be outside the scope of an underwriting.⁵⁸⁴ Such advice generally is not within the scope of serving as an

⁵⁸² See, e.g., letter from Robert Doty, AGFS, dated February 22, 2011 (“Doty Letter I”).

⁵⁸³ See letter from Colette-Irwin Knott, CIPFA, President, National Association of Independent Public Finance Advisors, dated February 22, 2011 (“NAIPFA Letter”).

⁵⁸⁴ See *infra* note 612 and accompanying text.

underwriter on an issuance of municipal securities and can raise issues that implicate the policy objectives of municipal advisor registration. For example, municipal entities suffered significant losses in the financial crisis related to advice on complex municipal derivatives,⁵⁸⁵ and advice on investments,⁵⁸⁶ such as refunding escrow investments provided by underwriters⁵⁸⁷ and investments involving fraud in investment bidding procedures,⁵⁸⁸ has been the subject of significant enforcement activity. In other circumstances, such advice may create conflicts of interest for an underwriter, such as when the advice addresses whether to issue debt or whether to conduct a competitive sale instead of a negotiated underwriting. In addition, as discussed further below, the underwriter exclusion does not include all activities that may be solely incidental to an underwriting, such as advice on investment strategies or advice on municipal derivatives, because these activities are not within the scope of an underwriting and are activities for which municipal entities and obligated persons require the protections afforded by municipal advisors.

Although, as noted above, “issuance of municipal securities” should be construed broadly,⁵⁸⁹ the Commission believes that, in order for a person to be “serving as an underwriter”⁵⁹⁰ with respect to an issuance of municipal securities, there must be a relationship to a particular transaction.⁵⁹¹ For

⁵⁸⁵ See supra note 3 and accompanying text.

⁵⁸⁶ See supra note 106 and accompanying text.

⁵⁸⁷ See supra note 380 and accompanying text.

⁵⁸⁸ See supra note 287 and accompanying text.

⁵⁸⁹ See supra Section III.A.1.b.vii (discussing the term “issuance of municipal securities”).

⁵⁹⁰ See Rule 15Ba1-1(d)(2)(i).

⁵⁹¹ See, e.g., In re Laser Arms Corp. Sec. Litig., 794 F.Supp. 475, 484 (S.D.N.Y. 1989) (citing L. LOSS, THE FUNDAMENTALS OF SECURITIES REGULATION 278 (1983)). As set forth in Section 2(11) of the Securities Act, the definition of a statutory underwriter turns on the relationship of the party and the offering. Professor Loss has observed that “[t]he term ‘underwriter’ is defined not with reference to the particular person’s general business but on the basis of his relationship to the particular offering.”

example, a contractual engagement by a municipal entity of a broker-dealer to serve as underwriter on a specific planned transaction for the issuance of municipal securities would constitute the requisite engagement on a particular issuance of municipal securities. By contrast, an engagement by a municipal entity of a broker-dealer to serve as underwriter for some period of time or to serve as a member of an underwriting "pool" without specifying the broker-dealer's assignment expressly to serve as underwriter on one or more particular planned transactions would not constitute serving as an underwriter on a particular issuance of municipal securities. Further, an underwriter providing advice with respect to related transactions or tranches on which it is not engaged would be acting within the scope of the underwriter exclusion only if such advice is also related to the tranche or transaction on which the underwriter is engaged. For example, an underwriter may give advice about the timing of a sale of a related transaction on which it is not engaged by noting that shifting the timing of such sale will have a positive impact on market demand for the transaction on which it is engaged. Such advice would fall within the underwriter exclusion because such advice concerns the timing of the particular issuance of municipal securities for which it is acting as underwriter and is not regarded by the Commission as being outside the scope of an underwriting.

The Commission recognizes, however, that a municipal entity issuer may wish to request advice on an issuance of municipal securities from a broker-dealer serving as a member of its underwriting "pool" that does not yet have a specific assignment or from a broker-dealer engaged on related transactions or tranches. In such circumstances, the broker-dealer could respond within the requirements of one of the other exemptions of general applicability discussed above. For example, if the municipal entity issuer was seeking the advice in response to a "mini-RFP" sent to members of the underwriting pool, the broker-dealer could respond and provide advice within the

limitations of the exemption for responses to RFPs and RFQs.⁵⁹² In addition, if the municipal entity is represented by an independent registered municipal advisor with respect to such issuance of municipal securities, the broker-dealer could respond and provide advice if the requirements of the exemption available when a municipal entity is otherwise represented by an independent registered municipal advisor with respect to the same aspects of the issuance of municipal securities were satisfied.⁵⁹³ Finally, depending on the nature of the requested information and the response, it might be considered a communication or effort to win business that is not municipal advisory activity.⁵⁹⁴

In response to commenters that suggested that underwriters should not be permitted to provide “advice” with respect to the structure, timing and terms of the bond issue it seeks to purchase and distribute,⁵⁹⁵ the Commission points out that, subsequent to the Proposal, the MSRB provided additional interpretive guidance under MSRB Rule G-17, which requires that brokers, dealers, and municipal securities dealers acting as underwriters make certain disclosures to municipal issuers about the roles of underwriters in negotiated sales of municipal securities, including disclosures about their duty of fair dealing with a municipal issuer (but not a fiduciary duty to a municipal issuer) and their actual or potential, material conflicts of interest. The Commission continues to believe that allowing underwriters to give advice within the scope of an underwriting with respect to the structure, timing, terms, and other similar matters concerning an issuance is consistent with the aim of improving the quality of advice that municipal entities and obligated persons receive, because these Rule G-17 disclosure requirements should assist them in

⁵⁹² See supra Section III.A.1.c.ii.

⁵⁹³ See supra Section III.A.1.c.iii.

⁵⁹⁴ See infra notes 615-618 and accompanying text.

⁵⁹⁵ See, e.g., NAIPFA Letter.

clarifying the duties of underwriters to municipal issuers, identifying conflicts of interest, and appropriately evaluating the advice they receive from underwriters with that informed perspective.⁵⁹⁶

The Commission continues to believe that a broker, dealer, or municipal securities dealer engaging in municipal advisory activities outside the scope of underwriting a particular issuance of municipal securities should be subject to municipal advisor registration, absent the availability of another exemption or exclusion. With respect to the treatment of advice on municipal derivatives as outside the underwriter exclusion, the Commission notes that one purpose of the municipal advisor provision in the Dodd-Frank Act was to address concerns about advice to municipalities on complex municipal derivatives in which municipalities suffered significant losses in the financial crisis.⁵⁹⁷

Several commenters requested additional guidance from the Commission regarding the types of activities that would fall within the Commission's interpretation of the statutory underwriter exclusion for activity within the scope of an underwriting of an issuance of municipal securities. For example, one commenter stated that the exclusion should clearly extend to a full range of activities "closely related" to the underwriting.⁵⁹⁸ Another commenter asserted that certain

⁵⁹⁶ See MSRB Notice 2012-25 (May 7, 2012) (Securities and Exchange Commission Approves Interpretive Notice on the Duties of Underwriters to State and Local Government Issuers). In response to comments on this Rule G-17 interpretive guidance, the MSRB also indicated that it would continue to study whether to impose a suitability standard on the types of financial products (including types of bond structures) that may be sold to municipal entities. See letter from Margaret Henry, General Counsel, Market Regulation, MSRB, dated February 13, 2012, available at <http://www.sec.gov/comments/sr-msrb-2011-09/msrb201109-24.pdf>.

⁵⁹⁷ See S. Rep. No. 111-176, at 38 (2010).

⁵⁹⁸ See SIFMA Letter I. This commenter recommended that covered activities for the underwriter exclusion should include: (1) advice regarding the issuance of municipal securities, municipal financial products, or any other securities in the context of an underwriting; (2) advice on the advisability of a municipal derivative (including entering

municipal advisory activities and, in particular, certain “transaction-related services” provided by underwriters are integral to fulfilling the function of an underwriter in a professional manner but did not specify which activities were integral.⁵⁹⁹ A few commenters stated that the Proposal did not provide sufficient guidance regarding the scope of the underwriter exclusion and requested further clarification.⁶⁰⁰

Set forth below are non-exclusive examples of activities that the Commission considers to be within or outside the scope of the underwriter exclusion to the municipal advisor definition, respectively.

Examples of Activities Within the Scope of Serving as an Underwriter of a Particular Issuance of Municipal Securities for Purposes of the Underwriter Exclusion

into a new derivative or amending or terminating an existing derivative) in connection with an underwriting; (3) advice in the capacity of a member of the municipal entity or obligated person’s underwriting pool, even if not in the context of a particular deal, or other services after the closing of an issuance of municipal securities but which relate to the issuance for which the underwriter acted as an underwriter; (4) communications and analyses that are part of an effort or presentation to obtain business from the municipal entity or obligated person, or otherwise part of seeking to serve as an underwriter on future transactions; (5) assistance on related transactions and related tranches of the offering; and (6) service as a dealer-manager on a related tender or exchange offer for outstanding securities.

⁵⁹⁹ See letter from Alan Polsky, Chair, MSRB, dated November 9, 2011 (“MSRB Letter II”) (including a listing of transaction-related services of which, according to the commenter, some may be appropriately performed by a broker-dealer as part of an underwriting). See also letter from Robert K. Dalton, Vice Chairman, George K. Baum & Company, dated December 20, 2011 (the “Baum Letter”) (noting that in the text of their November 9, 2011 letter the MSRB noted that not only transaction-related services are integral to an underwriting). But see NAIPFA Letter and letter from Colette Irwin-Knott, President, NAIPFA, dated November 30, 2011 (“NAIPFA Letter II”) (stating its belief that certain of such transaction-related services listed in the MSRB’s letter are not so “integrally related” to an underwriter’s duties to warrant exclusion from regulation as a municipal advisor).

⁶⁰⁰ See, e.g., letter from Robert J. Stracks, Counsel, BMO Capital Markets GKST Inc., dated February 22, 2011 (“BMO Capital Markets Letter”) (stating that the Commission has made no attempt to clarify the myriad of confusing issues it has raised with respect to the exclusion for underwriters); Joy Howard WM Financial Strategies Letter (stating that “it is unclear what trigger event would create an underwriting relationship as opposed to a municipal advisory relationship”); Bond Dealers of America Letter (noting that the underwriter exclusion is not clearly defined).

The Commission agrees with those commenters⁶⁰¹ that stated that it is not possible to provide an exhaustive list of all activities that would be considered to be within the scope of an underwriting. As a general matter, the Commission considers activities that are integral to the purchase and distribution of a particular issuance of municipal securities on which a broker, dealer, or municipal securities dealer is engaged to serve in the capacity as underwriter to be within the scope of the underwriter exclusion. The Commission also considers activities that are integral to fulfilling the role of an underwriter, such as the obligations of underwriters under the antifraud provisions of the federal securities laws and obligations of underwriters under MSRB rules, to be within the scope of an underwriting.⁶⁰²

The Commission considers the following activities, identified by commenters,⁶⁰³ to be within the scope of the underwriting exclusion:⁶⁰⁴ (1) advice regarding the structure, timing, terms, and other similar matters concerning a particular issuance of municipal securities (except as otherwise provided herein with respect to advice on investment strategies, municipal derivatives, or other activities identified by the Commission as outside the scope of an underwriting); (2) preparation of rating strategies and presentations related to the issuance being underwritten; (3) preparations for and assistance with investor “road shows” and investor discussions related to the issuance being underwritten; (4) advice regarding retail order periods and institutional marketing if

⁶⁰¹ See, e.g., MSRB Letter II.

⁶⁰² See Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799, 2811-28812 (July 10, 1989); Securities Exchange Act Release No. 62184A (May 27, 2010), 75 FR 33100, 33123-33125 (June 10, 2010); See also MSRB Rules G-17 and G-19.

⁶⁰³ See, e.g., MSRB Letter II; NAIPFA Letter; NAIPFA Letter II; SIFMA Letter I; and Baum Letter.

⁶⁰⁴ This list of activities includes examples of activities that the Commission considers to be within the scope of an underwriting; the list does not purport to cover all possible activities qualifying for the underwriter exclusion.

the municipal entity has determined to engage in a negotiated sale; (5) assistance in the preparation of the preliminary and final official statements for the municipal securities; (6) assistance with the closing of the issuance of municipal securities, including negotiation and discussion with respect to all documents, certificates, and opinions needed for such closing; (7) coordination with respect to obtaining CUSIP numbers and the registration of the issue of municipal securities with the book-entry only system of the Depository Trust Company; (8) preparation of post-sale reports for such municipal securities; and (9) structuring of refunding escrow cash flow requirements necessary to provide for the refunding and defeasance of an issue of municipal securities (provided, however, that the recommendation of and brokerage of particular municipal escrow investments is outside the scope of the underwriting exclusion).

Examples of Activities Outside the Scope of Serving as an Underwriter of a Particular Issuance of Municipal Securities for Purposes of the Underwriter Exclusion

Several commenters⁶⁰⁵ also requested clarification as to whether certain strategic, transaction-related, and post-issuance activities would be considered acting within the scope of the underwriter exclusion. The Commission notes that an underwriter providing certain advice outside the scope of the underwriter exclusion would not be required to be registered as a municipal advisor in order to provide that advice if: (a) the advice does not relate to a municipal financial product⁶⁰⁶ or the issuance of municipal securities,⁶⁰⁷ (b) the advice is given in response to a request for proposal⁶⁰⁸ or is otherwise permitted when seeking to obtain business,⁶⁰⁹ or (c) the advice is given

⁶⁰⁵ See, e.g., NAIPFA Letter.

⁶⁰⁶ See supra Section III.A.1.b.iv. (discussing the definition of “municipal financial products”).

⁶⁰⁷ See supra Section III.A.1.b.vii. (discussing the term “issuance of municipal securities”).

⁶⁰⁸ See supra Section III.A.1.c.ii. (discussing the exemption for responses to RFPs and RFQs).

⁶⁰⁹ See infra notes 615 and 616 and accompanying text (discussing communications or efforts to win business).

when the municipal entity has engaged an independent registered municipal advisor.⁶¹⁰

The Commission considers the following activities, identified by commenters,⁶¹¹ to be outside the scope of the underwriter exclusion:⁶¹² (1) advice on investment strategies; (2) advice on municipal derivatives (including derivative valuation services); (3) advice on what method of sale (competitive sale⁶¹³ or negotiated sale⁶¹⁴) a municipal entity should use for an issuance of municipal securities; (4) advice on whether a governing body of a municipal entity or obligated person should approve or authorize an issuance of municipal securities; (5) advice on a bond election campaign; (6) advice that is not specific to a particular issuance of municipal securities on which a person is serving as underwriter and that involves analysis or strategic services with respect to overall financing options, debt capacity constraints, debt portfolio impacts, analysis of effects of debt or expenditures under various economic assumptions, or other impacts of funding or financing capital projects or working capital; (7) assisting issuers with competitive sales, including bid verification,

⁶¹⁰ See *supra* Section III.A.1.c.iii. (discussing the exemption when the municipal entity or obligated person is represented by an independent municipal advisor).

⁶¹¹ See, e.g., MSRB Letter II; NAIPFA Letter; NAIPFA Letter II; SIFMA Letter I; and Baum Letter.

⁶¹² For broker-dealers serving as underwriters for a particular issuance of municipal securities, these activities would not be excluded from the definition of municipal advisor because they are not within the scope of an underwriting of such issuance of municipal securities. This list of activities includes examples of activities that the Commission considers to be outside the scope of the underwriter exclusion; the list does not purport to cover all possible activities not qualifying for the underwriter exclusion.

⁶¹³ Competitive sale is a method of sale chosen by an issuer, requesting underwriters to submit a firm offer to purchase a new issue of municipal securities. The issuer awards the municipal securities to the "winning" underwriter or syndicate presenting a bid complying with the terms of a Notice of Sale that provides the lowest interest rate cost according to stipulated criteria set forth in the Notice of Sale. See definition of "Competitive Sale" in MSRB Glossary.

⁶¹⁴ Negotiated sale is the sale of a new issue of municipal securities by an issuer directly to an underwriter or underwriting syndicate selected by the issuer. See definition of "Negotiated Sale" in MSRB Glossary.

true interest cost (TIC) calculations and reconciliations, verifications of bidding platform calculations, and preparation of notices of sale; (8) preparation of financial feasibility analyses with respect to new projects; (9) budget planning and analyses and budget implementation issues with respect to debt issuance and collateral budgetary impacts; (10) advice on an overall rating strategy that is not related to a particular issuance of municipal securities on which a person is serving as an underwriter, including advice and actions taken on behalf of a municipal entity or obligated person between financing transactions; (11) advice on overall financial controls that are not related to a particular issuance of municipal securities on which a person is serving as an underwriter; or (12) advice regarding the terms of requests for proposals or requests for qualification for the selection of underwriters or other professionals for a project financing and advice regarding review of responses to such requests, including matters regarding compensation of such underwriters or other professionals.

The Commission believes the above-listed activities are not within the scope of the underwriter exclusion because the activities are either not specific to a particular issuance of municipal securities for which a broker, dealer or municipal securities dealer could be serving as an underwriter or the activities are not integral to fulfilling the role of an underwriter.

Communications or Efforts to Win Business

A few commenters asked whether communications and analyses that are part of an effort to win business would be considered municipal advisory activity.⁶¹⁵ The Commission notes that not all communications with a municipal entity or obligated person constitute municipal advisory

⁶¹⁵ See SIFMA Letter I. See also letter from Nathan R. Howard, Esq., Municipal Advisor, WM Financial Strategies, dated February 22, 2011 (“Nathan R. Howard WM Financial Strategies Letter”) (stating that when the services provided by a broker-dealer are merely informational non-municipal advisory services, the broker-dealer should be excluded from the definition of municipal advisor).

activities. If the person has identified himself or herself as seeking to obtain business, such as serving as an underwriter on future transactions, whether such communications and analyses constitute municipal advisory activities or the provision of general information (as discussed further above⁶¹⁶) will depend on the specific facts and circumstances. For example, pursuant to the Commission's interpretation of the treatment of the provision of general information, the Commission believes that a broker-dealer who provides information to a municipal entity regarding its underwriting capabilities and experience or general market or financial information that might indicate favorable conditions to issue or refinance debt likely would not be treated as engaging in municipal advisory activity.

On the other hand, for purposes of this rule and in response to comments,⁶¹⁷ the Commission does not consider advice rendered by a broker-dealer in its capacity as a member of an "underwriting pool" for a municipal entity or obligated person (and in the absence of a designation of that broker-dealer to serve as underwriter on the particular issuance of municipal securities on which the advice is given) to be advice within the scope of the underwriting exclusion. An underwriting pool generally includes a group of underwriters selected by a municipal entity pursuant to an RFP or other process⁶¹⁸ from which the municipal entity may select one or more firms to underwrite a specific transaction. As noted above, a broker-dealer that is merely a part of an underwriting pool is not engaged to underwrite any particular issuance, and therefore, is not acting as an underwriter. As described above, however, depending on the particular facts and circumstances, the broker-dealer's activities as part of an underwriting pool may be within the

⁶¹⁶ See supra Section III.A.1.b.i. (discussing, among other things, the provision of general information).

⁶¹⁷ See SIFMA Letter I.

⁶¹⁸ See infra Section III.A.1.c.ii.

requirements of one of the exemptions of general applicability,⁶¹⁹ may be considered to be an effort to obtain underwriting business on its own behalf, or may be otherwise exempt, which would not require municipal advisor registration.

Post-Offering Services

Commenters asked whether post-offering work performed by an underwriter would qualify for the underwriter exclusion or whether it would constitute municipal advisory activity requiring registration.⁶²⁰ For purposes of this rule, the Commission considers post-offering work performed by an underwriter to be municipal advisory activity unless it is a request for information or services that would have been provided as part of the underwriting (such as resending cash flow and other similar information related to the offering) or is required for an underwriter to fulfill its regulatory obligations as underwriter.⁶²¹ If an issuance has closed and the underwriting period⁶²² has terminated, the broker-dealer cannot be considered to be acting as an underwriter with respect to the issuance of municipal securities. Therefore, any advice or recommendation with respect to the issuance of municipal securities or a municipal financial product given after the termination of the underwriting period generally would be municipal advisory activities. Accordingly, broker-dealers should consider whether particular post-offering work they provide would constitute advice with respect to the issuance of municipal securities or a municipal financial product.

The Commission notes that assisting a municipal entity or obligated person with filing

⁶¹⁹ See supra notes 592 and 593 and accompanying text.

⁶²⁰ See, e.g., SIFMA Letter I.

⁶²¹ See Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799, 28805, 2811-28812 (July 10, 1989); Securities Exchange Act Release No. 62184A (May 27, 2010), 75 FR 33100, 33123-33125 (June 10, 2010); See also MSRB Rules G-17; G-19 and G-32.

⁶²² For purposes of MSRB rules and Exchange Act Rule 15c2-12, the underwriting period is the period in connection with a primary offering of municipal securities ending on the later of the closing of the underwriting or the sale of the last of the securities by the syndicate. See definition of "Underwriting Period" in MSRB Glossary.

annual financial information, audited financial statements, or material event notices, as required by Rule 15c2-12,⁶²³ after an issuance has closed and after the underwriting period has terminated, would generally be outside the scope of the underwriting exclusion. A determination as to whether or not these activities would constitute advice would be based on all the facts and circumstances.⁶²⁴

Broker-Dealers Acting as Placement Agents, Dealer-Managers, and Remarketing Agents

A few commenters emphasized the similarity between private placement agents and underwriters, and suggested that private placement agents should be included in the underwriter exclusion.⁶²⁵ One commenter stated that a private placement agent offering securities of a municipal entity or obligated person in a private placement under the Securities Act, even if the agent is not serving as an underwriter within the strict meaning of Section 2(a)(11) of the Securities Act, serves almost exactly the same role underwriters play in assisting issuers.⁶²⁶ This commenter also noted that “[a]ny uncertainty with respect to a private placement agent’s role can be adequately clarified to municipal issuers or obligors through mandatory disclosures.”⁶²⁷

The Commission believes that any registered broker-dealer who participates in a particular issuance of municipal securities, whether the broker-dealer is acting as agent (such as in a best-efforts offering) or is acting as principal (such as in a firm commitment offering) would not have to register as a municipal advisor if facts and circumstances indicate that the registered broker-dealer is performing municipal advisory activities that otherwise would be considered within the scope of

⁶²³ 17 CFR 240.15c2-12.

⁶²⁴ See supra Section III.A.1.b.i (discussing the advice standard in general).

⁶²⁵ See SIFMA Letter I; Chapman & Cutler Letter (concurring with SIFMA that the duties of placement agents with respect to the sale and pricing of municipal securities are similar to the duties of underwriters); Piper Jaffray Letter.

⁶²⁶ See Piper Jaffray Letter.

⁶²⁷ See id.

the underwriting of a particular issuance of municipal securities as discussed above.⁶²⁸ Registered broker-dealers are subject to regulation under the Exchange Act, regardless of whether they act as principal or agent in a municipal securities offering. The Commission does not believe that the underwriter exclusion should be limited to a particular type of underwriting or particular type of offering.⁶²⁹ Therefore, if a registered broker-dealer, acting as a placement agent, performs municipal advisory activities that otherwise would be considered within the scope of the underwriting of a particular issuance of municipal securities as discussed above, the broker-dealer would not have to register as a municipal advisor.

In addition, the Commission has determined that a broker-dealer acting as a dealer-manager for a tender offer, without more,⁶³⁰ would not be municipal advisory activity because tender offers typically involve only the purchase of municipal securities and the purchase is not itself an advisory activity. Similarly, a broker-dealer acting as a dealer-manager for an exchange offer would generally involve only two transactions – the purchase of one security in the tender offer and the underwriting of a particular issuance of municipal securities in exchange for such tendered

⁶²⁸ A registered broker-dealer acting as a placement agent in the issuance of non-municipal securities, however, would not be able to rely on the underwriter exclusion and, based on the facts and circumstances, might be engaged in solicitation activity. See *supra* note 462 and accompanying text (discussing when a placement agent for an investment adviser to a pooled-investment vehicle would be considered a third-party solicitor that falls within the definition of municipal advisor). In addition, a placement agent may have other duties, including a fiduciary duty to its client, that arise as a matter of common law or another statutory or regulatory regime.

⁶²⁹ Whether or not a particular offering would be a distribution for purposes of Section 2(a)(11) of the Securities Act is a facts and circumstances determination. Whether there is a “distribution” does not affect the role of a registered broker-dealer in a municipal securities offering for purposes of this underwriter exclusion.

⁶³⁰ However, if, for example, the registered broker-dealer provides advice as to the benefits of a tender offer in comparison to the alternative of issuing refunding bonds, then, depending on the facts and circumstances, they might be engaged in municipal advisory activity outside the scope of an underwriting.

securities. Since the purchase itself is not advisory activity and the underwriting of the new issue of municipal securities would be excluded under the underwriter exclusion, neither component of the exchange offer would be considered municipal advisory activity.⁶³¹

A few commenters also suggested that remarketing agents should be included in the underwriter exclusion.⁶³² Generally, the Commission also would not consider a remarketing agent⁶³³ acting only in its capacity as a remarketing agent to be a municipal advisor because the mere remarketing of bonds likely would not constitute an issuance of municipal securities. If, however, the remarketing constitutes a primary offering,⁶³⁴ then the remarketing agent would need

⁶³¹ Any advice or recommendations to undertake such a tender or exchange offer, or regarding the timing or terms of such tender or exchange offer, would have to be evaluated in the context of that issuance or the issuance of other securities to determine if the advice was advice with respect to the structure, timing, terms, or other similar matters concerning an issuance being underwritten, and thus within the underwriter exclusion.

⁶³² See SIFMA Letter I (stating that activities in which a remarketing agent engages when it resells an issuance in the secondary market are similar to those of an underwriter of a primary issuance by a municipal entity or obligated person); Chapman & Cutler Letter (concurring with SIFMA that the duties of remarketing agents with respect to the sale and pricing of municipal securities are similar to the duties of underwriters).

⁶³³ A remarketing agent is a municipal securities dealer responsible for reselling to investors securities (such as variable rate demand obligations and other tender option bonds) that have been tendered for purchase by their owner. The remarketing agent also typically is responsible for resetting the interest rate for a variable rate issue and may act as tender agent. See definition of "Remarketing Agent" in MSRB Glossary.

⁶³⁴ Whether a remarketing is a "primary offering" of the municipal securities and whether the remarketing agent is an underwriter for purposes of the Securities Act of 1933 will depend on, among other matters, the level of issuer involvement in the remarketing. Whether a particular remarketing is a primary offering by the issuer of the securities requires an evaluation of relevant provisions of the governing documents, the relationship of the issuer to the other parties involved in the remarketing transaction, and other facts and circumstances pertaining to such remarketing, particularly with respect to the extent of issuer involvement. See, e.g., Securities Exchange Act Release No. 62184A (May 27, 2010), 75 FR 33100, 33103 (June 10, 2010). Although not applicable in determining whether an offering is a primary offering for purposes of the Securities Act of 1933, the Commission also notes that for purposes of Rule 15c2-12, a "primary offering" is defined to mean "an offering of municipal securities directly or indirectly by or on behalf of an issuer of such securities, including any remarketing of municipal securities" that meets certain

to evaluate its activities to determine if an exemption or exclusion from registration (such as the underwriter exclusion) applies. A primary offering is an issuance of municipal securities for purposes of the municipal advisor registration regime.⁶³⁵ Similarly, if the activities of a remarketing agent include providing advice (such as advice with respect to the investment of proceeds) beyond merely determining a remarketing price for bonds that have already been issued and that are not being reoffered, the remarketing agent would need to evaluate its activities to determine if an exception to registration (such as the investment adviser exclusion) applies.

Solely Incidental Services

Many commenters recommended that the municipal advisor registration rules include an exclusion for broker-dealers that is similar in scope to the broker-dealer exclusion under Section 202(a)(11)(C) of the Investment Advisers Act.⁶³⁶ Specifically, these commenters stated that the Commission should exclude from registration broker-dealers that provide advice that is solely incidental to a transaction.⁶³⁷ These commenters generally noted that broker-dealers are already

specified conditions. See 17 CFR 240.15c2-12(f)(7). See also Securities Exchange Act Release No. 34961 (November 10, 1994), 59 FR 59590 (November 17, 1994).

⁶³⁵ See supra Section III.A.1.b.vii. (discussing the term “issuance of municipal securities”). The Commission notes that, although it is likely in such a circumstance for the underwriter exemption to apply, if the agent is engaging in municipal advisory activity that is outside of the scope of underwriting activity and no other exemption or exclusion applies, such agent would be required to register as a municipal advisor.

⁶³⁶ Section 202(a)(11)(C) of the Investment Advisers Act excludes from the definition of “investment adviser” a broker or dealer “whose performance of [advisory] services is solely incidental to the conduct of his business as a broker or dealer who receives no special compensation therefor.” 15 U.S.C. 80b-2(a)(11)(C).

⁶³⁷ See, e.g., Union Bank Letter (stating that advice supplied that is “solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor” (Section 202(a)(11) of the Investment Advisers Act) should be excluded from the definition of “advice”); SIFMA Letter I (stating that “broker-dealers providing advice that is solely incidental to a transaction should be excluded from the definition of municipal advisor for the same reason that registered investment advisers are excluded (in some instances): they are already regulated”); Financial Services Institute Letter (stating that

regulated by the Commission and should not be subject to additional or duplicative regulation.⁶³⁸

The Commission is not adopting an exemption from the definition of municipal advisor for a broker-dealer that engages in municipal advisory activities that are solely incidental to the conduct of its business as a broker-dealer because the Commission believes that it has otherwise addressed commenters' concerns regarding duplicative regulation. As discussed above, the Commission is exempting from the definition of municipal advisor persons that provide advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities and the recommendation of and brokerage of municipal escrow investments.⁶³⁹ As discussed below, based on the application of the adopted rules, broker-dealers that sell securities to municipal entities and obligated persons would generally not be engaging in municipal advisory activity.⁶⁴⁰ The application of the adopted rules limits the range of municipal financial products to which duplicative regulation could apply. As noted above, the Commission believes that registered broker-dealers that engage in municipal advisory activities by advising on the investment of proceeds of municipal securities or municipal escrow investments should not be exempt from municipal advisor registration.⁶⁴¹

broker-dealers should be treated as in the Investment Advisers Act, i.e., where a municipal entity enters into an ordinary brokerage transaction, any incidental advice provided in the scope of that relationship should not require the broker-dealer to register as a municipal advisor).

⁶³⁸ See, e.g., Union Bank Letter (stating that Congress did not intend for broker-dealers and registered investment advisers that already engage in regulated activities for their municipal clients to be subject to the additional layer of regulation that would accompany municipal advisor registration); ICI Letter (noting that broker-dealers that are underwriters are already subject to MSRB Rule G-37 and are also regulated by the Commission as broker-dealers); SIFMA Letter I.

⁶³⁹ See supra note 327 and accompanying text and Rule 15Ba1-1(d)(3)(vii).

⁶⁴⁰ See infra note 644 and accompanying text.

⁶⁴¹ See supra Section III.A.1.b.viii. (discussing the Commission's views on why advice with respect to the investment of proceeds of municipal securities should be subject to municipal

Broker-Dealers Selling Securities to Municipal Entities and Obligated Persons

Several commenters suggested that, based on the Proposal, the Commission appears to conclude that “a broker-dealer that sells a security to a municipal entity where it is not serving as an underwriter” is engaged in municipal advisory activity, because advice is integral to the sale of securities.⁶⁴² That is not the conclusion of the Commission. The municipal advisor registration requirement does not apply in the absence of advice (or solicitation). As noted above, for purposes of the municipal advisor definition, “advice” includes, without limitation, a recommendation that is particularized to the needs and circumstances of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, based on all the facts and circumstances.⁶⁴³ Thus, a broker-dealer that effects a transaction that it has not recommended will not be a “municipal advisor” with respect to such activity.⁶⁴⁴ However, the sale of a security to a

advisor registration notwithstanding the existence of other regulatory regimes). See also infra Section III.A.1.c.v. (discussing, among other things, the Commission’s position that registered investment advisers engaging in municipal advisory activities are only excluded from registration to the extent their activities are investment advice). Likewise, the Commission believes that broker-dealers that engage in municipal advisory activities that are outside of the scope of the underwriting of a particular issuance of municipal securities should be regulated and registered as municipal advisors.

⁶⁴² See Insurance Companies Letter (stating that the Commission appears to conclude that every time a broker-dealer sells a security to a municipal entity where it is not serving as an underwriter, it must register as a municipal advisor, and that such an approach seems inconsistent with Congressional intent due to pre-existing broker-dealer regulation). See also ICI Letter (stating that the Commission proposed that the broker-dealer exclusion means that a broker, dealer or municipal securities dealer would be eligible for the exclusion only when acting in its capacity as an underwriter; and suggesting that the broker-dealer exclusion should include brokers, dealers, and municipal securities dealers who engage in additional activities while serving as underwriters to municipal entities or obligated persons); and Large Public Power Council Letter (expressing concern that the Commission is limiting the broker-dealer exemption to situations in which the broker-dealer is acting as an underwriter).

⁶⁴³ See supra Section III.A.1.b.i. (discussing the advice standard in general).

⁶⁴⁴ See supra note 162 (discussing the term “advice” in contexts outside of the municipal advisor definition).

municipal entity or obligated person constitutes a municipal advisory activity if: (1) the monies used to purchase such security are proceeds of municipal securities;⁶⁴⁵ and (2) in executing such transaction, the broker-dealer also recommends the investment or otherwise offers advice to the municipal entity or obligated person about which securities to purchase or sell.

Another commenter urged the Commission to exclude broker-dealers affiliated with life insurance companies from municipal advisor registration, because such “limited service” broker-dealers are substantively different from “full service” broker-dealers.⁶⁴⁶ The Commission notes that broker-dealers affiliated with insurance companies are only required to register as municipal advisors to the extent their activities constitute advice to (or solicitation of) a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities. The mere fact that a broker-dealer is affiliated with a life insurance company and may not sell as wide a range of securities as other broker-dealers is not determinative as to whether such broker-dealer must register as a municipal advisor. As noted in the paragraph above, such broker-dealers may sell securities to a municipal entity without triggering municipal advisor registration.

Broker-Dealers Providing Advice to Individual Plan Participants in a Public Employee Benefit Plan

One commenter expressed concern that broker-dealers that provide investment advice (such as asset allocation) to individual plan participants in the context of a 403(b) retirement plan or a similar defined contribution plan might trigger municipal advisor registration. This commenter recommended that such broker-dealers be specifically excluded from registration.⁶⁴⁷

⁶⁴⁵ See supra notes 330-343 and accompanying text (discussing the definition of “proceeds of municipal securities”).

⁶⁴⁶ See ACLI Letter (stating that the range of products offered by these limited purpose broker-dealers is typically narrow and focuses upon the distribution of variable insurance contracts and mutual funds; and that such broker-dealers primarily elicit orders from variable contract and mutual fund purchasers).

⁶⁴⁷ See letter from Adym W. Rygmyr, Associate General Counsel, TIAA-CREF Individual &

The definition of municipal advisor states that a municipal advisor is a person that provides advice “to or on behalf of a municipal entity or obligated person.” As described above, advice related to investment strategies that would require registration is limited to advice with respect to “the investment of proceeds of municipal securities . . . and the recommendation of and brokerage of municipal escrow investments.”⁶⁴⁸ Thus, the provision of investment advice to individual plan participants in a public employee benefit plan is not a municipal advisory activity, as long as the individual plan participant is not a municipal entity.⁶⁴⁹

v. Registered Investment Advisers

Exchange Act Section 15B(e)(4)(C) excludes from the definition of municipal advisor “any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice.”⁶⁵⁰ The Commission proposed in Rule 15Ba1-1(d)(2)(ii) to interpret the statutory exclusion for registered investment advisers from the definition of municipal advisor.⁶⁵¹ Specifically, the Commission proposed that the term “municipal advisor” shall not include “[a]n investment adviser registered under the Investment Advisers Act of 1940... or a person associated with such registered investment adviser, unless the registered investment adviser or person associated with the investment adviser engages in municipal advisory activities other than providing investment advice that would subject such adviser or person associated with such adviser to the Investment Advisers Act of 1940.”⁶⁵²

Institutional Services, LLC, dated February 22, 2011 (“TIAA-CREF Letter”).

⁶⁴⁸ Rule 15Ba1-1(b) and Rule 15Ba1-1(d)(3)(vii).

⁶⁴⁹ See supra Section III.A.1.b.viii. (distinguishing individual contributions from municipal entity contributions to 529 Savings Plans and public retirement plans, among other plans).

⁶⁵⁰ 15 U.S.C. 78o-4(e)(4)(C).

⁶⁵¹ See proposed Rule 15Ba1-1(d)(2)(ii).

⁶⁵² See id. See also Temporary Registration Rule Release, 75 FR at 54467.

In the Proposal, the Commission stated that a registered investment adviser or an associated person of a registered investment adviser would fall within the definition of municipal advisor and be required to register with the Commission as a municipal advisor if the adviser or associated person engages in any municipal advisory activities (including solicitation) that would not be investment advice subject to the Investment Advisers Act.⁶⁵³ In the Proposal, the Commission stated its belief that this interpretation is in furtherance of the goals of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities.⁶⁵⁴

As discussed further below, the Commission received several comments in response to its proposed interpretation of the statutory exclusion relating to investment advisers. After careful consideration, to address commenters' concerns, the Commission is modifying proposed Rule 15Ba1-1(d)(2)(ii) to provide certain clarifications. Specifically, Rule 15Ba1-1(d)(2)(ii), as adopted, provides that the definition of municipal advisor excludes "[a]ny investment adviser registered under the Investment Advisers Act of 1940 . . . or any person associated with such registered investment adviser to the extent that such registered investment adviser or such person is providing investment advice in such capacity." Moreover, the Commission clarifies in Rule 15Ba1-1(d)(2)(ii) that "investment advice," solely for purposes of this rule, "does not include advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person."⁶⁵⁵

Interpretation of the Statutory Language

⁶⁵³ See Proposal, 76 FR at 833.

⁶⁵⁴ See *id.*

⁶⁵⁵ See Rule 15Ba1-1(d)(2)(ii).

Several commenters stated that the Commission’s proposed interpretation is contrary to the plain meaning of the statute and exceeds its intended scope.⁶⁵⁶ One commenter stated that the statute excludes “any” registered investment adviser – without limitation.⁶⁵⁷ Similarly, another commenter stated that the phrase “who are providing investment advice” refers only to the immediately previous phrase, “persons associated with such investment advisers” – not to “such registered advisers” themselves.⁶⁵⁸ As such, this commenter also encouraged the Commission to interpret the exclusion for investment advisers to apply to all registered investment advisers, not just those who are providing investment advice.⁶⁵⁹ Yet another commenter stated that the statute’s exclusion of investment advisers “who are providing investment advice” cannot be interpreted to only exclude advisers providing “investment advice” subject to the Investment Advisers Act, because not all “investment advice” requires registration under the Investment Advisers Act (e.g., advice with respect to instruments that are not securities).⁶⁶⁰ This commenter stated that the Commission’s interpretation would mean that “[a Commission]-registered investment adviser would be excepted from municipal advisor registration for only some, but not all, of its investment activities.”⁶⁶¹ The commenter described the Commission’s interpretation as “without an apparent reason or policy justification.”⁶⁶²

In commenting that registered investment advisers should be excluded broadly from

⁶⁵⁶ See, e.g., IAA Letter; ICI Letter; SIFMA Letter I; and letter from Heidi Stam, Managing Director and General Counsel, The Vanguard Group, Inc., dated February 22, 2011 (“Vanguard Letter”).

⁶⁵⁷ See Vanguard Letter. See also ICI Letter.

⁶⁵⁸ See ICI Letter. See also IAA Letter.

⁶⁵⁹ See ICI Letter.

⁶⁶⁰ See SIFMA Letter I. See also text accompanying *infra* notes 682 and 683.

⁶⁶¹ SIFMA Letter I.

⁶⁶² *Id.*

municipal advisor registration, one commenter stated that the municipal advisor registration requirement established by the Dodd-Frank Act was “primarily aimed at registering unregulated persons.”⁶⁶³ Registered investment advisers, in the view of some commenters, are “already subject to the fiduciary duties and comprehensive registration and disclosure requirements mandated by the Investment Advisers Act.”⁶⁶⁴ The proposal would therefore subject them to “duplicative and overlapping regulation.”⁶⁶⁵

Some commenters stated that the Commission’s proposed interpretation of the exclusion “interjects ambiguity” on how to determine whether registered investment advisers must also register as municipal advisors.⁶⁶⁶ These commenters stated that the Commission’s interpretation would create “widespread uncertainty”⁶⁶⁷ among investment advisers regarding whether certain of their activities are subject to regulation as municipal advisory activities. One commenter stated that the uncertainty would be compounded by the lack of a definition concerning the kind of investment advice that would exempt a registered investment adviser from the municipal advisor registration requirement.⁶⁶⁸

One commenter requested that the Commission include a non-exclusive interpretation that “any advice provided by a registered investment adviser pursuant to a written agreement with a municipal entity to whom the adviser owes a fiduciary duty as an investment adviser constitutes the rendering of investment advice.”⁶⁶⁹ The requested interpretation would thereby exempt the

⁶⁶³ See Vanguard Letter.

⁶⁶⁴ Id. See also MFA Letter.

⁶⁶⁵ See Vanguard Letter.

⁶⁶⁶ See, e.g., Vanguard Letter.

⁶⁶⁷ MFA Letter.

⁶⁶⁸ See Vanguard Letter.

⁶⁶⁹ Id.

investment adviser from registration as a municipal advisor.⁶⁷⁰

As stated above, the Commission is adopting a revised Rule 15Ba1-1(d)(2)(ii). Under the rule the Commission is adopting today, a registered investment adviser could provide advice concerning the investment of proceeds in securities without registering as a municipal advisor because it would be “providing investment advice” in its capacity as a registered investment adviser. Further, if the advice is provided pursuant to an advisory agreement that extends to investments in both securities and non-security financial instruments, such advice would still be excluded, because investment advice provided pursuant to the advisory agreement would be investment advice for purposes of Rule 15Ba1-1(d)(2)(ii).⁶⁷¹

However, the Commission notes that, solely for purposes of the municipal advisor registration rules, pursuant to Rule 15Ba1-1(d)(2)(ii), “investment advice” does not include advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person. Notwithstanding that these activities may constitute advice under the Investment Advisers Act, the Commission believes that this approach is appropriate given that Section 15B(e) of the Exchange Act expressly

⁶⁷⁰ See id.

⁶⁷¹ As discussed below, solely for purposes of the municipal advisor registration rules, “investment advice” does not include advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person, even if such activities are under an advisory agreement. Also, investment advice provided pursuant to the advisory agreement would be subject to the anti-fraud provisions of the Investment Advisers Act. See 15 U.S.C. 80b-6(1) and 80b-6(2). The Supreme Court has construed Investment Advisers Act Sections 206(1) and (2) as establishing a fiduciary standard for investment advisers that imposes the “affirmative duty of ‘utmost good faith, and full and fair disclosure of all material facts,’ as well as an affirmative obligation to ‘employ reasonable care to avoid misleading’” their clients. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963).

designates these activities as requiring municipal advisor registration.⁶⁷² Accordingly, a registered investment adviser that provides these types of advice to municipal entities or obligated persons would need to register as a municipal advisor.

The Commission interprets the statutory language, which provides an exclusion for registered investment advisers and associated persons “who are providing investment advice,” as evidence that Congress did not intend to grant a blanket exemption from municipal advisor registration for all registered investment advisers and their associated persons regardless of the activities in which they are engaged. The Commission believes the phrase “who are providing investment advice” limits the exclusion. Under this interpretation, if an associated person or a registered investment adviser engages in municipal advisory activities that do not constitute “investment advice” for purposes of Rule 15Ba1-1(d)(2)(ii), both the registered investment adviser and the associated person of such adviser engaging in the municipal advisory activities would be “municipal advisors” unless eligible for another exclusion or exemption.⁶⁷³

The Commission further notes that the municipal advisor registration and regulatory regime relates to issues that are unique to municipal advisory activities – particularly the advice concerning utilization of municipal derivatives, whether and how to issue municipal securities, and the structure, timing, and terms of issuances of municipal securities and other similar matters. The registration of registered investment advisers as municipal advisors, to the extent they engage in these activities, whether or not already subject to the Investment Advisers Act, is necessary to provide the benefits associated with the regulation of persons who engage in municipal advisory

⁶⁷² See 15 U.S.C. 78o-4(e)(4). The Commission notes that this interpretation of the term investment advice relates solely to whether a registered investment adviser, or an associated person of such adviser, would need to register as a municipal advisor.

⁶⁷³ Consequently, both the registered investment adviser and the associated person would be required to register, unless the associated person meets the requirements of the exemption from registration in Rule 15Bc4-1 discussed below. See *infra* Section III.A.7.

activities. Such benefits include, but are not limited to, standards of conduct, training, and testing for municipal advisors that may be required by the Commission or the MSRB, and other requirements unique to municipal advisors that may be imposed by the MSRB.⁶⁷⁴

The Commission believes that the clarifications described above address the comments that the Commission's interpretation introduces "ambiguity" and will lead to "widespread uncertainty" among registered investment advisers. In particular, permitting a Commission-registered investment adviser to rely on the exclusion when providing any advice under an investment advisory agreement that is subject to the Investment Advisers Act, as long as such advice is not specifically excluded from the definition of "investment advice" under Rule 15Ba1-1(d)(2)(ii), will allow registered investment advisers to achieve greater certainty about the scope of the exclusion at the time they enter into an advisory agreement.⁶⁷⁵ If an investment adviser firm engages in a municipal advisory activity that is not within the registered investment adviser exclusion, such as advice concerning the issuance of municipal securities or the utilization of swaps by municipalities, the mere fact that the firm is registered under the Investment Advisers Act would not exempt that firm from registration as a municipal advisor.⁶⁷⁶

As discussed above in Section III.A.1.b.viii., the Commission is narrowing the application of the term "investment strategies" from all plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity to plans or programs for the investment of the proceeds of

⁶⁷⁴ See supra note 190.

⁶⁷⁵ See also Ancillary or Additional Advisory Services Provided by Investment Advisers section below.

⁶⁷⁶ The Commission acknowledges commenters' concerns that there will be overlapping requirements for registered investment advisers that engage in municipal advisory activities, just as there are for investment advisers that engage in broker-dealer activities. The Commission notes that it is permitting investment advisers that have already filed a Form ADV with the Commission to incorporate by reference in their Form MA certain information that they have already supplied in Form ADV. See infra Sections II.A.2.

municipal securities and the recommendation of and brokerage of municipal escrow investments. Accordingly, the municipal advisor registration regime, as adopted, will provide appropriate protection for advice with respect to proceeds of municipal securities while mitigating many of the commenters' concerns with respect to funds of municipal entities other than proceeds of municipal securities. Moreover, because advice provided to fewer types of plans, programs, or pools of assets would require municipal advisor registration, the Commission's exemption for persons providing advice with respect to certain investment strategies will result in fewer registered investment advisers having to register as municipal advisors compared to Rule 15Ba1-1(b) as originally proposed.⁶⁷⁷ For example, under the narrow scope of investment strategies, investment advisers who provide advice to public employee benefit plans, participant-directed investment plans such as 529, 403(b) or 457 plans that do not include proceeds of municipal securities would not be required to register as municipal advisors.

As noted above, one commenter suggested that any advice pursuant to a written agreement between an investment adviser and a municipal entity to whom the adviser owes a fiduciary duty should be considered investment advice and thus exclude the adviser from registration as a municipal advisor.⁶⁷⁸ In the Commission's view, this approach fails to recognize that the regulatory regime for municipal advisors set forth in the Dodd-Frank Act includes more than a fiduciary duty.⁶⁷⁹ Accordingly, unless an exclusion or exemption applies, a municipal advisor must register

⁶⁷⁷ See supra Section III.A.1.b.viii. (discussing the term "investment strategies" and the exemption pursuant to Rule 15Ba1-1(d)(3)(vii)).

⁶⁷⁸ See supra notes 669-670 and accompanying text (discussing the Vanguard Letter).

⁶⁷⁹ See 15 U.S.C. 78q-4(c)(1). As noted above, benefits associated with the regulation of municipal advisors also include, but are not limited to, the application of standards of conduct, training, and testing for municipal advisors that may be required by the Commission or the MSRB, and other requirements unique to municipal advisors that may be imposed by the MSRB. See supra note 190.

with the Commission and comply with the applicable MSRB rules.⁶⁸⁰

Ancillary or Additional Advisory Services Provided by Investment Advisers

Several commenters urged the Commission to carve out from the definition of municipal advisor certain investment advisers that provide various specific kinds of advice to municipal entities. For example, some commenters noted that a registered investment adviser may provide clients with services ancillary to its investment advice in “the normal course of its advisory services.”⁶⁸¹ Such ancillary service includes advice regarding investments other than securities (e.g., bank deposits, currencies, real estate, futures, and forward contracts),⁶⁸² research, and reports.⁶⁸³ One commenter stated that such services may not subject the adviser providing such services to the Investment Advisers Act but would require the provider to register as a municipal advisor. According to the commenter, an adviser would have to “segregate its activities into those that are exempt and those which require registration as a municipal advisor and follow potentially conflicting rules.”⁶⁸⁴

Another commenter stated that managers at investment adviser firms “would need to regularly monitor each service they provide to municipal entities,” which would be “burdensome for a private fund manager or other investment manager” and “would divert resources from the performance of [their] core advisory services.”⁶⁸⁵ The commenter stated that the proposed rules could also cause some managers to “choose to reduce the types of services they provide,” which

⁶⁸⁰ See, e.g., MSRB Rule G-17 (Conduct of Municipal Securities and Municipal Advisory Activities).

⁶⁸¹ See, e.g., MFA Letter.

⁶⁸² See, e.g., MFA Letter and ICI Letter. See also SIFMA Letter I and American Bankers Association Letter I.

⁶⁸³ See, e.g., MFA Letter.

⁶⁸⁴ American Bankers Association Letter I.

⁶⁸⁵ See MFA Letter.

could “harm fund managers and their municipal entity clients.”⁶⁸⁶

Another commenter suggested an exemption for a “particularized recommendation regarding the structuring or issuance of municipal securities” when such advice is provided in the context of the investment adviser providing investment advisory services.⁶⁸⁷ For example, according to this commenter, an investment adviser would be exempt if it recommends changes to the terms of a municipal entity’s proposed bond offering so that the municipal entity can pay a lower interest rate on the securities and invest the proceeds in less risky investment vehicles.⁶⁸⁸

The Commission carefully considered the comments received, including comments regarding the burden for firm managers to monitor each service provided by the firm to determine whether it would require municipal advisor registration. The Commission, however, is not exempting from the definition of municipal advisor a registered investment adviser that engages in municipal advisory activities that are “in the ordinary course of” investment advice or “ancillary” to such investment advice. The determination of whether a particular activity is “in the ordinary course of” or “ancillary” is very much based on facts and circumstances. Thus, the Commission is concerned that such a standard could be easily circumvented and could create a pretext for abuse.⁶⁸⁹

The Commission interprets the registered investment adviser exclusion to include any advice provided pursuant to an advisory agreement. However, Rule 15Ba1-1(d)(2)(ii) excludes from “investment advice” advice concerning: (1) whether and how to issue municipal securities; (2) the structure, timing, and terms of issuances of municipal securities and other similar matters; and (3) municipal derivatives. Additionally, the registered investment adviser exclusion does not cover

686

Id.

687

SIFMA Letter I.

688

See id.

689

See supra Section III.A.1.c.iv. (discussing broker-dealers selling securities and solely incidental services).

solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1-1(n). The Commission does not believe that it is necessary to adopt most of the interpretations or carve-outs from the municipal advisor definition that commenters suggested because it anticipates that most of these additional services would be covered by advisory agreements. For example, as discussed above, a registered investment adviser that advises a municipal entity to invest the proceeds of an issuance of municipal securities in an asset class other than securities will not be required to register as a municipal advisor, if that advice is provided pursuant to an advisory agreement between the registered investment adviser and the municipal entity. Similarly, if ancillary services are provided pursuant to an advisory agreement and these services are not of the type specifically excluded from “investment advice” under Rule 15Ba1-1(d)(2)(ii), the investment adviser exclusion would apply. The Commission believes that its interpretation of the investment adviser exclusion should mitigate commenters’ concerns regarding segregating activities into those that are exempt and those that are not and following potentially conflicting rules.⁶⁹⁰ The Commission also believes that its interpretation should mitigate commenters’ concerns regarding the burden for a firm to monitor its activities⁶⁹¹ because a firm would only need to monitor for the specific types of activities that are excluded from “investment advice” under Rule 15Ba1-1(d)(2)(ii) and the activities that are not covered by advisory agreements.

The Commission is also not adopting a commenter’s suggestion to create a specific exemption for “a particularized recommendation regarding the structuring or issuance of municipal securities.”⁶⁹² The Commission believes that an adviser offering advice regarding the issuance of municipal securities, including advice with respect to the structuring, timing, terms, and other

⁶⁹⁰ See supra note 684 and accompanying text.

⁶⁹¹ See supra notes 685-686 and accompanying text.

⁶⁹² See supra notes 687-688 and accompanying text.

similar matters, clearly is a municipal advisor because the statutory definition of municipal advisor expressly includes such activities.

Affiliates of Investment Advisers Providing Municipal Advisory Services

As discussed above, Exchange Act Section 15B(e)(4)(A)(ii) includes in the definition of municipal advisor a person that “undertakes a solicitation of a municipal entity.”⁶⁹³ Section 15B(e)(9), however, excludes a person that controls, is controlled by, or is under common control with a registered investment adviser⁶⁹⁴ from the requirement to register as a municipal advisor when it solicits municipal entities or obligated persons on behalf of the affiliated investment adviser.⁶⁹⁵ Thus, an affiliate of a registered investment adviser may engage in such solicitation without registering as a municipal advisor. Neither the statute nor the rules, as proposed, otherwise exclude an affiliate of a registered investment adviser from the definition of municipal advisor.

One commenter stated that registered investment advisers “often assign or delegate management of a portion of their client’s assets to an affiliated entity ... when they seek specialized expertise for particular regions, strategies, or products.”⁶⁹⁶ The commenter stated that such affiliated entities “are typically part of the same organization as the registered adviser and are subject to the same or similar compliance and management structures.”⁶⁹⁷ Further, they are usually “organized as separate legal entities rather than branch offices” for “tax or other purposes.”⁶⁹⁸ The commenter stated that, because the registered investment advisers themselves are exempt from

⁶⁹³ 15 U.S.C. 78o-4(e)(4)(A)(ii).

⁶⁹⁴ For purposes of this discussion, the term “affiliate of a registered investment adviser” means such a person.

⁶⁹⁵ See 15 U.S.C. 78o-4(e)(9).

⁶⁹⁶ See MFA Letter.

⁶⁹⁷ Id.

⁶⁹⁸ Id.

registration as municipal advisors when they provide investment advice, it would be incongruous to require their affiliates to register as municipal advisors.⁶⁹⁹ The commenter further stated that registration would “simply add costs to the industry and regulators without additional public policy benefits.”⁷⁰⁰

The Commission disagrees that there should be a general exemption for affiliates of registered investment advisers that engage in municipal advisory activities. The Commission notes that Congress explicitly exempted affiliates from the solicitation prong of the municipal advisor definition, but not from the prong relating to advisory and other activities. Accordingly, the Commission believes that the statute does not contemplate exempting affiliates from municipal advisor registration, except when an affiliate specifically solicits business for its affiliated entity.

Further, as discussed below, the Commission does not believe that any additional exemption is necessary or appropriate. In the case of solicitations, the Commission notes that, although the statute excludes solicitation by an affiliate from the definition of municipal advisor,⁷⁰¹ the Commission would still have regulatory authority over the entity on whose behalf the affiliate is soliciting, as a municipal advisor, if it engages in municipal advisory activities. If the entity is also a registered investment adviser and falls under the investment adviser exclusion in Rule 15Ba1-1(d)(2)(ii), the Commission would continue to have regulatory authority over that entity as a registered investment adviser. In a case where an affiliate of a registered investment adviser is engaged in municipal advisory activities as a municipal advisor, however, the Commission would not necessarily have regulatory authority outside of the municipal advisor registration regime.

Also, as discussed more fully above, the Commission’s exemption for persons that provide advice

⁶⁹⁹ Id.

⁷⁰⁰ Id.

⁷⁰¹ See 15 U.S.C. 78o-4(e)(9) (defining “solicitation of a municipal entity or obligated person”).

with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of escrow investments⁷⁰² should reduce the likelihood that specialized expertise from affiliates, such as foreign affiliates, will require registration.

Investment Adviser Solicitations and Referrals

Some commenters requested clarification on the exclusion for investment advisers from the solicitation prong of the municipal advisor definition. One commenter requested that the Commission confirm that the exclusion for investment advisers applies to the investment adviser and its employees “who may solicit municipal entities as part of their regular responsibilities to market the adviser’s investment advisory services or who may incidentally discuss the adviser’s advisory services with municipal entities.”⁷⁰³

The Commission agrees with this comment and notes that a registered investment adviser that solicits on its own behalf does not fall within the “solicitation” prong of the municipal advisor definition. Exchange Act Section 15B(e)(9) provides that the term “solicitation of a municipal entity or obligated person” means a communication “on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser ... that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation.”⁷⁰⁴ Thus, Section 15B(e)(9) permits a registered investment adviser and its employees, who market the adviser’s investment advisory services, to solicit municipal entities or obligated persons, including discussing the adviser’s advisory services, without triggering regulatory obligations, to the extent such

⁷⁰² See supra Section III.A.1.b.viii. (discussing the Commission’s application of the term “investment strategies”).

⁷⁰³ See IAA Letter.

⁷⁰⁴ 15 U.S.C. 78o-4(e)(9).

solicitation is on behalf of the registered investment adviser. As discussed above, the same is true for affiliates of registered investment advisers.

One commenter expressed concern that an investment adviser providing advice to a client regarding the selection or retention of another investment manager could constitute a solicitation of a municipal entity or obligated person under Section 15B(e)(9) of the Exchange Act.⁷⁰⁵ The Commission confirms that a registered investment adviser will not be required to register as a municipal advisor in this scenario, unless it receives direct or indirect compensation and acts on behalf of the recommended investment adviser. Absent such facts, the registered investment adviser is not soliciting on behalf of another broker, dealer, municipal securities dealer, municipal advisor, or investment adviser, and thus would not be engaging in solicitation requiring municipal advisor registration.⁷⁰⁶

State-Registered Investment Advisers

As a result of changes in the threshold for registration as an investment adviser with the Commission,⁷⁰⁷ certain entities are not required to register as investment advisers under the Investment Advisers Act and instead are subject to state registration requirements.⁷⁰⁸ In the Proposal, the Commission sought comment on whether state-registered investment advisers should be exempt from the municipal advisor definition to the extent they are providing advice that otherwise would be subject to the Investment Advisers Act, but for the operation of a prohibition

⁷⁰⁵ See Insurance Companies Letter.

⁷⁰⁶ However, such advice may be considered investment advice under the Investment Advisers Act. See *supra* note 423.

⁷⁰⁷ See 15 U.S.C. 80b-3a(a).

⁷⁰⁸ See Investment Advisers Act Release No. 3221 (June 22, 2011), 76 FR 42950 (July 19, 2011) (implementing the statutory shift to the states the responsibility for oversight of investment advisers that have between \$25 million and \$100 million of assets under management). Approximately 2,400 Commission-registered investment advisers withdrew their registrations and registered with state securities authorities in 2012 and 2013.

on, or exemption from, Commission registration.⁷⁰⁹

Several commenters supported an exemption for state-registered investment advisers.⁷¹⁰ One commenter, for example, stated that “Congress has recognized the efficacy of state regulation of investment advisers.”⁷¹¹ Therefore, “the Commission should similarly recognize the efficacy of state regulation of investment advisers, particularly since the provision of advice to municipal entities is a matter of special interest to state authorities.”⁷¹² Another commenter stated that state-registered investment advisers are already subject to significant regulation by state regulators, including fiduciary obligations with respect to investment management activities. Consequently, the commenter stated that “imposing an additional layer of regulation on these persons would not provide an appreciable regulatory benefit or increase the protection of municipal entities or obligated persons.”⁷¹³

After considering the commenters’ views, the Commission is not adopting an exemption for state-registered investment advisers at this time. The Commission notes that the statutory definition of municipal advisor excludes only federally-registered investment advisers. The Commission also notes that state regulation of investment advisers is not always similar to regulation under the Investment Advisers Act. For example, state-registered investment advisers are not subject to the Commission’s pay-to-play rule.⁷¹⁴ Furthermore, because the Commission is limiting the kinds of

⁷⁰⁹ See Proposal, 76 FR at 836.

⁷¹⁰ See, e.g., ABA Letter; MFA Letter; SIFMA Letter I; letter from Rex A. Staples, General Counsel, North American Securities Administrators Association, Inc., dated March 15, 2011 (“NASAA Letter”).

⁷¹¹ ABA Letter.

⁷¹² Id.

⁷¹³ SIFMA Letter I.

⁷¹⁴ See Investment Advisers Act Release No. 3043 (July 1, 2010), 75 FR 41018, 41019 (July 14, 2010) (“Political Contributions Final Rule”).

advice with respect to “investment strategies” that would require a person to register as a municipal advisor,⁷¹⁵ the Commission believes that fewer state-registered investment advisers will be required to register as municipal advisors than as originally proposed.⁷¹⁶

Exempt Reporting Advisers

Finally, the Commission is not adopting the suggestion of one commenter to exempt the category of “Exempt Reporting Advisers” from registration as municipal advisors.⁷¹⁷ The commenter stated that the Exempt Reporting Advisers exemption from registration under the Investment Advisers Act indicates that policy makers have determined that “such investment advisers are not of the type that must register with the [Commission] and be subject to Commission oversight as a registered investment adviser.”⁷¹⁸ The commenter stated that it would be “consistent with these policy determinations to similarly exempt these advisers from the definition of municipal advisor in connection with providing investment advice to a municipal entity.”⁷¹⁹

The Commission does not agree. The Commission believes that, if Exempt Reporting Advisers engage in municipal advisory activities, consistent with the protection of municipal

⁷¹⁵ See supra Section III.A.1.b.viii.

⁷¹⁶ For example, under the exemption pursuant to Rule 15Ba1-1(d)(3)(vii), state-registered investment advisers who provide advice to public employee benefit plans (including participant directed plans or plans such as 529 Savings Plans, 403(b) plans, and 457 plans) that do not include proceeds of municipal securities would not be required to register as municipal advisors.

⁷¹⁷ See MFA Letter (citing Investment Advisers Act Release No. 3111 (November 19, 2010), 75 FR 77190 (December 10, 2010) (Proposed Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers)). The Commission subsequently adopted the exemption from registration under the Investment Advisers Act for Exempt Reporting Advisers. See Investment Advisers Act Release No. 3222 (June 22, 2011), 76 FR 39646 (July 6, 2011) (Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers).

⁷¹⁸ MFA Letter.

⁷¹⁹ Id.

entities and obligated persons, and consistent with the policy objectives of Congress and this rulemaking, they should not be exempt from the municipal advisor registration requirement based on status. Specifically, while Congress determined that Exempt Reporting Advisers do not need to be registered in connection with their investment advisory activities, that does not suggest that Exempt Reporting Advisers should similarly be exempt from regulation as municipal advisors. Therefore, Exempt Reporting Advisers who are exempt from registration as investment advisers must register as municipal advisors if they engage in municipal advisory activities, unless they qualify for an exclusion or exemption. However, as discussed above, the Commission is exempting from the definition of municipal advisor persons that provide advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.⁷²⁰ Accordingly, the Commission believes that fewer Exempt Reporting Advisers will be required to register as municipal advisors than as originally proposed. For example, under the narrow scope of investment strategies, Exempt Reporting Advisers who provide advice to private funds that do not include proceeds of municipal securities would not be required to register as municipal advisors.

vi. Registered Commodity Trading Advisors; Swap Dealers

Exchange Act Section 15B(e)(4)(C) excludes from the definition of municipal advisor any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps. In the Proposal, the Commission interpreted the statutory exclusion for registered commodity trading advisors and their associated persons to apply only to such persons when they are providing advice related to swaps, as that term is defined in Section 1a(47) of the Commodity Exchange Act and Section 3(a)(69) of

⁷²⁰ See supra Section III.A.1.b.viii.

the Exchange Act,⁷²¹ and any rules and regulations promulgated thereunder.⁷²² As proposed in Rule 15Ba1-1(d)(2)(iii), a commodity trading advisor, or an associated person of a commodity trading advisor, would be required to register with the Commission as a municipal advisor if the commodity trading advisor, or an associated person of the commodity trading advisor, engages in any municipal advisory activities that are not advice related to swaps.⁷²³ Further, a commodity trading advisor would be required to register with the Commission if the advisor provides advice with respect to swaps on behalf of a municipal entity or obligated person, but is not registered as a commodity trading advisor under the Commodity Exchange Act or is not a person associated with a registered commodity trading advisor providing advice related to swaps.⁷²⁴

The Commission requested comment on, and received several comments regarding, its interpretation of the exclusion for commodity trading advisors.⁷²⁵ One commenter agreed that the exclusion should only be available when the registered commodity trading advisor is providing advice related to swaps.⁷²⁶ This commenter believed that Congress intended a single comprehensive municipal advisor regulatory structure to govern advice to municipal entities,

⁷²¹ 7 U.S.C. 1a(47) and 15 U.S.C. 78c(a)(69). Consistent with the statutory exclusion, the Commission's proposed interpretation of the statutory exclusion would not apply when such persons are providing advice with respect to security-based swaps.

⁷²² See Proposal, 76 FR at 833. See also Temporary Registration Rule Release, 75 FR at 54467.

⁷²³ See Proposal, 76 FR at 833. As an example, the Commission noted that if an advisor is providing advice to a municipal entity with respect to engaging in a swap transaction and provides advice to the municipal entity with respect to the structure of a municipal securities offering, the advisor would have to register with the Commission as a municipal advisor and would be subject to regulation by the MSRB as a municipal advisor. See id.

⁷²⁴ See id.

⁷²⁵ See id., at 837.

⁷²⁶ See MSRB Letter.

particularly in, but not necessarily limited to, the context of a municipal securities offering.⁷²⁷

Another commenter expressed concern that the Commission's proposed interpretation of the exclusion could have the unintended consequence of requiring commodity trading advisors to register as municipal advisors if, "in connection with providing advice about swaps, [a commodity trading advisor] provide[s] clients or prospective clients with research or advice about instruments other than swaps."⁷²⁸ The commenter expressed concern that a registered commodity trading advisor would need to register as a municipal advisor if these ancillary services fall within the scope of municipal advisory activities and are not deemed to be the type of advice described in the exclusion. According to the commenter, the types of ancillary services that a commodity trading advisor may provide to a municipal entity would be subject to "regular oversight by the [Commission] and CFTC."⁷²⁹ In addition, the commenter stated that the rules would create widespread uncertainty among registered commodity trading advisors regarding whether the services they perform would require registration as municipal advisors.⁷³⁰ According to the commenter, in order to comply with the proposed rules, managers would need to regularly monitor each service they provide to municipal entities, determine which of the services are municipal advisory activities, and further determine which of the services, if any, may not be deemed to be

⁷²⁷ See id.

⁷²⁸ MFA Letter.

⁷²⁹ Id. According to the commenter, such ancillary services include providing clients or prospective clients with research or advice about instruments other than swaps in connection with providing advice about swaps.

The Commission notes that providing certain general information to clients or prospective clients, such as research and general information about products, would not be municipal advisory activity. See supra Section III.A.1.b.i.

⁷³⁰ See MFA Letter.

advice related to swaps.⁷³¹

Another commenter urged the Commission to “honor a waiver, no-action letters or other remedy from the CFTC regarding the requirement to register as a commodity trading advisor.”⁷³² The same commenter stated that “the CFTC has established a ‘private advisor’ limited exemption from commodity trading advisor registration.”⁷³³ Under this exemption, a person does not have to register as a commodity trading advisor if it has not provided commodity trading advice to more than fifteen persons during the preceding twelve months and does not hold itself out to the public as a commodity trading advisor.⁷³⁴ The commenter suggested that the Commission should implement a similar exemption for purposes of determining when a person must register as a municipal advisor.⁷³⁵ In addition, the commenter stated that creating an exemption for providing advice to a de minimis number of entities would help distinguish between entities whose principal business is to be a municipal advisor and others.⁷³⁶

This commenter also expressed concern that a person must register, regardless of the type of swap advice that may be contemplated and irrespective of the relationship between the municipal entity and the person seeking to offer advice.⁷³⁷ The commenter urged the Commission to consider exclusions based on both: (1) the types of swaps (specifically, limiting municipal derivatives to securities-based swaps); and (2) the types of relationships between the municipal entity and the person who is providing the advice (specifically, providing an exclusion where the advisor acts as

⁷³¹ See id.

⁷³² ACES Power Marketing Letter.

⁷³³ See id. (citing Section 4m(1) of the Commodity Exchange Act).

⁷³⁴ See id.

⁷³⁵ See id.

⁷³⁶ See id.

⁷³⁷ See id.

an agent and fiduciary of the municipal entity).

Exclusion for Commodity Trading Advisors

The Commission is adopting the interpretation of the statutory exclusion for commodity trading advisors substantially as proposed, with some modifications to provide additional clarity on the scope of advice that would be excluded, in response to commenters' concerns. As adopted, Rule 15Ba1-1(d)(2)(iii) provides that the term "municipal advisor" shall not include any commodity trading advisor registered under the Commodity Exchange Act or person associated with a registered commodity trading advisor,⁷³⁸ to the extent that such registered commodity trading advisor or such person is providing advice that is related to swaps (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and Section 3(a)(69) of the Exchange Act (15 U.S.C. 78c(a)(69)), and any rules and regulations thereunder).⁷³⁹ The final rule reflects minor, non-substantive modifications to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions. Accordingly, the exclusion from the municipal advisor definition will not be available to a registered commodity trading advisor, or an associated person of a registered commodity trading advisor, to the extent it engages in municipal advisory activities that are not providing advice related to swaps.⁷⁴⁰ As noted in the

⁷³⁸ The Commission notes that Section 15B(e)(4)(C) excludes from the definition of municipal advisor "any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps." The Commission believes it is reasonable to interpret this exclusion to apply to registered commodity trading advisors and persons associated with a registered commodity trading advisor, as opposed to persons associated with any registered or unregistered commodity trading advisor. The Commission notes that a commenter also suggested this change. See MSRB Letter.

⁷³⁹ See Rule 15Ba1-1(d)(2)(iii).

⁷⁴⁰ The Commission notes, however, that to the extent a registered commodity trading advisor registers as a municipal advisor, its associated persons that are natural person municipal advisors would be exempt from registration if he or she is an associated person of an advisor that is registered with the Commission pursuant to Section 15B(a)(2) of the Act and the rules

Proposal, while a registered commodity trading advisor generally could provide advice related to swaps without registering as a municipal advisor, a commodity trading advisor that is not a registered commodity trading advisor would be required to register as a municipal advisor if it provides advice related to swaps to a municipal entity.⁷⁴¹ Similarly, as noted in the Proposal, if a registered commodity trading advisor provides advice with respect to an issuance of municipal securities or any municipal financial product other than the swap, the advisor must register as a municipal advisor.⁷⁴²

The Commission is not exempting from municipal advisor registration persons that have received no-action letters from the CFTC or are otherwise exempt from registration as commodity trading advisors.⁷⁴³ For example, a person may be exempted from registration as a commodity trading advisor precisely because it engages in the types of activities that are more akin to activities in which municipal advisors engage. Thus, the Commission does not believe that a blanket exemption is appropriate at this time. The Commission notes, however, that such entities could apply for no-action or exemptive relief.⁷⁴⁴

and regulations thereunder and engages in municipal advisory activities solely on behalf of a registered municipal advisor. See supra Section III.A.7. (discussing Rule 15Bc4-1).

⁷⁴¹ See Proposal, 76 FR at 833.

⁷⁴² See id. The commodity trading advisor must also consider whether its activities constitute “solicitation of a municipal entity or obligated person.” See supra Section III.A.1.b.x. (discussing solicitation of a municipal entity or obligated person).

⁷⁴³ See supra notes 732-735 and accompanying text (discussing comments related to CFTC no action letters and exemptions related to commodity trading advisor registration).

⁷⁴⁴ Exchange Act Section 15B(a)(4) provides that the Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any municipal advisor or class of municipal advisors from any provision of Section 15B or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 15B. See 15 U.S.C. 78o-4(a)(4). When requesting exemptive relief pursuant to Section 15B(a)(4), a person may follow the procedures for requesting exemptive relief pursuant to Section 36 of the Exchange Act, as set forth in Rule 0-12 under the Exchange Act. See 17 CFR 240.0-12.

The Commission is also not adopting an exemption for services provided by a commodity trading advisor that are solely incidental or ancillary to the commodity trading advisor's advice related to swaps.⁷⁴⁵ To the extent the commodity trading advisor is providing general information, however, such activities would not be municipal advisory activities that would subject the advisor to registration as a municipal advisor.⁷⁴⁶

Swap Dealers

Section 15B(e)(4)(C) of the Exchange Act does not include an exclusion from the definition of municipal advisor for swap dealers or security-based swap dealers. In its Proposal, the Commission requested comment generally as to whether there are exclusions from the definition of "municipal advisor," other than those proposed, that the Commission should consider.⁷⁴⁷

Some commenters suggested that the exclusion should be extended to swap dealers and security-based swap dealers because, otherwise, registration as a municipal advisor would be duplicative.⁷⁴⁸ One such commenter noted that Sections 731 and 764 of the Dodd-Frank Act have provisions requiring registration by swap dealers and security-based swap dealers with the CFTC and the Commission, respectively, and provisions specifically covering such dealers' activities when acting as advisors to "special entities," which include state and local governments.⁷⁴⁹ Another commenter stated that persons that will be considered municipal advisors will often be engaged in business activities other than providing advice to or on behalf of a municipal entity or obligated

⁷⁴⁵ See supra notes 728-729 and accompanying text.

⁷⁴⁶ See supra Section III.A.1.b.i. (providing guidance on "advice" and discussing the provision of general information).

⁷⁴⁷ See Proposal, 76 FR at 838.

⁷⁴⁸ See, e.g., Kutak Rock Letter; SIFMA Letter I.

⁷⁴⁹ See Kutak Rock Letter. This commenter suggested that the Proposal should be harmonized with other provisions of the Dodd-Frank Act specifically addressing swap practices.

person.⁷⁵⁰ The commenter expressed concern that regulated persons, such as swap dealers, that may also provide advice to a municipal entity or obligated person in connection with their business as swap dealers, may be required to register as municipal advisors.⁷⁵¹ The commenter stated that it would be best to avoid dual or multiple regulations by exempting any advice that is related to, or given in connection with, another regulated activity. The commenter also provided that, in the alternative, the Commission should coordinate the definition of “advice” with that of other regulatory regimes.⁷⁵²

In its Business Conduct Standards for Swaps, the CFTC adopted certain standards for swap dealers in their dealings with counterparties to swap transactions, as well as for any swap dealer that acts an advisor to a special entity.⁷⁵³ The CFTC’s adopted standards also include a safe harbor from the heightened protections that would otherwise apply when a swap dealer acts as an advisor to a special entity, if: such swap dealer does not express an opinion as to whether the special entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the special entity; the special entity represents in writing that it will not rely on recommendations provided by the swap dealer, and will rely on advice from an independent representative; and the swap dealer discloses to the special entity that it is not undertaking to act in the best interests of the special entity as otherwise required under the CFTC’s

⁷⁵⁰ See SIFMA Letter I. The commenter stated that a swap dealer that provides advice in connection with its other business activity may be subject to CFTC regulation and, absent an exemption, would become subject to additional regulation as a municipal advisor. See id.

⁷⁵¹ See id.

⁷⁵² See id. In this context, this commenter cited as an example the proposed CFTC business conduct standards for swaps.

⁷⁵³ CFTC Rule 23.440(c)(1) provides that a swap dealer that acts as an advisor to a special entity has “a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity [as defined in CFTC Rule 23.401(c)].”

standards.⁷⁵⁴ Consistent with this approach and for the reasons described below, the Commission believes that it is appropriate to provide an exemption for certain swap dealers.

Specifically, to address commenters' concerns, the Commission is exempting any swap dealer registered under the Commodity Exchange Act or associated person of the swap dealer recommending a municipal derivative or a trading strategy that involves a municipal derivative, so long as the registered swap dealer or associated person is not "acting as an advisor" to the municipal entity or obligated person with respect to the municipal derivative or trading strategy pursuant to Section 4s(h)(4) of the Commodity Exchange Act and the rules and regulations thereunder.⁷⁵⁵ For purposes of determining whether a swap dealer is "acting as an advisor" under Rule 15Ba1-1(d)(3)(v), the municipal entity or obligated person involved in the transaction will be treated as a "special entity"⁷⁵⁶ under Section 4s(h)(2) of the Commodity Exchange Act and the rules and

⁷⁵⁴ See Business Conduct Standards for Swaps, *supra* note 275. Specifically, CFTC Rule 23.440 provides that a swap dealer "acts as an advisor" to a special entity when it recommends a swap or a trading strategy involving a swap that is tailored to the particular needs or characteristics of the special entity, unless, among other things:

"(i) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity;

(ii) The Special Entity represents in writing that:

(A) The Special Entity will not rely on recommendations provided by the swap dealer; and

(B) The Special Entity will rely on advice from a qualified independent representative within the meaning of § 23.450; and

(iii) The swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity as otherwise required by this section."

⁷⁵⁵ See Rule 15Ba1-1(d)(3)(v)(A).

⁷⁵⁶ Special entity is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act and the rules and regulations thereunder. See 17 CFR 23.401(c) (defining "special entity," for purposes of business conduct requirements for swap dealers and major swap participants) and *supra* note 275 (discussing the protections provided by the Dodd-Frank Act for special entities with respect to derivative transactions).

regulations thereunder (regardless of whether such municipal entity or obligated person is otherwise a “special entity”).⁷⁵⁷

The Commission believes an exemption for swap dealers is appropriate because, as discussed below, the exemption will apply the standards that are applicable under the CFTC’s existing regulatory regime. As under such regime, the exemption will also preserve consistent and comparable protections for municipal entities and obligated persons. For example, for the exemption for registered swap dealers to apply, a municipal entity or obligated person must have an independent representative who is subject to a duty to act in the best interests of its client.⁷⁵⁸ The Commission notes that independent representatives would likely be commodity trading advisors, municipal advisors, investment advisers, or ERISA fiduciaries⁷⁵⁹ that are also subject to, or may become subject to,⁷⁶⁰ a fiduciary duty to their clients.⁷⁶¹ Moreover, regardless of whether a municipal entity or obligated person is a special entity, the swap dealer will need to comply with any applicable suitability standards and disclosure requirements, which should offer another measure of protection for municipal entities and obligated persons in addition to those noted above. Further, in the context of interactions between swap dealers and municipal entities and obligated persons, the exemptions will incorporate the standards provided by the CFTC’s Business Conduct

⁷⁵⁷ See Rule 15Ba1-1(d)(3)(v).

⁷⁵⁸ This is consistent with the blanket exemption where a municipal entity or obligated person is represented by an independent registered municipal advisor. See Rule 15Ba1-1(d)(3)(vi).

⁷⁵⁹ See Business Conduct Standards for Swaps, 77 FR at 9738.

⁷⁶⁰ The Commission notes that the CFTC has indicated that it is “considering developing rules for [commodity trading advisors] that are comparable to rules adopted by the [Commission] or the MSRB for municipal advisors.” See Business Conduct Standards for Swaps, 77 FR at 9739. Additionally, the CFTC has stated that it believes it has harmonized its rules with the regulatory regime for municipal advisors and will continue to work with the Commission as the Commission’s proposed rules for the registration of municipal advisors are finalized. *Id.*

⁷⁶¹ Municipal advisors, investment advisers, and ERISA fiduciaries all owe fiduciary duties to their clients.

Standards for Swaps, which include a requirement that the swap dealer disclose that it is not undertaking to act in the best interest of the special entity.⁷⁶² Therefore, municipal entities and certain obligated persons may already be familiar with the notion that exempt swap dealers are not undertaking to act in their best interest when recommending a swap or a trading strategy involving a swap and could more appropriately evaluate such recommendation. In addition, the Commission believes the standards provided by the CFTC's Business Conduct Standards for Swaps are appropriate for the swap dealer exemption from the definition of municipal advisor, because they will help provide clarity about: (1) when a swap dealer must register as a municipal advisor; and (2) its relationship with municipal entities and obligated persons.

For these reasons, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt swap dealers from the definition of municipal advisor, subject to the limitations described above, and therefore not require such dealers to register as municipal advisors.

The Commission is not adopting, at this time, an exemption for security-based swap dealers. As a general matter, the Commission understands that municipal entities currently do not typically enter into security-based swap transactions.⁷⁶³ The Commission also notes security-based swap dealers may, to the extent they would otherwise meet the definition of "municipal advisor," qualify for a different exemption, such as the exemption in Rule 15Ba1-1(d)(3)(vi) when the municipal entity or obligated person is otherwise represented by an independent registered municipal advisor.

⁷⁶² See supra note 754 (setting forth the disclosure requirements for swap dealers under CFTC Rule 23.440).

⁷⁶³ See, e.g., Transcript of the U.S. Securities and Exchange Commission Birmingham Field Hearing on the State of the Municipal Securities Market at 241 and 244.

Further, the Commission notes that such entities could apply for no-action or exemptive relief.⁷⁶⁴

When the Commission considers adopting external business conduct rules for security-based swap dealers, the Commission may also consider amending the municipal advisor definition to include an exemption for security-based swap dealers that is similar to the exemption for swap dealers.⁷⁶⁵

vii. Accountants, Attorneys, Engineers and Other Professionals

The definition of municipal advisor in Exchange Act Section 15B(e)(4) excludes attorneys offering legal advice or providing services of a traditional legal nature and engineers providing engineering advice.⁷⁶⁶ As discussed more fully below, the Commission proposed interpretations of the attorney and engineer exclusions and also proposed a limited exemption for accountants.⁷⁶⁷

Accountants Providing Attest Services

Exchange Act Section 15B(e)(4) does not explicitly exclude accountants from the definition of municipal advisor. In the Proposal, however, the Commission proposed to interpret the statutory definition of municipal advisor to exempt any accountant, unless the accountant engages in municipal advisory activities other than preparing or auditing financial statements or issuing letters for underwriters. In other words, the Commission proposed to exempt from the municipal advisor definition accountants preparing financial statements, auditing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.⁷⁶⁸ In the

⁷⁶⁴ See, e.g., supra note 744.

⁷⁶⁵ The Commission has proposed standards for security-based swap dealers that are similar to those that the CFTC has adopted. See Business Conduct Standards for Security-Based Swaps. Comments received by the Commission on this proposal are available at <http://www.sec.gov/comments/s7-25-11/s72511.shtml>.

⁷⁶⁶ See 15 U.S.C. 78o-4(e)(4)(C).

⁷⁶⁷ See proposed Rule 15Ba1-1(d)(2)(iv)-(vi) and Proposal, 76 FR at 833-834.

⁷⁶⁸ See proposed Rule 15Ba1-1(d)(2)(vi).

Proposal, the Commission noted that it was not appropriate to exempt accountants entirely, because accountants may provide advice to municipal entities that includes advice about the structure, timing, terms, and other similar matters concerning the issuance of municipal securities.⁷⁶⁹

The Commission requested comment on its proposed exemption for accountants. In particular, the Commission requested comment on whether the Commission should provide this exemption and whether there are additional types of accounting services that should fall under the exemption.⁷⁷⁰

The Commission received approximately 11 comment letters that addressed the proposed accountant exemption. Two commenters expressed support for the accountant exemption as proposed and did not suggest any changes.⁷⁷¹ Several commenters, however, believed that the proposed accountant exemption was too narrow and recommended including additional services under the exemption.⁷⁷²

⁷⁶⁹ See Proposal, 76 FR at 833. The Commission noted that accountants may also be engaged by municipal entities to provide other services, such as conducting feasibility studies or preparing financial projections and that, in defining municipal advisor in Exchange Act Section 15B(e)(4), Congress only excluded attorneys offering legal advice or services of a traditional legal nature or engineers providing engineering advice. See *id.*, at 833, notes 127-128 and accompanying text.

⁷⁷⁰ See *id.*, at 837.

⁷⁷¹ See MSRB Letter (agreeing that the exemption should apply solely when an accountant is preparing financial statements, auditing financial statements, or issuing bring down, comfort or “agreed upon procedures” letters for underwriters); letter from Kim M. Whelan, Co-President, Acacia Financial Group, Inc., dated February 22, 2011 (“Acacia Financial Group Letter”) (stating that “[t]o the extent accountants or engineers provide advice regarding municipal financial products or issuance of municipal securities, accountants and engineers should be considered Municipal Advisors”).

⁷⁷² See, e.g., State of Indiana Letter; letters from Deloitte LLP, dated February 22, 2011 (“Deloitte Letter”); Gerald G. Malone, H.J. Umbaugh & Associates, dated February 22, 2011 (“Umbaugh Letter”); letter from Susan S. Coffey, Senior Vice President, Member Quality and International Affairs, American Institute of Certified Public Accountants (“AICPA”), dated February 25, 2011 (“AICPA Letter”); and Gary Higgins, President, Registered Municipal Accountants Association of New Jersey, dated February 22, 2011

Several commenters recommended that attest, not just audit, services should be part of the accountant exemption.⁷⁷³ The performance of attest services is generally limited to certified public accountants by state regulation and professional standards.⁷⁷⁴ One commenter noted that audit services are a subset of the broader category of attest services and both are subject to similar professional standards, including an “independence” requirement.⁷⁷⁵ Another commenter also provided examples of services in this broader category of attest services, all of which it believed would be subject to professional standards: (1) examinations, compilations, or agreed-upon procedures engagements on projections or forecasts using AICPA Statements on Standards for Attestation Engagements (“SSAEs”); (2) performance of other types of agreed-upon procedures

(“RMAA Letter”).

⁷⁷³ See, e.g., Deloitte Letter (stating that “[a]udit services are a subset of the broader category of attest services... and we see no reason for the final rule to distinguish between the two”); Umbaugh Letter (stating that attest services and tax services (e.g., arbitrage rebate calculations on behalf of issuers) do not appear to fit the “municipal advisor” definition); letter from KPMG LLP, dated February 22, 2011 (“KPMG Letter”) (recommending that the Commission include, at a minimum, specific exemptions for attest services in the accountant exemption).

Commenters referred to the definition of the term “attest engagements” by the AICPA as “engagements... in which a certified public accountant in the practice of public accounting... is engaged to issue or does issue an examination, a review, or an agreed-upon procedures report on subject matter, or an assertion about the subject matter... that is the responsibility of another party.” See Deloitte Letter (citing AICPA Attestation Standards AT §101.01). The Uniform Accountancy Act, which has been used as a basis for state regulation of certified public accountants, incorporates similar concepts. (See, e.g., Section 14(a) of The Uniform Accountancy Act (5th ed. 2007), available at http://www.aicpa.org/Advocacy/State/StateContactInfo/uaa/DownloadableDocuments/UAA_Fifth_Edition_January_2008.pdf).

⁷⁷⁴ See, e.g., AICPA Code of Professional Conduct ET 201.01, 202.01; see also AICPA Attestation Standards AT §101.06 (providing that “[a]ny professional service resulting in the expression of assurance must be performed under AICPA professional standards that provide for the expression of such assurance”); see also, e.g., The Uniform Accountancy Act (5th ed. 2007), available at http://www.aicpa.org/Advocacy/State/StateContactInfo/uaa/DownloadableDocuments/UAA_Fifth_Edition_January_2008.pdf.

⁷⁷⁵ See Deloitte Letter.

engagements; (3) compliance audits (e.g., opinions on compliance with federal, state, or local compliance requirements); and (4) review of debt coverage requirements on outstanding bonds and verification of calculations of escrow account requirements for advance refunding of bonds.⁷⁷⁶

Further, one commenter asked if the following services would be included or excluded from the accountant exemption: (1) the preparation of unaudited annual financial statements; (2) the provision of annual independent audits of a municipal entity; (3) the review and preparation of pro forma maturity schedules of principal and interest on proposed bond issues; (4) the provision of budget, audit, and other information to credit rating agencies; and (5) the preparation of the “front end” of offering statements and financial and demographic information.⁷⁷⁷

Several commenters also recommended extending the exemption to services that non-certified public accountants can provide but are subject to regulation and professional standards. For example, two commenters stated that advice related to Generally Accepted Accounting Principles (“GAAP”) and tax advice related to municipal securities and derivatives should also fall under the accountant exemption.⁷⁷⁸

In addition to these services, another commenter recommended, more generally, that the Commission extend the accountant exemption to the provision of non-attest services, such as certain tax and actuarial services.⁷⁷⁹ Two other commenters stated that accountants and other consultants who provide feasibility studies should not be considered municipal advisors.⁷⁸⁰

One commenter suggested that accountants of conduit borrowers should be exempt as

⁷⁷⁶ See AICPA Letter.

⁷⁷⁷ See RMAA Letter.

⁷⁷⁸ See KPMG Letter; AICPA Letter.

⁷⁷⁹ See Deloitte Letter.

⁷⁸⁰ See Gilmore & Bell Letter; State of Indiana Letter.

municipal advisors.⁷⁸¹

The Commission has carefully considered issues raised by commenters on the Proposal and is expanding the accountant exemption to include accountants providing audit or other attest services. Specifically, Rule 15Ba1-1(d)(3)(i), as adopted, provides that the term “municipal advisor” shall not include any accountant to the extent that the accountant is providing audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.⁷⁸² To the extent commenters requested clarification regarding whether specific activities would be exempted, such activities would be exempted if they constitute audit or other attest services,⁷⁸³ the preparation of financial statements, or the issuance of letters for underwriters for, or on behalf of, a municipal entity or obligated person.

The Commission believes that it is appropriate to include attest services in general, and not just audit services in particular, among the services that fall under the exemption. Both audit and other attest services are generally subject to regulation and professional standards,⁷⁸⁴ including independence requirements. Such independence requirements could potentially conflict with municipal advisors’ fiduciary duty to the municipal entities they advise.⁷⁸⁵ Accountants providing

⁷⁸¹ See South Lake County Hospital Letter.

⁷⁸² See Rule 15Ba1-1(d)(3)(i). In addition to adopting an expanded accountant exemption, as compared to the Proposal, the Commission is also making minor, non-substantive modifications to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions.

⁷⁸³ See supra notes 776-777.

⁷⁸⁴ See, e.g., AICPA Code of Professional Conduct ET 201.01, 202.01; see also AICPA Attestation Standards AT §101.06 (providing that “[a]ny professional service resulting in the expression of assurance must be performed under AICPA professional standards that provide for the expression of such assurance”).

⁷⁸⁵ See AICPA Attestation Standards AT §101.35 (“The practitioner must maintain independence in mental attitude in all matters relating to the engagement.”), 101.36 (“The

attest services are also required to meet general standards related to adequate technical training and proficiency, adequate knowledge of subject matter, suitability and availability of criteria, and the exercise of due professional care.⁷⁸⁶ Accordingly, the Commission believes that attest services, and not just audit services, exemplify the types of services typically performed by accountants that should not constitute the provision of advice within the meaning of Exchange Act Section 15B(e)(4)(A)(i).⁷⁸⁷

The Commission has considered whether various non-attest services should also be included in the accountant exemption, such as tax services (including arbitrage rebate services⁷⁸⁸) and advice relating to GAAP. While the Commission acknowledges that such non-attest services may represent activities provided by accountants, such services are neither necessarily provided by certified public accountants, nor necessarily subject to similar regulation and professional standards as attest services. The Commission does not believe it is appropriate to expand the exemption to cover activities or services that non-accountants could perform. Accordingly, the Commission is not including non-attest services in the accountant exemption. Nevertheless, a person providing non-attest services would only be required to register as a municipal advisor if such services are within the scope of the municipal advisory activities definition.

Several commenters noted that non-attest services should be included because accountants are already subject to other regulatory regimes, including those of state boards of accountancy, the

practitioner should maintain the intellectual honesty and impartiality necessary to reach an unbiased conclusion about the subject matter or the assertion. This is a cornerstone of the attest function.”).

⁷⁸⁶ See AICPA Attestation Standards AT §101.19 to 101.41.

⁷⁸⁷ See 15 U.S.C. 78o-4(e)(4)(A)(i).

⁷⁸⁸ See, e.g., *supra* note 773.

Commission, and the Public Company Accounting Oversight Board.⁷⁸⁹ The Commission does not believe those regimes, which are principally focused on the certified public accountant's provision of attest services,⁷⁹⁰ are sufficient to warrant further expansion of the accountant exemption.

As stated above and in the Proposal, accountants may provide advice to municipal entities, including advice about the structure, timing, terms, and other similar matters, and such advice may be the basis for an issuance of municipal securities. Therefore, the Commission does not believe that it is appropriate to exempt accountants from the definition of municipal advisor entirely. In addition, although attest services are often included as part of larger engagements, such as the examination of prospective financial information that is included as part of a feasibility study or acquisition study,⁷⁹¹ the accountant exemption includes only the attest portion of these engagements and does not cover all services that comprise such engagements.⁷⁹²

The Commission also notes that, according to the exemption provided by Rule 15Ba1-1(d)(3)(i), feasibility studies concerning the issuance of municipal securities or municipal financial products for which an accountant provides only audit or attest services would not require the

⁷⁸⁹ See, e.g., KPMG Letter.

⁷⁹⁰ See Sarbanes-Oxley Act of 2002, as amended by Section 982 of the Dodd-Frank Act. 15 U.S.C. 7201 et seq. See, specifically, Section 102 of the Sarbanes-Oxley Act of 2002. 15 U.S.C. 7212.

⁷⁹¹ See AICPA Attestation Standards AT §101.05.

⁷⁹² For example, the exemption would not apply to accountants that provide consulting services to municipal entities, including advice with respect to the structure, timing, terms, or other similar matters concerning an issuance of municipal securities or a municipal financial product, modeling future debt service coverage, suggesting future rate schedules, tax advice related to municipal securities and derivatives, and other non-attest services that constitute municipal advisory activities. The scope of the accountant exemption is different from the scope of the investment adviser exclusion because, unlike accountant engagements that include attest as well as other services, investment advice provided pursuant to an advisory agreement would be subject to the anti-fraud provisions of the Investment Advisers Act and a fiduciary duty. See *supra* note 671.

accountant to register as a municipal advisor.⁷⁹³

Lastly, with respect to accountants of obligated persons, the Commission notes that such accountants will be treated consistently with accountants of municipal entities.⁷⁹⁴

For these reasons, the Commission finds it consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt accountants from the definition of municipal advisor, subject to the limitations described above.

Attorneys Offering Legal Advice or Providing Services of a Traditional Legal Nature

Section 15B(e)(4)(C) of the Exchange Act excludes from the municipal advisor definition attorneys offering legal advice or providing services that are of a traditional legal nature. In the Proposal, the Commission proposed to interpret the exclusion to mean that the term “municipal advisor” shall not include any attorney, unless the attorney engages in municipal advisory activities other than offering legal advice or providing services that are of a traditional legal nature to a client of the attorney that is a municipal entity or obligated person.⁷⁹⁵ In addition, the Commission proposed to interpret advice from an attorney to his or her client with respect to the structure, timing, terms, and other similar matters concerning the issuance of municipal securities or municipal financial products to be services of a traditional legal nature, if such advice is provided within an attorney-client relationship specifically related to the issuance of municipal securities or such municipal financial products in conjunction with related legal advice.⁷⁹⁶ Further, in the

⁷⁹³ This is consistent with the approach for engineers that provide feasibility studies discussed below in this section.

⁷⁹⁴ See Rule 15Ba1-1(d)(3)(i). See also South Lake County Hospital Letter.

⁷⁹⁵ See Proposal, 76 FR at 833-834. See also proposed Rule 15Ba1-1(d)(2)(iv).

⁷⁹⁶ As an example, the Commission stated that advice comparing the structures, terms, or associated costs of the issuance of different types of securities or financial instruments (such

Proposal, the Commission indicated that, for example, the following advice would be considered to be services of a traditional legal nature: (1) advice comparing the structures, terms, or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering; (2) advice concerning the tax consequences of alternative financing structures; or (3) advice recommending a particular financing structure due to legal considerations, such as the limitations included in existing contracts and indentures to which the issuer is a party.⁷⁹⁷

The Commission, however, also stated in the Proposal that the following advice would not be services of a traditional legal nature: (1) advice concerning the financial feasibility of a project or a financing; (2) advice estimating or comparing the relative cost to maturity of an issuance, depending on various interest rate assumptions, or (3) advice recommending a particular structure as being financially advantageous under prevailing market conditions.⁷⁹⁸

The Commission requested comment on numerous aspects of the attorney exclusion, including whether the exclusion should only apply to legal services to an attorney's municipal or obligated person client; whether the Commission should provide an exclusion for all an attorney's activities as long as that attorney has an attorney-client relationship with the municipal entity or obligated person; and whether the meaning of the term "services of a traditional legal nature" is

as fixed rate bonds or variable rate demand obligations) given by an attorney hired to advise a municipal entity client embarking on a bond offering, would be considered to be services of a traditional legal nature, as would advice concerning the tax consequences of alternative financing structures or advice recommending a particular financing structure due to legal considerations such as the limitations included in existing contracts and indentures to which the issuer is a party. See Proposal, 76 FR at 834.

⁷⁹⁷ See id.

⁷⁹⁸ See id.

sufficiently clear.⁷⁹⁹

The Commission received approximately 20 comment letters regarding the attorney exclusion. Two commenters generally supported the proposed interpretation of the exclusion,⁸⁰⁰ although one of these commenters recommended that the Commission continue to refine the attorney exemption. The commenter suggested that exempted activity “consists of advice on legal matters such as the legal ramifications of such structure, timing, terms and other matters, the appropriate documentation thereof, and matters of a similar legal nature.”⁸⁰¹ Meanwhile, two other commenters stated that they did not support the exclusion because advice provided by attorneys to financing teams is generally financial in nature and represents municipal advisory activity.⁸⁰²

The majority of commenters did not support the proposed interpretation of the statutory exclusion, stating that the interpretation is too limited in scope.⁸⁰³ One commenter sought

⁷⁹⁹ See *id.*, at 837.

⁸⁰⁰ See MSRB Letter I (supporting the language of the attorney exclusion, “including in particular that such exclusion applies solely when an attorney is providing legal advice or services that are of a traditional legal nature to a client that is a municipal entity or obligated person”); letter from Robert Doty, AGFS, dated March 1, 2011 (“Doty Letter II”) (stating that: “[i]n the municipal securities market... it has long been recognized that attorneys providing other services are stepping beyond their recognized roles”).

⁸⁰¹ See MSRB Letter I.

⁸⁰² See letter from John J. Haas, President, Ranson Financial Consultants, LLC, dated February 17, 2011 (“Ranson Financial Consultants Letter”) (“How an attorney can give advice on whether an entity should be rated or not, and/or to walk and [sic] entity through the rating process without being a registered Municipal Advisor is not understandable.... The Commission, in principal [sic], is allowing bond attorney and local attorneys to continue to act as Municipal Advisors without the requirement to be registered as one.”); Acacia Financial Group Letter (stating that attorney advice comparing the structures, terms or associated costs of issuance of different types of securities or financial instruments (such as fixed rate bonds or variable rate demand obligations) is not service that should be included in the definition of traditional legal services as it is at the heart of the advice that a municipal advisor provides and is directly financial in nature).

⁸⁰³ See, e.g., NABL Letter (“[A]ttorneys have an obligation to give frank advice to their clients and...not to limit their advice to strictly legal issues if their clients otherwise would be prejudiced.... The attorney should be free to discuss the possible pros and cons of different

clarification that the statutory exclusion for attorneys covers all “legal advice” and that the “traditional legal nature” limitation applies only to “services” provided by attorneys.⁸⁰⁴ Some commenters noted the difficulty of separating “services of a traditional legal nature” from advice that could be considered “financial” in nature.⁸⁰⁵ These commenters also noted that roles of outside counsel are not neatly compartmentalized, and that municipal clients benefit from attorneys’ “financial” advice.⁸⁰⁶ Other commenters indicated that attorneys should feel free to provide advice to municipal entities and obligated persons without fear of falling subject to municipal advisor

transaction structures if more than one is legally authorized, including practical consequences that are financial in nature.... [T]he exclusion for attorneys should not be afforded only for advice given to clients, but should apply to all advice that one must be licensed as an attorney to give or that is given as part of a traditional legal nature, or that is incidental to such services.”); letter from Wm. Raymond Manning, President & CEO, Manning Architects, dated February 21, 2011 (“Manning Architects Letter”) (“[B]y requiring attorneys for the government entity to register if they stray beyond pure legal advice . . . the SEC will be chilling some of the most effective advice that a lawyer can provide. Attorneys often challenge the analysis of experts and other advisors to their clients and if that challenge strays beyond the purely legal, then those lawyers may be fearful to fully and ably represent their clients. The Commission should consider carefully if chilling a lawyer’s advice to a client serves the interests it seeks to protect.”); Sherman & Howard Letter (“We believe that in so limiting the exemption for attorneys, the Commission is going beyond what Congress intended, as shown by the language of the Act, and beyond what Congress has authorized.”).

⁸⁰⁴ See NABL Letter.

⁸⁰⁵ See, e.g., letter from Joe B. Allen, Allen Boone Humphries Robinson LLP, dated February 21, 2011 (“Allen Boone Humphries Robinson Letter”) (“‘[S]ervices that are of a traditional legal nature’ is vague, especially for bond counsel. Bond counsel’s consultation with a client necessarily includes ‘structure, timing, terms and other similar matters.’”).

⁸⁰⁶ See, e.g., American Municipal Power Letter; Squire Sanders & Dempsey Letter (“[C]ertain advice and services the Commission may identify as financial in nature are in fact an integral part of and inseparable from legal advice and services that attorneys have traditionally been expected to provide to their clients in connection with municipal finance transactions” and attorneys should be excluded from the application of the proposed rules “when the attorney is providing legal advice or services, including ancillary financial or related advice or services relating to a municipal finance transaction or municipal financial product, or providing information concerning developments in the municipal marketplace.”); letter from Edward G. Henifin, General Manager and Steven G. de Mik, Director of Finance, Hampton Roads Sanitation District, dated February 22, 2011 (“Hampton Roads Sanitation District Letter”).

registration.⁸⁰⁷ Some commenters questioned whether registration of attorneys was necessary, even if they provided financial advice. These commenters reasoned that attorneys already have a fiduciary duty to their clients, in addition to state ethics laws and well-established disciplinary processes for those who breach their fiduciary duties.⁸⁰⁸

Several commenters stated that the attorney exclusion should not depend on a pre-existing attorney-client relationship.⁸⁰⁹ Some commenters generally noted that attorneys are often expected to provide counsel to all financing team members, and not only to the attorney's clients that are municipal entities and obligated persons.⁸¹⁰ One commenter stated that "others in the bond issue clearly rely upon the legal advice of bond counsel, including the . . . obligated person in a conduit financing. The very role of bond counsel is to provide advice to the entire group relative to the state law authority for the issuance of the bonds (the approving legal opinion) and the federal and state tax status of the interest on the bonds."⁸¹¹ Similarly, another commenter noted that bond counsel

⁸⁰⁷ See, e.g., NABL Letter; American Municipal Power Letter; Hampton Roads Sanitation District Letter; Rose Letter; letter from Susan Combs, Texas Comptroller of Public Accounts, dated February 22, 2011 ("Texas Comptroller of Public Accounts Letter").

⁸⁰⁸ See, e.g., NABL Letter; State of Indiana Letter; Squire Sanders & Dempsey Letter.

⁸⁰⁹ See, e.g., State of Indiana Letter ("Not all attorneys who are integrally involved in a typical municipal finance transaction have an attorney/client relationship with the municipal entity issuing the bonds. . . . The responsibilities of these counsel are relatively standard at the core, but can be varied in accordance with the agreements of the various parties to the transaction to produce the most efficient and effective final product for the municipal entity. . . . All these attorneys need absolute comfort that their contributions will not be considered municipal advisory services which are outside the scope of the exemption simply because they are not engaged by the municipal entity."); Squire Sanders & Dempsey Letter (stating that imposing a federal fiduciary duty upon an attorney with respect to a non-client municipal entity or obligated person will create potential ethical dilemmas regarding conflicts of interest rules under state professional conduct rules that already impose a prior competing fiduciary duty in favor of the attorney's client); Chapman and Cutler Letter; Gilmore & Bell Letter; Sherman & Howard Letter; and Texas Comptroller of Public Accounts Letter.

⁸¹⁰ See, e.g., Gilmore & Bell Letter; NABL Letter.

⁸¹¹ See Gilmore & Bell Letter.

has at times been described as representing “the transaction” rather than any particular party to an offering.⁸¹² Accordingly, the commenter asked the Commission to clarify if in such instance the bond counsel would be viewed as having a municipal entity or obligated person as a client. Finally, commenters also stated that attorneys representing parties other than municipal entities and obligated persons, such as underwriter’s counsel, are called upon to provide their views or advice to the entire team, yet the attorney exclusion, as proposed, would not pertain to these attorneys.⁸¹³

Some commenters noted that, if an attorney is required to register as a municipal advisor in order to provide advice to non-clients on the financing team, the resulting municipal advisory relationship would create a fiduciary duty for the attorney to the non-client. According to these commenters, such a fiduciary duty would directly conflict with the attorney’s pre-existing fiduciary duties to its clients, and thus potentially infringe upon state rules of professional responsibility.⁸¹⁴

Other commenters indicated that many law firms provide to both clients and non-clients educational material about municipal bond financings through newsletters and emails and expressed concern that such activity would not be covered under the proposed interpretation of the attorney exclusion.⁸¹⁵ Moreover, some commenters indicated that attorneys typically provide legal advice to a client, both before a formal attorney-client relationship is formed and after the attorney-client relationship has ended (e.g., upon the closing of a bond transaction).⁸¹⁶ One commenter noted that

⁸¹² See MSRB Letter.

⁸¹³ See, e.g., State of Indiana Letter; Squire Sanders & Dempsey Letter; Sherman & Howard Letter; NABL Letter.

⁸¹⁴ See, e.g., NABL Letter (recommending that the Commission clarify the attorney exclusion to prevent the imposition of fiduciary duties to issuers that are inconsistent with the duties of lawyers under their state professional conduct rules); Sherman & Howard Letter; Squire Sanders & Dempsey Letter.

⁸¹⁵ See, e.g., NABL Letter; Squire Sanders & Dempsey Letter; Sherman & Howard Letter.

⁸¹⁶ See, e.g., State of Indiana Letter; Squire Sanders & Dempsey Letter; NABL Letter.

it is often asked to provide its view or advice on matters relating to prior transactions for which it served as bond counsel or in another legal capacity.⁸¹⁷

The Commission has carefully considered issues raised by commenters on the Proposal and is modifying its interpretation of the statutory attorney exclusion to provide that attorneys are excluded from the definition of municipal advisor to the extent that the attorney is offering legal advice or providing services that are of a traditional legal nature with respect to the issuance of municipal securities or municipal financial products to a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction. The Commission recognizes that legal advice and services of a traditional legal nature in the area of municipal finance inherently involves a financial advice component. By contrast, to the extent an attorney represents himself or herself as a financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products, the attorney is not excluded with respect to such financial activities under Rule 15Ba1-1(d)(2)(iv) as this type of advice and services would be outside the statutory exclusion.⁸¹⁸

By revising its interpretation of the exclusion in this way and providing guidance, the Commission intends to clarify that all legal advice or services of a traditional legal nature involving the issuance of municipal securities or a municipal financial product are covered under the attorney exclusion. This approach addresses many comments received by the Commission noting the negative impacts of requiring attorneys in municipal finance transactions to limit their advice and services to those related strictly to legal issues and describing the difficulty involved in complying

⁸¹⁷ See Squire Sanders & Dempsey Letter.

⁸¹⁸ Rule 15Ba1-1(d)(2)(iv). In addition to the modifications discussed above, the Commission is adopting the attorney exclusion with minor, non-substantive modifications to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions.

with such limitations given the nature of the legal advice and services attorneys traditionally have provided, and are expected to provide, in municipal finance transactions.⁸¹⁹ In addition, if another participant in the issuance or transaction, who is not a client of the attorney, receives and acts upon the legal advice the attorney provides to its client, the attorney will not have to register as a municipal advisor. In this situation, the attorney is still only advising its client, even if the advice affects the actions of other participants in the transaction. This approach addresses commenters' concerns that bond counsel and other attorneys routinely share their views with non-client parties in a municipal finance transaction in the context of working group discussions.⁸²⁰ Because such attorney would not be required to register as a municipal advisor, he or she would not be subject to an additional fiduciary duty that could potentially conflict with the attorney's existing fiduciary duty to his or her client.⁸²¹ By revising its interpretation of the exclusion to include a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction, the Commission intends to be responsive to the comments received that attorneys representing participants other than a municipal entity or obligated person should be included in the exemption.⁸²²

If, however, in connection with the issuance of municipal securities or municipal financial products, an attorney represents himself or herself as a "financial advisor" or "financial expert," the

⁸¹⁹ See supra notes 803-807 and accompanying text.

⁸²⁰ See supra notes 809-813 and accompanying text (discussing comments on the role of bond counsel in a municipal securities transaction and the expectation that attorneys share their advice with the financing team).

⁸²¹ See supra notes 809 and 814 and accompanying text (discussing comments on potentially conflicting duties if an attorney is not counsel to the municipal entity or obligated person, but would be required to register as a municipal advisor to the extent they provide advice on the transaction).

⁸²² See supra note 813 and accompanying text (discussing role of underwriter's counsel in a municipal securities transaction).

attorney will be required to register as a municipal advisor if the attorney engages in municipal advisory activities. As provided in the Proposal, the Commission would consider an attorney to be representing himself or herself as a “financial advisor” or “financial expert” if the attorney provides advice that is primarily financial in nature, such as: (1) the financial feasibility of a project or financing; (2) advice estimating or comparing the relative cost to maturity of an issuance of municipal securities depending on various interest rate assumptions; (3) advice recommending a particular structure as being financially advantageous under prevailing market conditions; (4) advice regarding the financial aspects of pursuing a competitive sale versus a negotiated sale; and (5) other types of financial advice that are not related to the attorney’s provision of legal advice and services of a traditional legal nature.⁸²³ In these examples, attorneys would be providing services that are primarily financial in nature and that are beyond their traditional legal roles and outside of the statutory exclusion. The Commission believes that if an attorney represents himself or herself as a financial advisor or expert and engages in municipal advisory activities, the attorney is acting outside the scope of the statutory exclusion (i.e., the attorney is not offering legal advice or providing services that are of a traditional legal nature).⁸²⁴

The Commission recognizes that analysis, discussion, negotiation, and advice regarding the legal ramifications of the structure, timing, terms, and other provisions of a financial transaction by an attorney to a client are essential to the development of a plan of finance. In turn, these services become, among other things, the basis for a transaction’s basic legal documents, the preparation and delivery of the official statement or other disclosure document that describes the material terms and provisions of the transaction, the preparation of the various closing certificates that embody the terms and provisions of the transaction, the preparation and delivery of the attorney’s legal opinion

⁸²³ See Proposal, 76 FR at 834.

⁸²⁴ See 15 U.S.C. 78o-4(e)(4)(C).

with respect to the transaction that is relied upon by the client and investors in the municipal securities marketplace, and advice and documentation with respect to post-closing policies and procedures that are necessary for compliance with federal and state law during the term of the municipal securities or municipal financial product. Similarly, attorneys often provide legal advice and related legal services regarding Federal tax requirements for issues of municipal securities, such as, for example, legal advice and services in determining ongoing compliance of an issue of municipal securities with the Federal tax law requirement to “rebate” excess arbitrage earnings on investments of tax-exempt bond proceeds to the Federal Government at periodic intervals during the term of the bond issue. The legal advice and legal services described in this paragraph would be within the attorney exclusion to the municipal advisor definition. Thus, attorneys providing this advice or these services would not be required to register as municipal advisors.

In addition, the Commission recognizes that attorneys seeking to represent municipal entities and obligated persons are often required to respond to RFPs and RFQs, and to participate in interviews during which they are requested to, and do, offer advice regarding the structure, timing, terms, and other provisions of a proposed offering of municipal securities or municipal financial products before being retained as counsel and that these requests may not be limited to legal questions. As discussed above in Section III.A.1.c.ii, the Commission does not believe that a response to an RFP or RFQ is advice with respect to the issuance of municipal securities or municipal financial products, and the Commission is adopting an exemption from the definition of municipal advisor for any person providing a response to an RFP or RFQ, provided such person does not receive separate direct or indirect compensation for advice provided as part of such RFP or RFQ. The Commission notes that responses to RFPs and RFQs are provided at the request of the municipal entity or obligated person. Thus, anyone responding to an RFP or RFQ in accordance

with the exemption, including an attorney, will not have to register as a municipal advisor.

The Commission also recognizes that attorneys who represent municipal entities or obligated persons with respect to the issuance of municipal securities or municipal financial products are often asked to provide interpretation of the provisions of the legal documents throughout the term of the municipal securities or municipal financial products, including before and after the formal attorney-client relationship with respect to the issuance or municipal financial product exists.⁸²⁵ Although the attorney-client relationship may not be in existence, if the advice is with respect to an issuance or transaction in connection with which the municipal entity was or will be a client of the attorney, the Commission considers such advice to be “to a client.” Accordingly, such advice will not require the attorney to register as a municipal advisor.

Finally, as discussed above, the Commission is clarifying that provision of general information, including the provision of educational materials to an attorney’s clients and non-clients does not constitute advice, and therefore, will not require the attorney to register as a municipal advisor.⁸²⁶

Engineers Providing Engineering Advice

Section 15B(e)(4)(C) of the Exchange Act excludes engineers providing engineering advice from the municipal advisor definition. In the Proposal, the Commission proposed to interpret this exclusion to mean that the term “municipal advisor” shall not include “[a]ny engineer, unless the engineer engages in municipal advisory activities other than providing engineering advice.”⁸²⁷ In the Proposal, the Commission stated that costing out engineering alternatives would not subject an

⁸²⁵ See supra notes 816-817 and accompanying text.

⁸²⁶ See supra Section III.A.1.b.i. (discussing the provision of general information) and note 815 and accompanying text.

⁸²⁷ See proposed Rule 15Ba1-1(d)(2)(v).

engineer to registration because such activity would be considered “engineering advice.”⁸²⁸ The Commission, however, further proposed that this exclusion would not include circumstances in which the engineer is engaging in municipal advisory activities, including cash flow modeling or the provision of information and educational materials relating to municipal financial products or the issuance of municipal securities, even if those activities are incidental to the provision of engineering advice.⁸²⁹ The Commission also proposed that the exclusion would not include preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that provide analysis beyond the engineering aspects of the project. Therefore, under the Proposal, engineers engaging in the types of activities described above would have been required to register as a municipal advisor.⁸³⁰

The Commission requested comment on whether it should expand its proposed interpretation of the statutory exclusion beyond engineers providing engineering advice.⁸³¹ The Commission also asked how the term “engineering advice” should be interpreted and whether the engineering exclusion should include circumstances in which the engineer is preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that include analysis beyond the engineering aspects of the project.⁸³²

The Commission received approximately 32 comment letters regarding the proposed interpretation of the statutory engineering exclusion. Some commenters supported the proposed

⁸²⁸ See Proposal, 76 FR at 834.

⁸²⁹ See id.

⁸³⁰ See id.

⁸³¹ See id., at 837.

⁸³² See id.

interpretation of the exclusion.⁸³³ One commenter stated that the Commission ignored the statutory exclusion altogether.⁸³⁴ Most commenters, however, suggested that the Commission's proposed interpretation of the engineering exclusion was too narrow and that activities such as cash flow analyses and feasibility studies represent an integral part of an engineer's services.⁸³⁵ Some

⁸³³ See MSRB Letter ("The MSRB supports the language of proposed Rule 15Ba1-1(d)(2)(v) regarding the exclusion for engineers, including in particular that such exclusion applies solely when an engineer is providing engineering advice. Thus, to the extent that an engineer provides advice with respect to municipal financial products, the issuance of municipal securities or other financing structure that is not considered engineering advice (such as advice on how to structure an issue to cover the costs of a project), the engineer would be considered a municipal advisor.") and Acacia Financial Group Letter.

⁸³⁴ See letter from Spencer Bachus, Chairman, United States House of Representatives, Committee on Financial Services, dated February 23, 2011 ("Bachus Letter").

⁸³⁵ See, e.g., letters from David King, President, Virginia/DC/Maryland Chapter, American Public Works Association, dated February 16, 2011 ("APWA Letter") (stating that engineering professional services for infrastructure evaluations, studies, and design contracts by their very nature involve and require cost analyses); David A. Raymond, President & CEO, American Council of Engineering Companies, dated February 18, 2011 ("ACEC Letter") (stating that in many cases, analysis of cash flow requirements is inextricable from the design of an engineering project, and that engineers often provide guidance regarding alternative phasing of projects to match available revenues or to maximize the infrastructure given limited resources); Parsons Brinckerhoff Inc., dated February 18, 2011 ("Parsons Brinckerhoff Letter") (noting that in the engineering context, cash-flow modeling often involves (1) a cost-loaded design and construction schedule, or (2) a record-keeping cash flow analysis that facilitates periodic reporting); Kutak Rock Letter (stating that the Commission should treat an engineer's preparation of a project feasibility study as a part of routine engineering advice); Honeywell Letter (stating that "the provision of such [feasibility studies and other activities that currently do not fall under the engineer exemption] is simply necessary for the municipality to initially understand the costs associated with a proposed engineering project and the range of potential options for financing such project, not to assist it in specifically evaluating or recommending financing options"); NAESCO Letter (stating that "engineering includes a continuum of services... including the provision of general and specific information about financing options for energy projects, preparation of studies including information about cash-flows and other financial projections, and identification of, and introduction to brokers, dealers, municipal advisors (including financial advisors) and municipal securities dealers with expertise in financing energy service projects"); letter from David A. Raymond, President & CEO, HNTB Holdings Ltd, dated February 22, 2011 ("HNTB Holdings Letter") (stating that "[t]he conception of engineering advice expressed in the proposing release does not reflect engineering as it is practiced today, particularly in the context of infrastructure projects, and excludes many activities that are intrinsic to the profession of engineering").

commenters suggested that the terms “cash flow analysis” and “feasibility studies” have very specific meanings within the engineering industry.⁸³⁶ One commenter specifically recommended that engineering firms reporting on the condition of water and sewer systems should be excluded from the definition of municipal advisor.⁸³⁷ Another commenter noted that the Brooks Act,⁸³⁸ which was enacted in 1972, delineates what constitutes “engineering services.”⁸³⁹

A number of commenters highlighted energy services and solar energy companies, in particular, as a sector of the engineering industry that would be especially affected by the Commission’s proposed interpretation.⁸⁴⁰ Three commenters suggested that energy service companies should be able to provide disclosure statements to municipalities without being

⁸³⁶ See, e.g., Parsons Brinkerhoff Letter.

⁸³⁷ See letter from Mark Page, Director of Management and Budget, The City of New York, dated February 22, 2011 (“NYC Management and Budget Letter”). This commenter also stated that sewer rate consultants issuing reports relating to the sufficiency of water and sewer rates to satisfy obligations of a city’s water authority are not providing advice relating to municipal securities or municipal financial products; and that rate consultants providing advice regarding rates and revenues should, like engineers providing engineering advice, be excluded from the definition of “municipal advisor.”

⁸³⁸ 40 U.S.C. 1102. The Brooks Act is a federal law that sets forth policies and certain procedures for selection by the federal government of engineering and architecture firms and related services.

⁸³⁹ See letter from Mark A. Casso, President, Construction Industry Round Table, dated February 22, 2011 (“Construction Industry Round Table Letter”).

⁸⁴⁰ See, e.g., letters from Senator Daniel Coats, Congressmen Dan Burton, Larry Bucshon, Todd Rokita, and Todd Young, dated May 27, 2011 (“Senator Coats et al. Letter”) (highlighting the “unnecessarily dire impacts” that the proposed rule would have on energy services companies); Senator Landrieu, Senator Coons, and Chairman Bingaman, United States Senate Committee on Energy and Natural Resources, dated June 22, 2011 (“Senator Landrieu et al. Letter”) (stating that “the Commission’s proposal undermines [the engineering] exemption by suggesting that any [energy services company] that so much as provides a cash flow analysis or feasibility study to a municipality would not be providing ‘engineering advice’ and would therefore be subject to registration as a ‘municipal advisor’”); Honeywell Letter; letter from Katherine Gensler, Director, Regulatory Affairs, and Emily J. Duncan, Policy Specialist, Solar Energy Industries Association, dated November 9, 2011 (“Solar Energy Industries Association Letter”).

considered municipal advisors,⁸⁴¹ and one commenter suggested that solar energy companies acting in an engineering role and providing just information and education related to cost savings integral to solar engineering should be included in the exemption.⁸⁴²

The Commission has carefully considered the issues raised by commenters on the Proposal and is adopting its interpretation of the statutory engineering exclusion, substantially as proposed, to provide that engineers are excluded from the definition of municipal advisor “to the extent that the engineer is providing engineering advice,”⁸⁴³ with modifications and clarifications regarding the scope of its interpretation of the statutory exclusion in response to public comment.⁸⁴⁴ In general, the Commission believes activities within the scope of the engineering exclusion may include feasibility studies, cash flow analyses, and similar activities; provided, however, that the engineering exclusion does not cover activities in which an engineer provides advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities, as discussed further herein.

Activities within the scope of the engineering exclusion include, among other things, certain activities discussed below. The Commission believes that this exclusion covers an engineer’s provision of certain information to its client regarding a project schedule and anticipated funding requirements of the project. The Commission further believes that the provision of engineering

⁸⁴¹ See NAESCO Letter; Honeywell Letter; Chevron Letter.

⁸⁴² See Solar Energy Industries Association Letter. For purposes of the engineering exclusion discussion, the Commission treats energy services and solar energy companies as engineering companies.

⁸⁴³ See Rule 15Ba1-1(d)(2)(v). The Commission is adopting the engineering exclusion with minor, non-substantive modifications from the version proposed to provide greater clarity and consistency with other organizational changes the Commission is making to the exclusions and exemptions.

⁸⁴⁴ See supra notes 835-836 and accompanying text (discussing comments related to cash flow analyses and feasibility studies).

feasibility studies that include certain types of projections, such as projections of output capacity, utility project rates, project market demand, or project revenues that are based on considerations involving engineering aspects of a project are within the scope of the engineering exception.

For example,⁸⁴⁵ an engineer who provides funding schedules and cash flow models that anticipate the need for funding at certain junctures in a project or engineering feasibility studies based on analysis of engineering aspects of the project will fall within the Commission's interpretation of the statutory engineering exclusion from the municipal advisor definition. An engineering feasibility study, for example, might include a discussion of how much power might be generated by the installation of solar panels, and such a discussion would not constitute a municipal advisory activity. Similarly, recommendations about how to increase power output based on factors such as the placement of the panels or the number of panels would also not constitute a municipal advisory activity. Moreover, an engineer might provide estimates of water delivery capacity or a road's traffic capacity without engaging in municipal advisory activity. Engineers who report on the physical condition of infrastructure, such as roads, bridges or water and sewer systems, would also not be engaged in municipal advisor activity.⁸⁴⁶ Absent other facts and circumstances which indicate that an engineer is providing advice to a municipal entity or obligated person regarding the issuance of municipal securities, an engineer's use of assumptions provided by a municipal entity or

⁸⁴⁵ See, e.g., supra note 835 and accompanying text.

⁸⁴⁶ See supra note 837. Whether a rate consultant providing advice regarding rates and revenues would be a "municipal advisor" will depend upon the facts and circumstances. For example, if such consultant provides advice on whether certain rates and revenues would support debt service on an issue of municipal securities, such activity would be municipal advisory activity that would subject the consultant to the registration requirement. Although the Commission is not adopting an exemption for persons performing such activities, the Commission notes that like all persons, such entities could apply for no-action or exemptive relief. As noted above, when requesting exemptive relief pursuant to Section 15B(a)(4), a person may follow the procedures for requesting exemptive relief pursuant to Section 36 of the Exchange Act, as set forth in Rule 0-12 under the Exchange Act. See 17 CFR 240.0-12.

obligated person regarding interest rates or debt levels in preparing an engineering feasibility study or cash flow analysis alone will not result in municipal advisory activity.

With respect to services related to cash flow analysis, a municipal entity might seek input from an engineering company about whether a project could be accomplished with estimated available funding, including the timing of such funding. As noted above, engineers that provide input about the anticipated funding requirements of a project would not be engaging in a municipal advisory activity.⁸⁴⁷ Thus, an engineer could advise a municipal entity about whether a project could be safely or reliably completed with the available funds and provide engineering advice about other alternative projects, cost estimates, or funding schedules without engaging in municipal advisory activity. Further, the Commission would consider an engineering company that informs a municipal entity or obligated person of potential tax savings, discounts, or rebates on supplies to be acting within the scope of the engineering exclusion.

By contrast, however, activities of engineers are outside the scope of the engineering exclusion if they include advice to a municipal entity or obligated person regarding municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such products or issuances. For example, an engineer that is engaged by a municipal entity or obligated person to prepare revenue projections to support the structure of an issuance of municipal securities would be providing advice outside the scope of the engineering exclusion and would be engaging in municipal advisory activity. Further, while the inclusion of an engineering feasibility study in an official statement or other offering document for an issuance of municipal securities alone does not cause an engineer's activities with respect to the feasibility study to be treated as municipal advisory activity, other facts

⁸⁴⁷ In the Proposal, the Commission gave as an example of activity that would be engineering advice the costing out of engineering alternatives. See Proposal, 76 FR at 834.

and circumstances, such as the inclusion of revenue projections and debt service coverage calculations in the feasibility study, may suggest municipal advisory activity.

Engineering companies may also provide advice to their clients regarding financing of products and services delivered to such clients. As noted previously, the Commission is clarifying that provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including general information with respect to financing options) would not be municipal advisory activity.⁸⁴⁸ Depending on all the facts and circumstances, however, the provision of information describing financing alternatives that may meet the needs of a municipal entity or obligated person may be considered a recommendation with respect to municipal financial products or the issuance of municipal securities that would be municipal advisory activity.⁸⁴⁹

One commenter stated that another standard service offered by engineers involves the provision of introductions of municipal entities to brokers, dealers, municipal advisors, and municipal securities dealers and that such introductions should be within the engineering exclusion.⁸⁵⁰ One commenter recommended that the Commission “refine its approach” to register only those solicitors that receive compensation for introductions to funding sources.⁸⁵¹

The Commission does not believe it is necessary or appropriate to provide a separate exemption for engineers engaging in introductions. The Commission notes that introductions provided by engineers would be subject to the same analysis as any other “solicitation of a

⁸⁴⁸ See supra note 168 and accompanying text. See also supra Section III.A.1.b.i. (providing guidance on the term “advice” and discussing the provision of general information).

⁸⁴⁹ See supra Section III.A.1.b.i. (providing guidance on the term “advice” and discussing the provision of general information).

⁸⁵⁰ See NAESCO Letter.

⁸⁵¹ See letter from Jennifer Schafer, Coordinator, Federal Performance Contracting Coalition, dated February 22, 2011 (“Federal Performance Contracting Coalition Letter”).

municipal entity or obligated person.”⁸⁵² Thus, if an introduction does not result in direct or indirect compensation to the engineer, the introduction will not constitute such a solicitation and the engineer will not be required to register as a municipal advisor.

Finally, as discussed previously, the Commission is providing an exemption for advice given to municipal entities and obligated persons in circumstances in which the municipal entity or obligated person separately is represented by an independent registered municipal advisor.⁸⁵³ Engineers may provide advice beyond engineering advice when such an independent registered municipal advisor is present without triggering the requirement to register as a municipal advisor.

Vendors Generally

Some commenters who commented on other aspects of the Proposal also provided information with respect to purchases from vendors made by municipal entities that could potentially involve the issuance of municipal securities. One commenter stated that most municipalities, for example, do not purchase a solar installation upfront, but rather enter into a purchase or lease agreement with the solar company.⁸⁵⁴ Another commenter referenced lease-leaseback arrangements and preferred provider or performance contract arrangements.⁸⁵⁵

The Commission notes that municipal entities and obligated persons purchase a wide range of products from vendors, including, for example, computers, office furnishings and supplies, car, truck and school bus fleets, telephone systems, and a multitude of other products. The Commission believes that the activities of vendors in advertising, promoting, and selling their products to

⁸⁵² See supra Section III.A.1.b.x. (discussing “solicitation of a municipal entity or obligated person”).

⁸⁵³ See supra Section III.A.1.c.iii. (discussing the exemption when a “municipal entity or obligated person represented by an independent municipal advisor”).

⁸⁵⁴ See Solar Energy Industries Association Letter.

⁸⁵⁵ See NAESCO Letter.

municipal entities are generally outside the scope of municipal advisory activities because these activities generally do not involve advice with respect to the issuance of municipal securities or municipal financial products.⁸⁵⁶

The Commission understands, however, that sometimes municipal entities and obligated persons may finance the purchase of products from vendors through the use of instruments such as installment purchase contracts, installment sale contracts, lease-purchase agreements, or loans. The Commission notes that the provision of advice and recommendations by vendors (or any other person including, for example, lease financing companies affiliated with vendors) to municipal entity or obligated person clients regarding specific financing options for the purchase of products could, depending on the facts and circumstances, be a municipal advisory activity. For example, certain financings, depending on how they are structured, could constitute the issuance of a security⁸⁵⁷ by a municipal entity and, therefore, could constitute the issuance of a municipal security.⁸⁵⁸ The provision of advice and recommendations regarding such an issuance would constitute municipal advisory activity unless an exclusion or exemption applies.

Actuaries

Section 15B(e)(4)(C) of the Exchange Act does not include an exclusion for actuaries from the municipal advisor definition. The Commission received approximately five comment letters concerning a possible exemption for actuaries.⁸⁵⁹

⁸⁵⁶ See supra note 143 and accompanying text (discussing the term “municipal advisory activities”).

⁸⁵⁷ See Reves v. Ernst & Young, Inc., 494 U.S. 56 (1990), where the U.S. Supreme Court established a multi-factor test to distinguish securities from instruments that are not securities.

⁸⁵⁸ See 15 U.S.C. 78c(a)(29) (defining “municipal securities”).

⁸⁵⁹ See, e.g., Fraser Stryker Letter; State of Indiana Letter; letter from Maria Sarli, Resource Actuary, and Lynn Cook, Towers Watson, dated February 22, 2011 (“Towers Watson

One commenter stated that if the term “investment strategies” extends beyond proceeds of municipal securities to include funds held in pension plans, actuarial services for pension plans would potentially require municipal advisor registration.⁸⁶⁰ The same commenter recommended that the Commission exempt from the municipal advisor definition enrolled actuaries and members of the five U.S.-based actuarial organizations that have adopted the actuarial Code of Professional Conduct (including the American Academy of Actuaries, the American Society of Pension Professionals and Actuaries, the Casualty Actuarial Society, the Conference of Consulting Actuaries, and the Society of Actuaries).⁸⁶¹ This commenter suggested that such exemption should apply to actuaries providing actuarial services that are governed by the Actuarial Standards of Practice and the Code of Professional Conduct.⁸⁶² Further, another commenter recommended that actuaries providing actuarial services to public pension plans, 403(b) plans, and 457(b) plans generally should also be exempt.⁸⁶³ Additionally, one commenter recommended that the Commission clarify whether actuaries who perform actuarial and/or consulting services for certain other governmental benefit plans and trusts, such as retiree medical plans, voluntary employee benefit associations and related trusts (“VEBAs”), and other post-employment benefits (“OPEB”) plans and trusts would be municipal advisors.⁸⁶⁴ Finally, another commenter stated that actuarial studies should not be considered to be “municipal advisory activities.”⁸⁶⁵

Letter”); American Society of Pension Professionals Letter; and American Academy of Actuaries Letter.

⁸⁶⁰ See American Academy of Actuaries Letter.

⁸⁶¹ See id.

⁸⁶² See id.

⁸⁶³ See Towers Watson Letter.

⁸⁶⁴ See Fraser Stryker Letter.

⁸⁶⁵ See State of Indiana Letter.

For the reasons discussed below, the Commission does not believe that it is necessary or appropriate to exempt actuaries from the municipal advisor registration regime as suggested by commenters. However, as discussed in other sections of the release, the Commission is making several changes to the final rule text and its interpretations that would also address some of the concerns raised by commenters. As discussed above in Section III.A.1.b.viii, the Commission is exempting from the definition of municipal advisor persons that provide advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. Thus, persons who provide advice with respect to a plan, such as a public employee benefit plan (including 403(b) plans and 457(b) plans, to the extent the plans do not contain proceeds of municipal securities) will not be required to register as municipal advisors. To the extent that a plan contains proceeds of municipal securities, the Commission understands that an actuary's service does not generally involve advice with respect to the investment of such proceeds. As such, an actuary's services with respect to such plan generally would not constitute municipal advisory activities and would not require the actuary to register as a municipal advisor.

In addition, the provision of actuarial studies that are used as the basis for a municipal entity to engage in a financing will not be considered a municipal advisory activity if the actuarial study only uses client-provided investment return assumptions and does not make any recommendations about how such municipal entity might address an unfunded liability, including a discussion of the advisability of an issuance of municipal securities or a municipal financial product. Further, in order for the provision of actuarial studies that form the basis for disclosure with respect to an issuance of municipal securities to not constitute a municipal advisory activity, it must not include a discussion of the advisability of an issuance of municipal securities or a municipal financial

product. Such actuarial studies only provide calculations using data from the client and do not involve the provision of any advice. An actuary may be deemed to be engaged in a municipal advisory activity if the facts and circumstances indicate that the actuary tailored its actuarial study to support an issuance of municipal securities or to support entering into a municipal financial product.

viii. Banks

In the Proposal, the Commission discussed a commenter's suggestion that the Commission exempt from the definition of "municipal advisor" banks providing "traditional banking services" and banks and trust companies that provide "investment advisory services."⁸⁶⁶ The Commission noted that Congress included in the statutory definition of municipal advisor a limited number of exclusions, and such exclusions did not include banks in any capacity.⁸⁶⁷ In addition, as discussed more fully above,⁸⁶⁸ the Commission proposed to interpret the term "investment strategies" to include "plans, programs, or pools of assets that invest in funds held by or on behalf of a municipal

⁸⁶⁶ See letter from Carolyn Walsh, Vice President and Senior Counsel, Center for Securities, Trust and Investments, American Bankers Association, and Deputy General Counsel, ABA Securities Association, dated October 13, 2010. See also Proposal, 76 FR at 834, notes 143-144 and accompanying text. As support, this commenter stated that banks are currently well-regulated and banks that offer trustee services are subject to rigorous and frequent examination, as well as extensive regulation by the various federal or state banking regulators.

The commenter also listed the following activities as examples of the types of activities in which bank and trust companies engage: providing direct loans, checking accounts, and CDs; responding to RFPs regarding investment products offered by the bank, such as interest bearing deposits, money market mutual funds, or other exempt securities; investing in securities issued by municipalities and providing credit, or through their affiliates, underwriting services to municipalities (such as when the municipality wants to buy a fire truck or build a school); providing fiduciary services to municipal entities (such as by managing investment accounts for local towns or acting as trustee with respect to bond proceeds, escrow accounts, governmental pension plans and other similar capacities). See Proposal, 76 FR at 834, n.143

⁸⁶⁷ See *id.*, at 835.

⁸⁶⁸ See *supra* Section III.A.1.b.viii.

entity.”⁸⁶⁹ In connection with its proposed interpretation of “investment strategies,” the Commission stated that, because every bank account of a municipal entity is comprised of funds “held by or on behalf of a municipal entity,” money managers that provide advice to municipal entities regarding their bank accounts could be municipal advisors.⁸⁷⁰

The Commission requested comment on whether it should exempt banks providing advice to a municipal entity or obligated person concerning transactions that involve a “deposit” (as defined in Section 3(l) of the Federal Deposit Insurance Act⁸⁷¹) at an “insured depository institution” (as defined in Section 3(c)(2) of the Federal Deposit Insurance Act⁸⁷²). The Commission stated that, if adopted, banks would be exempted from the definition of municipal advisor to the extent they provide advice to a municipal entity or obligated person with respect to such banking products as insured checking and savings accounts and certificates of deposit. However, banks would not be

⁸⁶⁹ See Proposal, 76 FR at 830.

⁸⁷⁰ See *id.*

⁸⁷¹ 12 U.S.C. 1813(l).

⁸⁷² 12 U.S.C. 1813(c)(2). See Proposal, 76 FR at 835.

The Commission also requested on comment on whether to exclude banks performing certain other specific activities, including, for example: banks responding to RFPs from municipal entities regarding other investment products offered by the banking entity, such as money market mutual funds or other exempt securities; banks that provide to a municipal entity a listing of the options available from the bank for the short-term investment of excess cash (for example, interest-bearing bank accounts and overnight or other periodic investment sweeps) and negotiate the terms of an investment with the municipal entity; banks that provide to a municipal entity the terms upon which the bank would purchase for the bank’s own account (to be held to maturity) securities issued by the municipal entity, such as bond anticipation notes, tax anticipation notes, or revenue anticipation notes; banks that direct or execute purchases and sales of securities or other instruments with respect to funds in a trust account or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis; banks and trust companies that provide other fiduciary services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities; and banks and trust companies to the extent they are providing advice that otherwise would subject them to registration under the Investment Advisers Act, but for the operation of a prohibition to or exemption from registration. See Proposal, 76 FR at 837.

exempted if they engage in other municipal advisory activities.⁸⁷³

In response to request for comment, the Commission received over 300 letters from commenters, many of them commercial banks and banking associations. The commenters stated that, because the Commission was proposing to interpret the term “investment strategies” to encompass any funds “held” by a municipal entity, regardless of whether such funds are related to the issuance of municipal securities or investment of bond proceeds, the definition would potentially cover what commenters termed “traditional banking products and services.”⁸⁷⁴ According to the commenters, such services include deposit accounts, cash management products, and loans to municipalities, all of which are already subject to supervision by federal bank regulators.⁸⁷⁵ As a result, these commenters stated that banks providing such products and services would have to register as municipal advisors, adding “a new layer of regulation on bank products for no meaningful public purpose.”⁸⁷⁶ One commenter noted that “the OCC and the other federal

⁸⁷³ See *id.*, at 835.

⁸⁷⁴ See, e.g., American Bankers Association Letter I (the SEC’s proposed interpretation would regulate “already-regulated traditional banking products, such as deposit, cash management and lending activities, and trust or custody products with or on behalf of municipalities”); Union Bank Letter; Form Letter A (of the approximately 300 comment letters that addressed the topic of commercial bank regulation, 170 were submitted in Form Letter A format) (the SEC’s proposed interpretation would cover “traditional bank products and services, such as deposit accounts, cash management products, and loans to municipalities”). See also Form Letter D (36 comment letters were submitted in this form) (the SEC’s proposed interpretation “would label as “municipal advisors” banks and many bank employees providing essential and traditional bank services to their local municipalities, including day-to-day deposit, cash management, custody, trustee, and lending services—a result we do not believe furthers any legitimate policy goal...”).

⁸⁷⁵ See, e.g., American Bankers Association Letter I; Union Bank Letter; Form Letter A.

⁸⁷⁶ See, e.g., Form Letter A. See also Form Letter D (36 comment letters were submitted in this format) (stating that “the rule would result in... additional, redundant layers of multiple rules by the SEC and Municipal Securities Rulemaking Board (MSRB) for the very same products and services for which we are already comprehensively supervised by the prudential banking regulators”); BOK Financial Corp. Letter (stating that “[e]xpanding the... registration requirement to providers of traditional banking services is unnecessary

banking agencies have an existing regulatory framework and oversight over traditional banking products and services, which include bank deposit transactions... The OCC also already evaluates the ability of bank management to monitor and control traditional banking products and services, including the administration of deposit accounts, through regular and extensive on-site examinations.”⁸⁷⁷ Other commenters recommended that municipal advisor registration should instead only apply to currently unregulated entities.⁸⁷⁸

Many commenters focused, in particular, on the potential effects of the proposed rules on “community banks.”⁸⁷⁹ Many other commenters claimed that the additional regulatory burden of registering as a municipal advisor would raise costs, which would either discourage community

because it provides no additional protection to municipalities or investors in municipal securities beyond existing regulation and oversight”); American Bankers Association Letter I (stating that “[d]eposit accounts, cash management products, loans, and trust and custody products are but four broad types of [municipal financial products]” and that “[a]ll are extensively regulated, and the institutions providing them are supervised and regularly examined by the federal bank regulators”).

⁸⁷⁷ See OCC Letter.

⁸⁷⁸ See, e.g., SIFMA Letter I; American Bankers Association Letter I (stating that “as drafted, the proposal goes far beyond legislative intent or public policy need by purporting to regulate already-regulated traditional banking products, such as deposit, cash management and lending activities, and trust and custody products with or on behalf of municipalities”); Union Bank Letter (stating that Congress intended to regulate a heretofore unregulated group that advises municipal entities, and not banks that are already regulated).

⁸⁷⁹ Entities referring to themselves as “community banks” include, for example First Bank of Owasso; ACB Bank, Cherokee; First National Bank of Bastrop, Texas; and The First National Bank of Suffield. See letter from Dominic Sokolosky, President, First Bank of Owasso, dated February 14, 2011; letter from Kari Roberts, President/CCO, ACB Bank, Cherokee, dated February 15, 2011; letter from Reid Sharp, President/CEO, First National Bank of Bastrop, Texas, Bastrop, Texas, dated February 16, 2011; letter from George W. Hermann, President/CEO, The First National Bank of Suffield, dated February 17, 2011.

The OCC defines “community banks” generally as “banks with less than \$1 billion in total assets and may include limited-purpose chartered institutions, such as trust banks and community development banks.” See Comptroller’s Handbook, Community Bank Supervision (2010) available at <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/cbs.pdf> at 1.

banks from offering their full array of products and services to municipalities⁸⁸⁰ or lead community banks to pass on added costs and expenses to their municipal entity customers.⁸⁸¹

Commenters stated that “traditional banking products and services” are not the intended focus of the municipal advisor registration provision of the Dodd-Frank Act and that banks that provide these services should not be subject to this provision.⁸⁸² For example, one commenter noted that products such as deposit accounts and cash management products do not warrant municipal advisor registration, because “[t]hese types of products merely are extension [sic] of more traditional deposit products, such as savings accounts, checking accounts and CDs, and do not constitute ‘advice’ under any reasonably accepted definition of the term.”⁸⁸³

Other commenters listed specific banking products and services that, in their view, should not be encompassed within municipal advisor registration. For example, one commenter stated that, “[a]t a minimum, the Commission should clarify that banks providing municipal entity customers advice regarding traditional banking products including deposit accounts, savings accounts, certificates of deposit, bankers acceptances, bank loans and letters of credit, and certain loan

⁸⁸⁰ See, e.g., Form Letter A.

⁸⁸¹ See, e.g., Hancock Holding Co. Letter. However, none of the commenters provided any data on the dollar cost that would be imposed by the proposed rules.

⁸⁸² See, e.g., Form Letter A, Form Letter D, American Bankers Association Letter I, Independent Community Bankers of America Letter, and OCC Letter.

⁸⁸³ See Independent Community Bankers of America Letter. As examples of short-term investment of cash, this commenter listed “interest-bearing bank accounts and overnight or other periodic investment sweeps.” See id.

See also letter from Charles V. Motil, Capital One Financial Corporation, dated February 22, 2011 (stating that “a bank teller would be caught under the [municipal advisor] definition when helping an employee of the municipal entity deposit money into the entity’s checking account if the teller, seeing that the account carries a high balance, recommends a savings account or certificate of deposit that would give the entity a higher rate of return”).

participations do not need to register as municipal advisors.”⁸⁸⁴ This commenter also stated that the Commission should clarify that “banks providing the terms for the purchase of municipal securities for the bank’s own account shall be excluded from registration as ‘municipal advisors’” and explained that “banks are authorized to purchase municipal securities for their own account subject to extensive regulation and oversight.”⁸⁸⁵ Another commenter also argued that banks extending credit, “whether through loans, letters of credit or otherwise,” should be excluded from the definition of municipal advisor.⁸⁸⁶

Meanwhile, another commenter recommended that the Commission adopt an exclusion for providing advice concerning (or soliciting) transactions that involve a “deposit” at an “insured depository institution,” as defined in Section 3(c)(2) of the Federal Deposit Insurance Act, including advice with respect to: (1) insured checking and savings accounts and certificates of deposit; (2) directing or executing purchases and sales of securities or other instruments in a trust, fiduciary, or investment management account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis; (3) providing other services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities; (4) providing advice concerning (or soliciting) transactions that are subject to an exemption under Regulation R under the Exchange Act, or transactions otherwise excluded from the definition of broker-dealer activities under the Exchange Act, including bank broker-dealer exceptions relating to third-party networking arrangements, trust and fiduciary activities, deposit “sweep” activities,

⁸⁸⁴ See OCC Letter.

⁸⁸⁵ See *id.* See also Independent Community Bankers of America Letter (stating that the Commission should exclude from the definition of “municipal advisor” banks that provide “to a municipal entity the terms upon which the bank would purchase for [its] own account securities...issued by the municipal entity,” and arguing that “[s]uch activities do not involve the safeguarding of public funds”).

⁸⁸⁶ See Independent Community Bankers of America Letter.

custody and safekeeping activities and certain securities lending transactions; (5) and serving as trustee to a pooled investment vehicle.⁸⁸⁷ Another commenter recommended that the municipal advisor definition only cover the services of advisors with respect to the investment of proceeds of municipal securities and exclude the deposit and cash management services traditionally provided by “community banks.”⁸⁸⁸ Another commenter suggested that “investment strategies” not include products and services in the categories of deposit accounts insured by the FDIC (up to \$250,000) or bank activities that the Commission has exempted from the definitions of “broker” under Section 3(a)(4)(B) of the Exchange Act.⁸⁸⁹

The Commission is exempting from the definition of municipal advisor persons that provide advice with respect to “investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.”⁸⁹⁰ Accordingly, the performance of many of the bank activities and services about which commenters were concerned would not require banks to register as municipal advisors. In addition, as discussed further below, the Commission is exempting from registration banks that perform certain activities.

Specifically, the Commission is exempting from the definition of municipal advisor “[a]ny bank, as defined in section 3(a)(6) of the Act (15 U.S.C. 78c(a)(6)), to the extent the bank provides advice with respect to the following: (A) [a]ny investments that are held in a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank; (B) [a]ny extension of credit by a bank to a municipal entity or obligated person, including the issuance of a

⁸⁸⁷ See SIFMA Letter I.

⁸⁸⁸ See First Bank of Owasso Letter.

⁸⁸⁹ See First Tennessee Bank National Association Letter.

⁸⁹⁰ See Rule 15Ba1-1(d)(3)(vii). See also *supra* Section III.A.1.b.viii.

letter of credit, the making of a direct loan, or the purchase of a municipal security by the bank for its own account; (C) [a]ny funds held in a sweep account that meets the requirements of Section 3(a)(4)(B)(v) of the Act (15 U.S.C.78c(a)(4)(B)(v)); or (D) [a]ny investment made by a bank acting in the capacity of an indenture trustee⁸⁹¹ or similar capacity.”⁸⁹² The Commission believes that advice by banks to municipal entities and obligated persons with respect to these products and services would not subject municipal entities and obligated persons to the kinds of risks that the municipal advisor registration regime is intended to mitigate.

The Commission notes that the products and services included in the exemption, such as deposit accounts and certain other short-term cash investments like sweep accounts, and extensions of credit by a bank (whether by direct loan or otherwise),⁸⁹³ are transactions in which there should be no confusion as to the role of the bank or its employees. Similarly, the Commission notes that banks that purchase securities from municipal entities or obligated persons for their own account (without providing advice to the municipal entities or obligated persons with respect to other issues or municipal products) are not engaging in municipal advisory activities. Instead, they are acting as principals in purchase transactions.⁸⁹⁴ In the case of investments made by an indenture trustee, the

⁸⁹¹ For purposes of this rule, an indenture trustee acts as an order-taker at the direction of the municipal entity that issued the municipal securities, within the investment parameters set forth in the indenture, ordinance, resolution, or similar instrument, and, therefore, acts in a constrained capacity, because the indenture trustee is responsible for making sure that any investments it undertakes fall within the investment parameters of the indenture.

⁸⁹² Rule 15Ba1-1(d)(3)(iii).

⁸⁹³ The Commission notes that the examples of extensions of credit set forth in Rule 15Ba1-1(d)(3)(iii) are not intended to be exhaustive, and that the exemption would also apply to banks providing advice to a municipal entity or obligated person with respect to other extensions of credit by a bank such as a banker's acceptance or a participation in a loan which the bank or an affiliate of the bank (other than a broker or dealer) funds, participates in, or owns.

⁸⁹⁴ Specifically, banks providing municipal entities or obligated persons with the terms under which they would purchase securities for their own account are not engaging in municipal

bank acts at the direction of the municipal entity or obligated person.

Accordingly, Rule 15Ba1-1(d)(3)(iii) provides an exemption from the definition of municipal advisor for banks that provide advice with respect to certain enumerated products and services that the Commission believes do not pose the types of risks that the Dodd-Frank Act was designed to address. Moreover, the Commission notes that the narrower focus of the “investment strategies” definition on investments of proceeds of municipal securities and municipal escrow investments discussed above is intended to be responsive to comments about the impact of the municipal advisor registration requirement on the provision of products and services offered by banks. The Commission believes that, together, these exemptions to the definition of “municipal advisor” generally will cover banks with respect to advice that they provide regarding the types of products and services that commenters referred to as “traditional banking products and services.”⁸⁹⁵ For example, commenters identified deposit accounts, which municipal entities typically use for short-term investments of revenues, as one type of traditional banking product. Under the final rules, banks that provide advice regarding deposit accounts generally will be explicitly exempt from the definition of municipal advisor for this type of account. Similarly, banks will be explicitly exempt with respect to other identified products and services such as letters of credit and sweep accounts. Additionally, although the final rules would not explicitly exempt certain products and services such as custody accounts and trust services (unless the bank is serving in the capacity of an indenture trustee or a similar capacity), a bank providing advice with respect to such products or

advisory activities.

The Commission notes that, in this context, such banks may, however, depending on the facts and circumstances, be subject to regulation as “municipal securities dealers.” See Sections 3(a)(30) and 15B of the Exchange Act and the rules and regulations thereunder.

⁸⁹⁵ See, e.g., *supra* notes 874 and 875, and accompanying text. See also *supra* note 884 and accompanying text (discussing the OCC Letter).

services would not be required to register as a municipal advisor, as a result of the narrower approach with respect to investment strategies, unless such accounts contain proceeds of municipal securities or municipal escrow investments.

By contrast, however, the Commission is not exempting from registration banks that engage in municipal advisory activities, including without limitation banks that provide advice to municipal entities or obligated persons with respect to the issuance of municipal securities, or banks that provide advice with respect to municipal derivatives, unless the bank qualifies for another exclusion or exemption, such as under the limited circumstances described above with respect to the exemption for certain swap dealers.⁸⁹⁶ As discussed above in the context of the definition of municipal derivatives and the exemption for certain swap dealers, with the Dodd-Frank Act, Congress established heightened protection with respect to swaps and security-based swaps,⁸⁹⁷ and the Commission therefore does not believe that a blanket exemption for banks with respect to such activities would be appropriate. The Commission believes it is important to emphasize that the bank exemption does not apply to advice on municipal derivatives, which is a significant problem area identified in the financial crisis in which municipal entities suffered significant losses,⁸⁹⁸ and further, the bank exemption does not apply to advice on the issuance of municipal securities, which is a core focus of the protections to municipal entities in the municipal advisor registration provision and is an area in which a blanket exemption to banks would result in a potential inappropriate

⁸⁹⁶ See supra Section III.A.1.b.v. (discussing the definition of municipal derivatives) and Section III.A.1.c.vi. (discussing an exemption for certain swap dealers). See also supra note 275 (discussing generally the protections afforded to special entities under the Dodd-Frank Act with respect to swap and security-based swap transactions).

⁸⁹⁷ See id.

⁸⁹⁸ See supra note 3 and accompanying text.

competitive advantage to banks over other financial advisors.⁸⁹⁹

The Commission believes that the exemption it is providing for banks will help ensure that parties engaging in key municipal advisory activities are registered, while permitting banks to continue to provide products and services to municipal entities and obligated persons that do not pose the types of risks that the Dodd-Frank Act was designed to address. Therefore, for these reasons and the reasons described above, the Commission finds that it is consistent with the public interest, the protection of investors, and the purposes of Section 15B of the Exchange Act, to use its authority pursuant to Exchange Act Section 15B(a)(4) to exempt banks engaging in certain municipal advisory activities from the definition of municipal advisor pursuant to the limitations described above. Accordingly, such banks are not required to register as municipal advisors.

Separately Identifiable Departments or Divisions

Sections 3(a)(30) and 15B(b)(2)(H) of the Exchange Act provide for the MSRB to define a separately identifiable department or division of a bank (“SID”) for purposes of whether a bank is a municipal securities dealer and must register as such.⁹⁰⁰ In the Proposal, the Commission specifically requested comment on whether the Commission should permit SIDs (providing a

⁸⁹⁹ See *infra* Section VIII.D.6.b. (discussing alternatives to the exemptions from the definition of municipal advisor).

⁹⁰⁰ Exchange Act Section 3(a)(30)(B) provides that the term “municipal securities dealer” does not include banks, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, provided, however that if the bank is engaged in such activities through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the municipal securities dealer. Exchange Act Section 15B(b)(2)(H) provides for the MSRB to “define the term ‘separately identifiable department or division’, as that term is used in [Exchange Act Section 3(a)(30)], in accordance with specified and appropriate standards to assure that a bank is not deemed to be engaged in the business of buying and selling municipal securities through a separately identifiable department or division unless such department or division is organized and administered so as to permit independent examination and enforcement of applicable provisions of [the Exchange Act], the rules and regulations thereunder and the rules of the [MSRB].”

bank's municipal advisory activities) to register as a municipal advisor, rather than the bank itself.⁹⁰¹ The Commission requested comment on suggested rule text relating to SIDs, based on MSRB Rule G-1 relating to SIDs engaged in municipal securities dealer activities,⁹⁰² and asked: whether such a rule would provide appropriate conditions for determining whether and when a SID engaged in municipal advisory activities may register as a municipal advisor; whether there were reasons the language based on MSRB Rule G-1 should not be used for SIDs engaging in municipal advisory activities; and whether the language should be modified or clarified in any way, or if there

⁹⁰¹ See Proposal, 76 FR at 838.

⁹⁰² See *id.*

Specifically, the Commission requested comment on the following suggested definition of SID for purposes of municipal advisor registration:

“(a) A separately identifiable department or division of a bank, as such term is used in Section 3(a)(30) of the Securities Exchange Act of 1934, is that unit of the bank which conducts all of the municipal advisory activities of the bank, provided that: (1) Such unit is under the direct supervision of an officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's municipal advisory activities, including the supervision of all bank employees engaged in the performance of such activities; and (2) There are separately maintained in or separately extractable from such unit's own facilities or the facilities of the bank, all of the records relating to the bank's municipal advisory activities, and further provided that such records are so maintained or otherwise accessible as to permit independent examination thereof and enforcement of applicable provisions of the Exchange Act, the rules and regulations thereunder and the rules of the MSRB relating to municipal advisors; (b) The fact that directors and senior officers of the bank may from time to time set broad policy guidelines affecting the bank as a whole and which are not directly related to the day-to-day conduct of the bank's municipal advisory activities, shall not disqualify the unit hereinbefore described as a separately identifiable department or division of the bank or require that such directors or officers be considered as part of such unit; and (c) The fact that the bank's municipal advisory activities are conducted in more than one geographic organizational or operational unit of the bank shall not preclude a finding that the bank has a separately identifiable department or division for purposes of this rule, provided, however, that all such units are identifiable and that the requirements of paragraphs (1) and (2) of section (a) of this rule are met with respect to each such unit. All such geographic, organizational or operational units of the bank shall be considered in the aggregate as the separately identifiable department or division of the bank for purposes of this rule.”

was alternative language the Commission should consider.⁹⁰³ The Commission notes that the concept of separate treatment for SIDs exists in the current regulatory regimes for both municipal securities dealers and investment advisers, which both permit the SID to be the regulated entity.⁹⁰⁴

Although as discussed above many commenters recommended that the Commission create a blanket exemption for banks,⁹⁰⁵ some commenters specifically recommended that, to the extent a bank provides products or services that would not be excluded, the Commission should allow a bank to register a SID if its municipal advisory services or actions are performed through such a SID.⁹⁰⁶ A few commenters⁹⁰⁷ additionally stated that permitting registration of SIDs would be consistent with the registration scheme for municipal securities dealers⁹⁰⁸ and investment

⁹⁰³ See Proposal, 76 FR at 838.

⁹⁰⁴ See *supra* note 900 and *infra* note 909, respectively.

⁹⁰⁵ See *supra* notes 874-878 and accompanying text.

⁹⁰⁶ See, e.g., Kutak Rock Letter (stating in response to the Commission's request for comment with respect to SIDs that "a bank creating a SID should be exempted in all its other activities from registration as an advisor); SIFMA Letter 1 (encouraging the Commission to permit SIDs to register instead of the entire banking entity); Union Bank Letter (recommending that the Commission permit registration of SIDs on a voluntary basis, because given the dispersion of public finance activities throughout a bank, a bank may not be able to consolidate the activities in a single department or division as is contemplated in the analogous language for municipal dealer SIDs); ABA Letter (supporting the concept of permitting banks to register, when required to register at all, SIDs).

⁹⁰⁷ See Financial Services Roundtable Letter (requesting that, if banks are required to register as municipal advisors, they should only be required to register those department actually providing municipal advisory services, consistent with the exclusion from the definition of "municipal securities dealer" for banks under Section 3(a)(30)(B) of the Exchange Act); First Tennessee Bank National Association Letter (stating that registration as a SID would be consistent with the registration scheme for bank municipal securities dealers and bank investment advisers to investment companies); and letter from Kurt R. Bauer, President/CEO, Wisconsin Bankers Association, dated February 21, 2011 (noting the discrepancy between the municipal advisor registration regime for municipal securities dealers that are banks, in that the Dodd-Frank Act did not provide for registration of SIDs).

⁹⁰⁸ See *supra* note 900.

advisers.⁹⁰⁹

The Commission has carefully considered issues raised by commenters on its proposal and is adopting Rule 15Ba1-1(d)(4) to permit a SID that meets the requirements of the rule to register as a municipal advisor instead of the bank. The Commission agrees with commenters that it is appropriate to treat banks performing municipal advisory activities through a SID in a manner consistent with their treatment under the investment adviser and municipal securities dealer registration regimes.⁹¹⁰ Thus, to the extent a bank provides advice with respect to a municipal derivative or engages in any other non-exempted municipal advisory activity, if such advice is provided through a SID that meets the requirements of Rule 15Ba1-1(d)(4), the SID, rather than the

⁹⁰⁹ See Section 202(a)(11)(A).

The Commission notes that the Investment Advisers Act excepts from the definition of "investment adviser" "a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company," but provides that the exception does not apply to "any bank or bank holding company to the extent that such bank or bank holding company serves or acts as an investment adviser to a registered investment company." The Investment Advisers Act also provides that "if in the case of a bank, such services or actions are performed through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the investment adviser" See Section 202(a)(11) of the Investment Advisers Act.

⁹¹⁰ One commenter stated that, "given the dispersion of municipal advisory activities throughout the bank, banks may not be able to consolidate the activities in a single department or division as is contemplated in the analogous language for municipal dealer SIDs" and, as a result, does "not think the referenced language is workable." This commenter also stated that the Commission should not dictate the structure of a bank's municipal business. See American Bankers Association Letter I.

The Commission notes that it is not requiring banks to consolidate their municipal advisory activities into a SID. Rather, to the extent that a bank does not otherwise qualify for an exclusion or exemption (such as the exemption for banks with respect to certain activities described above), the bank may choose to consolidate its municipal advisory activities into a SID. In such case, only the SID, and not the bank itself, would be required to register as a municipal advisor. Also, as discussed further below, Rule 15Ba1-1(d)(4) would not preclude a finding that a bank has a SID if the bank's municipal advisory activities are conducted in more than one geographic organizational or operational unit, so long as all such units are identifiable and otherwise meet the requirements of the rule with respect to each such unit.

bank itself, shall be deemed to be the municipal advisor.⁹¹¹ The Commission believes that permitting SIDs to register is in the public interest, because it will ensure that municipal entities and obligated persons receive the regulatory protection intended by the statute, while addressing commenters' general concerns about duplicative regulation for banks and the impact of imposing the municipal advisor registration regime on banks in general.⁹¹²

Specifically, as adopted, Rule 15Ba1-1(d)(4) provides that “[i]f a bank engages in municipal advisory activities through a separately identifiable department or division that meets the requirements of [Rule 15Ba1-1(d)(4)], the determination of whether those municipal advisory activities cause any person to be a municipal advisor may be made separately for such department or division. In such event, that department or division, rather than the bank itself, shall be deemed to be the municipal advisor.” For purposes of Rule 15Ba1-1(d)(4), a SID of a bank is defined as “that unit of the bank which conducts all of the municipal advisory activities of the bank” provided that certain specific requirements are met. In the Proposal, the Commission suggested defining SID as such term is defined in Section 3(a)(30) of the Exchange Act. To provide additional clarity, however, the Commission is eliminating the specific reference to Section 3(a)(30) of the Exchange Act in the definition of SID that it is adopting because, while based on that definition, Section 3(a)(30) relates specifically to activities of municipal securities dealers, as opposed to municipal advisory activities. The Commission is also clarifying, consistent with the definition for SIDs suggested in the Proposal, that the fact that directors and senior officers of the bank may from time to time set broad policy guidelines affecting the bank as a whole and which are not directly related to the day-to-day conduct of the bank’s municipal advisory activities, shall not disqualify such unit or require that such directors or officers be considered as part of such unit. Further, the fact that the

⁹¹¹ See Rule 15Ba1-1(d)(4).

⁹¹² See, e.g., notes 874-889 and accompanying text.

bank's municipal advisory activities are conducted in more than one geographic organizational or operational unit of the bank shall not preclude a finding that the bank has a separately identifiable department or division for purposes of Rule 15Ba1-1(d)(4), provided, however, that all such units are identifiable and that the requirements of Rule 15Ba1-1(d)(4) are met with respect to each such unit. All such geographic, organizational or operational units of the bank shall be considered in the aggregate as the separately identifiable department or division of the bank for purposes of this paragraph Rule 15Ba1-1(d)(4).⁹¹³ With the exception of the reference to Section 3(a)(30) and the removal from the rule text of the Commission's guidance with respect to the activities of directors and senior officers and multiple geographic locations, the other applicable requirements are substantively identical to those suggested in the proposal and based on the rules applicable to municipal securities dealer SIDs.⁹¹⁴

2. Rule 15Ba1-2

a. Application for Municipal Advisor Registration

Section 15B(a)(1)(B) of the Exchange Act provides that it shall be unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered in accordance with the relevant provisions of the statute. A "municipal advisor" is defined in Section 15B(e)(4) of the Exchange Act to mean, with certain exceptions, "a person" that "provides advice to or on behalf of

⁹¹³ The Commission notes that it is not including this clarification in Rule 15Ba1-1(d)(4) itself as suggested in the Proposal. See *supra* note 902.

⁹¹⁴ See Rule 15Ba1-1(d)(4)(i)(A)-(B). See also *supra* note 902 and accompanying text. The other differences between the definition suggested in the Proposal and the adopted definition are technical and organizational in nature.

a municipal entity or obligated person ... or undertakes a solicitation of a municipal entity.”⁹¹⁵ In the Proposal, the Commission indicated that the type of information it should gather from firms versus individuals for registration purposes may be different.⁹¹⁶ As such, the Commission proposed two different registration forms: Form MA for “municipal advisory firms” and Form MA-I for “natural person municipal advisors.”⁹¹⁷

In connection with these forms, the Commission also proposed Rule 15Ba1-2(a) and 15Ba1-2(b) for the registration of municipal advisory firms and natural person municipal advisors, respectively. Rule 15Ba1-2(a), as proposed, required a “person, other than a natural person, including a sole proprietor”⁹¹⁸ applying for registration with the Commission as a municipal advisor to complete Form MA in accordance with the instructions to the form and to file the form electronically with the Commission. Rule 15Ba1-2(b), as proposed, required a “natural person (including a sole proprietor)”⁹¹⁹ applying for registration with the Commission as a municipal advisor to complete Form MA-I in accordance with the instructions to the form and to file the form electronically with the Commission. This proposed requirement applied to, among others, each

⁹¹⁵ See supra Section III.A.1.a. (discussing the definition of the term “municipal advisor”).

⁹¹⁶ Id.

⁹¹⁷ Id. A “municipal advisory firm,” as defined in the Glossary of Terms for the forms and used hereinafter, is “any organized entity that is a municipal advisor, including sole proprietors.” A “natural person municipal advisor,” as was defined in the Glossary, as proposed, and used hereinafter, is “any natural person that is a municipal advisor, including sole proprietors,” with the further clarification that “[a] sole proprietor that is a municipal advisor is also a municipal advisory firm.” See also infra notes 918 and 919.

⁹¹⁸ This language in proposed paragraph 15Ba1-2(a) is equivalent to the simpler term, “municipal advisory firm” used in the forms and herein, see supra note 917. The formulation of the rule language was intended to preclude any misinterpretation of the word “firm” as excluding sole proprietors.

⁹¹⁹ The category to which proposed paragraph 15Ba1-2(b) applied is identical to the “natural person municipal advisor” defined above. See supra note 917. The formulation of the rule language was intended to preclude any misinterpretation that would exclude sole proprietors.

individual employee of a firm who meets the definition of municipal advisor. The two proposed provisions read together required a sole proprietor to complete both Form MA and Form MA-I.

The Commission requested comments on proposed Rule 15Ba1-2(a) and Form MA. The Commission received no comments directly on proposed Rule 15Ba1-2(a) and is adopting this provision substantively⁹²⁰ as proposed.⁹²¹

The Commission also requested comments on proposed Rule 15Ba1-2(b) and Form MA-I. Specifically, the Commission solicited comments on the effects of a separate registration requirement for natural persons and firms and the relative advantages and disadvantages for firms, municipal advisor employees, municipal entities, obligated persons, investors, and regulators, of requiring separate registration for natural person municipal advisors.⁹²² The Commission also asked, if the Commission were to only require registration of municipal advisory firms, would inclusion of information regarding the firm's employees on the firm's Form MA cause confusion for municipal entities, obligated persons, and investors.⁹²³ Finally, the Commission also asked

⁹²⁰ The adopted rule, however, is phrased differently. Rule 15Ba1-2(a), as adopted, provides: "A person applying for registration with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4) must complete Form MA (17 CFR 249.1400) in accordance with the instructions in the Form and file the Form electronically with the Commission."

The adopted rule no longer includes the phrase "person, other than a natural person, including a sole proprietor" to describe the person subject to registration on Form MA. As discussed below, under the adopted rules, natural persons that engage in municipal advisory activities solely on behalf of a firm with which they are associated (generally, as employees) are exempted from registration. Thus, such persons do not need to be excluded from Rule 15Ba1-2(a), which applies to municipal advisors "applying for registration." In addition, sole proprietors do not need to be identified specifically among the persons who are required to complete Form MA.

⁹²¹ As discussed in the Proposal at 76 FR 838, Rule 15Ba1-2(a) requires firms that are currently registered on Form MA-T to register anew on Form MA.

⁹²² See Proposal, 76 FR at 851.

⁹²³ Id.

what, if any, legal ramifications may result for firms, and/or for natural persons, based on a registration regime that allows natural person municipal advisors that are employees of a municipal advisory firm to be registered by their firms as opposed to separate registration.⁹²⁴

The Commission received several comment letters regarding the proposed requirement for individual registration of natural person municipal advisors on Form MA-I.⁹²⁵ One commenter asserted that the Commission should not require individuals to register separately on Form MA-I.⁹²⁶ This commenter stated such requirement would not only impose significant burden and costs on municipal advisory firms and their individual associated persons but also would “force the SEC to devote substantial resources to processing many individual applications for registration” in addition to processing municipal advisory firms’ registrations on Form MA.⁹²⁷ This commenter noted that the Commission expected approximately 21,800—if not more—individuals to register as municipal advisors on Form MA-I⁹²⁸ and that “[t]he sheer number of registrations would place significant strain on the SEC’s budget and personnel, especially if it plans to review all applications for

924

Id.

925

See, e.g., Deloitte Letter; JPMorgan Chase & Co. Letter; MSRB Letter I; and SIFMA Letter I.

926

SIFMA Letter I. The commenter also argued that the separate registration requirement would be “excessively burdensome and costly.” Although this description was made primarily in the context of the commenter’s belief that the information requested by Form MA-I regarding individuals “largely duplicates Form MA’s disclosures regarding a municipal advisor’s associated persons,” the Commission believes that the commenter also intended it as a reason to eliminate individual registration regardless of the extent of the information required on the form. Regarding the commenter’s concern about duplication, see infra notes 1171-1173 and accompanying discussion.

927

See SIFMA Letter I.

928

Id. The commenter added that “[t]his would be in addition to the 800 municipal advisory firms that have already registered with the SEC on Form MA-T and would be required to re-register on Form MA, and at least 200 additional firms that are also expected to register.” For the basis of the referenced Commission’s estimate, see Proposal, 76 FR at 865.

municipal advisors that are filed under the permanent registration program.”⁹²⁹ The commenter questioned “whether the incremental regulatory benefit (which [the commenter] does not believe would be significant) stemming from the public availability of the information that would be produced by a system of individual registration would justify this massive resource commitment by both applicants and the SEC.”⁹³⁰ Another commenter also suggested that the Commission eliminate individual registration of registrants’ employees.⁹³¹

Two commenters argued that the statute does not require individual registration of natural person municipal advisors.⁹³² One of these commenters asserted that the statute appears to intend that registration of municipal advisors be limited to entities (including partnerships, unincorporated organizations, and sole proprietors).⁹³³ This commenter also stated that such entities would provide the critical information about individuals (including associated persons of the municipal advisor entity) during the registration process.⁹³⁴

Another commenter believed that “dual reporting” on Forms MA and MA-I “could lead to confusion” and that “there could be inadvertent inconsistencies in the information.”⁹³⁵ In particular,

⁹²⁹ See SIFMA Letter I.

⁹³⁰ Id.

⁹³¹ See JPMorgan Chase & Co. Letter. This commenter also advocated the “simplification of Form MA” and more broadly criticized the scope of the proposed rules.

⁹³² See SIFMA Letter I (asserting that “the registration of individuals in the manner proposed by the SEC is not called for in any respect by Section 975”) and MSRB Letter I.

⁹³³ See MSRB Letter I.

⁹³⁴ Id. The commenter further maintained that forms relating to individuals at municipal advisor firms should be viewed as officially submitted by the municipal advisor entity. (To clarify, however, the commenter was questioning why individuals within a firm that is itself acting as a registered municipal advisor should be viewed as municipal advisors rather than as associated persons of a municipal advisor.)

⁹³⁵ Deloitte Letter. This letter, like SIFMA Letter I, see supra note 926, tied the argument against separate registration for individuals to its belief that “separate registration for natural persons is largely redundant.”

the commenter noted that, under the Proposal, natural persons would be required to maintain and comply with recordkeeping and inspection requirements, which, in the commenter's view, would be "a significant burden" without "any meaningful benefit." The commenter suggested that the Commission eliminate registration for natural persons altogether, or at least require natural persons to register as "registered representatives," without recordkeeping and inspection requirements.⁹³⁶ Similarly, another commenter believed that, rather than introducing a new Form MA-I to provide for registration of natural persons, FINRA's Form U4 should be adapted to allow for registration of individuals.⁹³⁷

The Commission has carefully considered the issues raised by commenters on the Proposal. In response to these comments, the Commission is modifying its approach in the final rules and is not adopting Rule 15Ba1-2(b) and Form MA-I as proposed. Specifically, the Commission is exempting certain natural persons from the requirement to register as municipal advisors⁹³⁸ and is modifying Rule 15Ba1-2(b) and Form MA-I accordingly. Rule 15Ba1-3, as adopted, exempts from municipal advisor registration natural persons who are associated persons of a registered municipal advisor and who engage in municipal advisory activities solely on behalf of a registered municipal advisor.⁹³⁹ In practical terms, this exemption means that employees of municipal advisory firms who do not engage in municipal advisory activities independently of their firms (e.g., by engaging

⁹³⁶ See *id.*

⁹³⁷ See Financial Services Roundtable Letter. See also *infra* note 992 and accompanying text for information concerning Form U4 and further discussion.

⁹³⁸ See Rule 15Ba1-3, as adopted, which provides: "A natural person municipal advisor shall be exempt from section 15B(a)(1)(B) of the Act (15 U.S.C. 78o-4(a)(1)(B)) if he or she: (a) [i]s an associated person of an advisor that is registered with the Commission pursuant to section 15B(a)(2) of the Act (15 U.S.C. 78o-4(a)(2)) and the rules and regulations thereunder; and (b) [e]ngages in municipal advisory activities solely on behalf of a registered municipal advisor."

⁹³⁹ This exemption does not include sole proprietors, who must register as a municipal advisor on Form MA and also file a Form MA-I.

in municipal advisory activities on the side as a sole proprietor) will not be required to register as municipal advisors.

While the Commission is not requiring municipal advisor registration for these natural persons, the Commission is requiring municipal advisory firms to provide the Commission with information relating to these exempted natural persons. In this regard, Rule 15Ba1-2(b), as adopted, requires the municipal advisor to complete and file with the Commission Form MA-I for each of its natural persons who are associated with the municipal advisor and engaged in municipal advisory activities on its behalf.⁹⁴⁰ While Form MA-I, as adopted, is not a form for individual registration of natural persons, adopted Form MA-I requires municipal advisory firms to provide similar information regarding its associated natural persons as proposed Form MA-I required (with some modifications, as discussed below).

The Commission believes that the information obtained from Form MA-I is necessary and appropriate to assist the Commission in assuring compliance with Section 15B of the Exchange Act and the rules thereunder. The Commission believes that exempting certain natural persons from registration and requiring municipal advisors to complete and file a Form MA-I for certain exempted natural persons retains the benefits of individual registration discussed in the Proposal while also addressing the concerns raised by commenters. Specifically, the final rules and forms

⁹⁴⁰ See Rule 15Ba1-2(b), as adopted, which provides: “(1) A person applying for registration or registered with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4) must complete Form MA-I (17 CFR 249.1410) with respect to each natural person who is a person associated with the municipal advisor (as defined in section 15B(e)(7) of the Act (15 U.S.C. 78o-4(e)(7))) and engaged in municipal advisory activities on its behalf in accordance with the instructions in the Form and file the Form electronically with the Commission. (2) A natural person applying for registration with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4), in addition to completing and filing Form MA pursuant to paragraph (a), must complete Form MA-I (17 CFR 249.1410) in accordance with the instructions in the Form and file the Form electronically with the Commission.”

mitigate commenters' concerns about imposing registration obligations upon the large number of individuals without negating the important disclosures and other benefits that the Commission believes would be obtained through Form MA-I.⁹⁴¹ For example, as discussed in the Proposal, the information provided by Form MA-I would help the Commission (i) manage its regulatory and examination programs by assisting the Commission in identifying municipal advisors and understanding their business structures; (ii) prepare for its inspection and examination of municipal advisors; and (iii) oversee the municipal securities market and investigate possible wrongdoing.⁹⁴² This approach would also provide municipal entities, obligated persons, investors, and other regulators with information that would inform them as to the relevant municipal advisory experience and history of each natural person for whom the municipal advisor completed and filed a Form MA-I.⁹⁴³

This approach also would help to streamline the manner of gathering pertinent information, reduce confusion in the disclosure process, and reduce inconsistencies in the information reported because the municipal advisory firm will be required to complete and file Form MA and Form MA-I for each of the associated natural persons engaged in municipal advisory activities on its behalf.⁹⁴⁴ Indeed, commenters observed that a registered municipal advisory firm should provide critical information about its employees who engage in municipal advisory activities, rather than require the individual's separate registration.⁹⁴⁵ Accordingly, as adopted, Rule 15Ba1-2(b), Rule 15Ba1-3, and

⁹⁴¹ See, e.g., SIFMA Letter I.

⁹⁴² See Proposal, 76 FR at 850.

⁹⁴³ See *id.*, at 851.

⁹⁴⁴ This approach does not address the argument of commenters that Form MA-I is redundant of Form MA. That issue is addressed in the discussion below regarding the information requested in Form MA-I. See *infra* notes 1171-1173 and accompanying text.

⁹⁴⁵ See, e.g., MSRB Letter I.

Form MA-I will serve this purpose. Finally, the Commission also believes that eliminating the requirement for individual municipal advisors to separately register addresses commenters' concerns regarding regulatory efficiency, as it will allow the Commission to direct resources that would have otherwise been required to review many thousands of these individuals' applications to other regulatory matters.

As stated above, one commenter argued against individual registration, claiming that, under the Proposal, natural persons would be required to maintain and comply with recordkeeping and inspection requirements, which, in the commenter's view, would be "a significant burden" without "any meaningful benefit."⁹⁴⁶ The Commission notes, however, that the recordkeeping obligations imposed by the Proposal always applied only to municipal advisory firms.⁹⁴⁷

The Commission recognizes that the rule, as adopted, places on municipal advisory firms an obligation to file a Form MA-I for each individual employee that acts as a municipal advisor on its behalf. The Commission notes that, in the context of broker-dealer regulation, Form U4, which is required of individual employees and asks for much the same information as Form MA-I, is generally filed by the employees' firms.⁹⁴⁸ Indeed, commenters appeared to favor a regime in which firms submit information regarding their employees rather than one in which each employee

⁹⁴⁶ See id.

⁹⁴⁷ As proposed, the text of Rule 240.15Ba1-7(a) provided: "Every person, other than a natural person, including sole proprietors, registered or required to be registered under Section 15B of the Securities Exchange Act ... shall make and keep true, accurate, and current the following books and records relating to its municipal advisory activities" (emphasis added). See Proposal, 76 FR at 883. The highlighted language is retained in the recordkeeping rule, as adopted, which has been renumbered as Rule 240.15Ba1-8. See infra Section III.C.

⁹⁴⁸ The Commission notes, moreover, that Form U4 is used for registration. Under the rules as adopted Form MA-I is not a registration form. It is a form to obtain information about persons who engage in municipal advisory activities on behalf of the firm.

submits information separately.⁹⁴⁹

The Commission notes further that, as described below,⁹⁵⁰ the information that firms will need to obtain to complete Form MA-I is primarily the individual's full legal and other names, social security number, and employment and residential history, other business activities in which the employee is engaged, and his or her disciplinary history. The Commission notes that, in any case, a firm generally must obtain information regarding any relevant criminal, regulatory, or civil judicial history concerning any of its associated persons⁹⁵¹ in order to accurately complete Form MA for purposes of its own registration.⁹⁵² In addition, to help ensure adequate regulatory oversight, aid the prosecution of wrongdoing, and benefit municipal entities and investors, the final Form MA-I collects substantially the same information as required under the proposed form.⁹⁵³ Moreover, although under the adopted rules employees of municipal advisory firms are not required to register independently, they are otherwise not exempt from any other provision relating to

⁹⁴⁹ See, e.g., MSRB Letter I and citation at supra note 934. See also Deloitte Letter, stating: "Alternatively, if the SEC does not eliminate separate registration for natural persons, the Commission should require such persons to register as registered representatives of municipal advisors, as is done in the broker-dealer context, rather than as municipal advisors." Although the commenter is suggesting an alternative kind of registration for natural persons, and does not specifically state that the applications for registration of such persons would be filed by their firms, the analogy to the broker-dealer context suggests that the proposed alternative would operate in a similar manner, where firms file an individual's Form U4.

⁹⁵⁰ See infra Section III.A.2.c., "Information Requested in Form MA-I."

⁹⁵¹ See infra note 1054 for the meaning of "associated persons" in this context.

⁹⁵² See infra Section III.A.2.b., under "Item 9: Disclosure Information and Related DRPs." Thus, for purposes of completing an employee's Form MA-I, a firm will additionally need to obtain the information required by the form concerning investigations of the employee; customer complaints, arbitration, and civil litigation relating to municipal advisor-related or investment-related matters involving the employee; terminations of the employee; and outstanding judgments or liens against the employee. This information is substantially the same as required by Form MA-I under the Proposal, with the modifications discussed below. See infra Section III.A.2.c., "Information Requested in Form MA-I."

⁹⁵³ See id.

municipal advisors.

The Commission received no comments on the requirement, under the Proposal, for a sole proprietor to file both Form MA and Form MA-I. Accordingly, the Commission is retaining this requirement in the rules, although, in view of the other changes described above, a provision has been added to set forth explicitly that a natural person applying for registration must file Form MA-I in addition to Form MA.⁹⁵⁴

The Commission stated in the Proposal that it was considering whether Form MA and Form MA-I should be submitted through the Commission's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR") or otherwise.⁹⁵⁵ The Commission requested comment on whether the electronic registration system to be established should have the ability to cross-check other electronic systems, such as IARD and CRD, and whether requiring the filing of forms on EDGAR would be an appropriate means to make the requested information available.⁹⁵⁶

Two commenters favored the use of FINRA's electronic registration system for CRD and IARD or some similar system for the registration of municipal advisors.⁹⁵⁷ One commenter stated that this system would "allow regulators to easily find filings for firms and individuals, as well as

⁹⁵⁴ See Rule 15Ba1-2(b)(2) of the adopted rules, 17 CFR 240.15Ba1-2(b)(2), which provides: "A natural person applying for registration with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4), in addition to completing and filing Form MA pursuant to paragraph (a), must complete Form MA-I (17 CFR 249.1410) in accordance with the instructions in the Form and file the Form electronically with the Commission." The addition of Rule 15Ba1-2(b)(2), which relates to sole proprietors, was necessary because Rule 15Ba1-2(b)(1), as adopted, is worded specifically to require municipal advisors that are firms to file Form MA-I with respect to associated persons who engage in municipal advisory activities on their behalves, and would not by definition apply to sole proprietors.

⁹⁵⁵ See Proposal, 76 FR at 839.

⁹⁵⁶ See *id.*

⁹⁵⁷ See NASAA Letter and letter from Gary Kimball, President, Specialized Public Finance, Inc., dated February 22, 2011 ("Specialized Public Finance Letter").

cross reference between the CRD and IARD systems.”⁹⁵⁸ The commenters believed that use of FINRA’s system would allay concerns that EDGAR would subject registration information to “unnecessary public scrutiny”⁹⁵⁹ and “compromise the confidentiality of operating performance data for privately held Municipal Advisors.”⁹⁶⁰

After carefully considering the comments, the Commission has determined to require the forms to be submitted through EDGAR.⁹⁶¹ Although EDGAR is known primarily as the vehicle through which public companies file their annual and quarterly reports and other disclosures, the Commission has adapted EDGAR for other information gathering purposes.⁹⁶² Further, collecting information regarding municipal advisors through EDGAR should enable the Commission to efficiently retrieve and analyze data in a cost-effective manner to carry out its oversight of municipal advisors and their municipal advisory activities. The Commission notes that, while IARD, which is an electronic filing system that facilitates investment adviser registration, is funded

⁹⁵⁸ See NASAA Letter.

⁹⁵⁹ See Specialized Public Finance Letter. In this regard, the commenter mentioned specifically social security numbers.

⁹⁶⁰ Id.

⁹⁶¹ As discussed in the Proposal, because the registration forms will be required to be submitted through EDGAR, the electronic filing requirements of Regulation S-T will apply. See generally 17 CFR 232 (governing the electronic submission of documents filed with the Commission). The Commission will provide, in the municipal securities area of its website, full instructions on how applicants for municipal advisor registration that are not currently EDGAR filers can acquire authorized codes to access the system. These instructions have now also been added to the General Instructions for the Form MA series. General information about EDGAR is available at <http://www.sec.gov/info/edgar.shtml>, where the EDGAR Filer Manual can also be accessed. The Commission recommends that applicants read this filer manual before they begin using the system.

⁹⁶² Most recently, for example, the Commission determined to adapt EDGAR to accept Form 13H filings required under the “Large Trader Reporting” regime established by new Rule 13h-1 under Section 13(h) of the Exchange Act. See Securities Exchange Act Release No. 64976 (July 27, 2011), 76 FR 46960 (August 3, 2011).

through user fees,⁹⁶³ there is no comparable provision in Section 975 of the Dodd-Frank Act authorizing the Commission to charge municipal advisors (or to authorize another entity to collect) registration fees. Accordingly, the Commission has determined to leverage its existing technology to serve as a mechanism by which municipal advisors can register with the Commission. The Commission further notes that EDGAR is a widely utilized resource that is already familiar to investors and other interested parties seeking information about public companies, and believes that municipal entities, investors, other regulators, and members of the public seeking information about municipal advisors should not have difficulty learning how to use the system.

Regarding the comment that the use of FINRA's CRD and IARD systems would be preferable because it would allow regulators to cross reference the information in Forms MA and MA-I with information in those other systems, the Commission notes that, as discussed further below, Form MA requires a municipal advisor that has been assigned a number either under the CRD system or the IARD system (a "CRD Number") to provide that number in completing the form.⁹⁶⁴ In addition, Form MA asks an applicant specifically whether it is registered with the Commission in various other capacities (e.g., municipal securities dealer, government securities broker-dealer, or other category that the applicant must specify) and, if so, to provide the relevant file numbers.⁹⁶⁵ In a similar fashion, an applicant is required to supply file numbers for any registrations it has with another federal agency or state or other U.S. jurisdiction.⁹⁶⁶ Form MA-I requires the municipal advisory firm filing the form to provide the relevant individual's CRD

⁹⁶³ See Section 204(c) of the Advisers Act, which permits the Commission to charge fees associated with filings and the maintenance of a filing system.

⁹⁶⁴ See *infra* Section III.A.2.b., "Information Requested in Form MA," discussion of Item 1, "Identifying Information." See also *infra* note 1007.

⁹⁶⁵ See *infra* Section III.A.2.b.

⁹⁶⁶ *Id.*

Number, if registered on the CRD or IARD system; list any other names by which the individual is known or has been known; and provide the name, registration number, and the firm's EDGAR CIK (Central Index Key) number.⁹⁶⁷ These identifying numbers should assist municipal entities, regulators, and the public to access any other publicly available information about the municipal advisor. Although EDGAR will not automatically provide an electronic link to the information on the CRD and IARD systems, these systems are nevertheless readily accessible to regulators, municipal entities, and to the public.

With respect to commenters' concerns regarding privacy, the Commission notes that, while information required in Form MA and Form MA-I generally will not be confidential, some information, such as social security numbers, will be kept confidential (subject to the provisions of applicable law).⁹⁶⁸ The EDGAR system will block the relevant information in these forms in the versions that will be made public.

One commenter argued that information relating to operating performance of privately held

⁹⁶⁷ See *infra* Section III.A.2.c., "Information Requested in Form MA-I," discussion of Items 1 and 2, "Identifying Information and Other Names."

⁹⁶⁸ The Proposal specified that social security numbers would not be made public. See Proposal, 76 FR at 867, 868, and 869. The forms, as adopted, specify additional instances in which responses will be kept confidential subject to the provisions of applicable law. See, e.g., Item 8 of Schedule A of Form MA (advising applicants that social security numbers, foreign identity numbers, and dates of birth will not be publicly disseminated) and Item 3 of Form MA-I, as adopted (advising that private residential addresses disclosed in completing the residential history section of the form will not be included in publicly available versions). The Commission has determined that it is appropriate to block this information from public view, as well. To make this clear, in the forms, as adopted, in each place where an applicant is asked for a social security number, foreign identity number, private residential address, or a date of birth, guidance has been added stating that the information will not be included in publicly available versions of the form. In addition, at various other places in the forms that ask for an address, the filer is asked to indicate whether the address provided in response is a private residence and is advised that, if so, the address will not be included in publicly available versions of the form. One of the DRPs in Form MA-I, which asked whether the docket or case number of a particular case is the municipal advisor's social security number, bank card number, or personal identification number, has been deleted as unnecessary.

municipal advisors should be kept confidential.⁹⁶⁹ The commenter did not specify which particular questions in the forms it considered problematic. The Commission believes, however, that the public interest in making the information available – to allow municipal entities to better evaluate candidates for service in municipal advisory roles and to provide investors in municipal securities with clearer knowledge of who may be influencing the use and outcome of their investments – outweighs this type of confidentiality concern.⁹⁷⁰

The Commission received no comments on the requirement in proposed Rules 15Ba1-2(a) and (b) that Forms MA and MA-I, respectively, must be filed electronically, and is adopting this requirement as proposed. The Commission also received no comments on paragraph (c) of proposed Rule 15Ba1-2, which provided that the forms would be considered filed with the Commission “upon acceptance by the [applicable electronic system].” However, the Commission is adopting the rule with modifications.

As proposed, Rule 15Ba1-2 provides that Forms MA and MA-I “shall be considered filed with the Commission upon acceptance by the [applicable electronic system].” As adopted, the rule instead provides that the forms are considered filed upon “submission of a completed Form MA, together with all additional required documents, including all required filings of Form MA-I (17 CFR 249.1410)...” The Commission is modifying the rule to state that the form is considered filed upon “submission” to EDGAR rather than upon “acceptance” to align the rule with the terminology used by the EDGAR system. Further, the Commission is modifying the rule to provide that Form MA will be considered filed upon submission of a “completed Form MA, together with all

⁹⁶⁹ See supra note 960.

⁹⁷⁰ Form ADV, upon which Form MA was substantially modeled (see text accompanying infra note 975), requires a similar level of disclosure. The Commission would make this information publicly available regardless of the electronic registration system that is used. See also infra notes 1046 and 1048 and accompanying text.

additional required documents,” to clarify that, if a Form MA is not considered complete, the Commission’s statutory forty-five day review period will not commence.⁹⁷¹ Moreover, because a municipal advisor applying for registration under the final rules is responsible for submitting Form MA-I for each associated person engaging in municipal advisory activities on its behalf, the Commission believes it appropriate to stipulate that the firm’s application for registration will be considered filed only if the firm has submitted all requisite Form MA-Is.

When an applicant attempts to transmit its Form MA electronically, EDGAR performs the initial automated checks to determine whether questions that require responses have been answered and to detect, in certain instances, defective responses. For example, if an applicant indicates that it has three websites but provides, contrary to instructions, only two corresponding website addresses, EDGAR will detect the deficiency.⁹⁷² In such instance, EDGAR will not permit the applicant’s submission. However, if a form passes EDGAR’s automated checks, EDGAR will display a message indicating that the submission was successfully transmitted and will provide an “accession number,” which permits the applicant to enter the system to check the status of its application. At this point, the applicant is also advised that its application is not “accepted,” which is an EDGAR term for not “approved,” and EDGAR will display the status of the application as “In Progress.”

Once an application passes EDGAR’s initial automated check and is successfully transmitted, the Commission staff will check the application for the types of deficiencies that may not be detected through automation, and if the Form MA is considered incomplete, the applicant will receive by email an EDGAR-generated notice of suspension. The notice will inform the

⁹⁷¹ If a Form MA is complete and all additional required documents are attached, the form is considered filed and the forty-five day period for the Commission to act upon the application (*i.e.*, either approve or institute proceedings to determine whether it should be denied) begins.

⁹⁷² See *infra* note 1003 for more examples.

applicant that the transmission has been suspended and the reason for the suspension. The notice will also instruct the applicant to make corrections and re-transmit the application to the Commission in its entirety.

The Commission notes that, within forty-five days of the date a complete Form MA is considered filed, the Commission shall by order grant registration or institute proceedings to determine whether registration should be denied. The Commission also notes that the statutory review period for a filed Form MA may be longer if the applicant consents to a longer time period. If the Commission determines to grant registration, an EDGAR-generated email will be sent to inform the applicant that the filing has been “accepted” and the Commission will issue a formal order of approval separately.

The Proposed paragraph (d) of Rule 15Ba1-2 provided that Forms MA and MA-I constitute “reports” within the meaning of Sections 15B(c), 17(a), 18(a), 32(a) (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Exchange Act.⁹⁷³ The Commission received no comments on paragraph (d) and is adopting this provision as proposed. As a consequence, it is unlawful for a municipal advisor to willfully make or cause to be made, a false or misleading statement of a material fact or omit to state a material fact in Form MA or Form MA-I.

b. Information Requested in Form MA

Municipal advisors that are municipal advisory firms (including sole proprietors) must submit Form MA to register with the Commission. The Commission received several comments, as discussed further below, on the information it proposed to require from applicants in completing Form MA.⁹⁷⁴ After carefully considering the comments, the Commission is adopting Form MA substantially as proposed, with some modifications, as discussed below.

⁹⁷³ See Rule 15Ba1-2(d).

⁹⁷⁴ See *infra* notes 979-987.

Form MA is modeled primarily on Form ADV (Part 1),⁹⁷⁵ which is used for the registration of investment advisers with the Commission, with appropriate changes made to reflect the differences in the activities of municipal advisors and the markets that they serve. The information that applicants are required to provide on the form is described in detail below. As discussed in the Proposal, the items in Form MA were drafted broadly to apply to the different types of municipal advisors that may register with the Commission.⁹⁷⁶

Form MA asks for information about the municipal advisor and persons associated with the advisor. The Commission believes it necessary to obtain the requested information to manage the Commission's regulatory and examination programs and to make such information available to the MSRB to better inform its regulation of municipal advisors. The information will assist the Commission in identifying municipal advisors, their owners, and their business models, and in determining whether a municipal advisor might present sufficient concerns as to warrant the Commission's further attention in order to protect the municipal advisor's clients. In addition, the information will assist the Commission in understanding the kinds of activities in which the applicant participates. The information will also be useful to the Commission in tailoring any requests for additional information that the Commission may send to a municipal advisor. Furthermore, the required information will assist the Commission in the preparation of the Commission's inspection and examination of municipal advisors and the MSRB in determining what regulations for municipal advisors may be necessary or appropriate and how such regulations might be best implemented.⁹⁷⁷

Moreover, the Commission believes that the information sought will enable municipal

⁹⁷⁵ See 17 CFR 279.1. See also Proposal, 76 FR at 840.

⁹⁷⁶ See Proposal, 76 FR at 840.

⁹⁷⁷ See *id.*, at 841.

entities and potential obligated persons to better assess the experience and background of municipal advisors in deciding whether to engage the services of, or do business with, any particular municipal advisor. Similarly, information about the persons serving as municipal advisors can be important to investors in deciding whether to purchase specific municipal securities. In determining what information should be disclosed, the Commission also considered the broader public interest in the availability of information about municipal advisors to the public.⁹⁷⁸

The Commission received several comments regarding the extent and kind of information sought on Form MA, as a general matter, and the impact that the requirement to provide this information will have on municipal advisors.⁹⁷⁹ While one commenter generally approved of the content of the questions, most of the commenters on this subject believed that the scope of information sought was too broad, that the form should ask different questions for different kinds of municipal advisors, or that providing the answers would be too burdensome.

Specifically, one commenter stated its belief that the information requested was “generally appropriate” and that it would assist the Commission in its examination and enforcement activities as well as assist its rulemaking activities.⁹⁸⁰ Another commenter stated that it does not object in

⁹⁷⁸ See id.

⁹⁷⁹ See, e.g., Acacia Financial Group Letter; Financial Services Roundtable Letter; JP Morgan Chase Letter; Managed Funds Association Letter; MSRB Letter I; NAESCO Letter; SIFMA Letter I; Specialized Public Finance Letter.

⁹⁸⁰ See MSRB Letter I. The MSRB also expressed the hope that the Commission would receive “significant meaningful feedback from small municipal advisors regarding the potential burdens the Rule Proposal would impose, and give due weight to such feedback in light of the Congressional intent regarding regulatory burden on small municipal advisors.” At the same time, the MSRB believed that the information gleaned from the forms will “help the MSRB to better gauge the parameters of what should be considered a small municipal advisor and to structure its rules to effectuate the intent of Section 15B(b)(2)(L)(iv) [of the Exchange Act],” which requires that the MSRB “not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.”

principle to requiring municipal advisors to make disclosures similar to the disclosures required of registered investment advisers, but urged that the Commission “tailor carefully” any disclosure document to “ensure that the information to be disclosed relates only to the municipal advisor activities of the provider, rather than broadly requiring companies to disclose information unrelated to municipal advisory activities.”⁹⁸¹ Another commenter suggested that the forms be tailored for various categories of advisors, instead of a “one-size-fits-all” approach.⁹⁸² According to another commenter, “the disclosures required for investment advisers on Form ADV, on which proposed Form MA is based, are, in many cases, not relevant to municipal advisors.”⁹⁸³ The commenter maintained that many of the other questions drawn from Form ADV are “not likely to obtain useful responses from municipal advisors” and that the Commission “has not articulated a convincing purpose for much of the information.”⁹⁸⁴

Some commenters additionally believed that supplying the information requested on the proposed forms would be too burdensome on certain firms and individuals, but varied on the specifics.⁹⁸⁵ On the one hand, some commenters believed, as one commenter expressed, that “the scope of the proposed information to be collected” in Form MA “is exhaustive and could place a

⁹⁸¹ See NAESCO Letter.

⁹⁸² See Acacia Financial Group Letter.

⁹⁸³ See SIFMA Letter I.

⁹⁸⁴ See *id.* The commenter cited in particular in this regard the proposed disclosure requirements in Form MA relating to a municipal advisor’s clients; compensation arrangements; other business activities; financial industry affiliations; proprietary and sales interests in its municipal advisory clients’ transactions; and investment or brokerage discretion. The Commission believes that information in each of these areas can shed light on the possible conflicts of interest that a municipal advisor may have when providing advice. See also *infra* notes 1065, 1087, and 1119 and accompanying text, regarding this commenter’s comments relating specifically to disclosures about affiliates and other associated persons.

⁹⁸⁵ See, e.g., Acacia Financial Group Letter, SIFMA Letter I.

burden on small municipal advisors.”⁹⁸⁶ On the other hand, one commenter believed that large organizations would incur “significant time, burden, and expense in identifying personnel involved in activities that would subject them to registration.”⁹⁸⁷

In considering these comments, the Commission carefully analyzed each aspect of Form MA as set forth in the Proposal, consulting with and drawing on the experience and expertise of Commission’s enforcement and examination staffs. As already stated, the Commission had paid conscious and due attention in developing Form MA to the differences between the activities of investment advisers and those of municipal advisors. The Commission has analyzed proposed Form MA in the light of the comments received, specifically with an eye to making any possible further adjustments to reflect the field of municipal advisory activities and to remove any proposed elements of Form MA that are not appropriate to the regulation of municipal advisors or valuable for such regulation in consideration of the burdens of completing the form.

The Commission continues to believe that the information requested will be valuable in establishing and maintaining effective oversight of municipal advisors. The various purposes to which the Commission intends to put the information to use, as well as its value for municipal entities and investors, have been broadly described above. The decision to model Form MA on Form ADV was based, in part, on the Commission’s belief that the level of information sought in Form ADV is important, appropriate, and not unduly burdensome for participants engaged in providing investment advice, bearing in mind the goal of protection of investors and the public interest. The Commission believes that the regulation of municipal advisors warrants obtaining a similar level of information as pertinent to municipal advisors.⁹⁸⁸ The Commission notes that the

⁹⁸⁶ See Acacia Financial Group Letter.

⁹⁸⁷ See SIFMA Letter I.

⁹⁸⁸ For example, knowledge of the kind of clients that a municipal advisor serves may be useful

MSRB, the statutorily mandated rulemaking body for the municipal securities market, believes that the information obtained generally will contribute to the Commission's and its own regulatory activities.⁹⁸⁹

Some commenters believed that the information sought by Form MA with respect to many municipal advisors is information already available to the Commission through other registrations and that the proposed disclosures would therefore be redundant.⁹⁹⁰ One commenter argued that "adding new layers of regulation in this area will not serve to enhance the protection of municipal entities or investors."⁹⁹¹ Another commenter contended that it would be "more efficient for the

to a municipal entity in determining whether that advisor has the background and expertise necessary to provide advice regarding the issuance that the entity is contemplating. Similarly, information regarding the advisor's compensation arrangements generally may help a municipal entity evaluate the advisor's proposed compensation arrangements for the issuance under consideration. Such information can also be valuable to regulators in uncovering irregularities when questions are raised regarding a municipal advisor's motives and/or business conduct with respect to a particular transaction. The information that a municipal advisor provides regarding its other business activities, its financial industry affiliations, the proprietary and sales interests it may have in its municipal advisory clients' transactions, and the investment or brokerage discretion that it is granted in carrying out its services may help municipal entities, investors in municipal securities, and regulators assess whether conflicts of interest may affect the advice that the firm provides or may have influenced its advice in a transaction under investigation. The Commission believes that obtaining such information is consistent with the intent of the Dodd-Frank Act in establishing a regulatory framework for municipal advisory activities.

⁹⁸⁹ See MSRB Letter I. The MSRB also commented that the Commission "should give due weight to feedback from small municipal advisors regarding the potential burdens in light of the Congressional intent regarding regulatory burden on small municipal advisors." See *id.* The Commission addresses the burden for smaller municipal advisory firms in the Final Regulatory Flexibility Analysis below. See *infra* Section IX.

⁹⁹⁰ See, e.g., JP Morgan Chase Letter; SIFMA Letter I; and Specialized Public Finance Letter. See also Financial Services Roundtable Letter (maintaining that, for registered broker-dealers, "Form MA is largely duplicative of Form BD"); and Managed Funds Association Letter (maintaining that proposed Form MA, "but for items specifically relating to municipal advisory activities," is "substantially similar to Form ADV").

⁹⁹¹ See JP Morgan Chase Letter. This view was expressed particularly with respect to traditional banking products and services. See also *supra* Section III.A.1.c.viii., regarding banks.

SEC to leverage existing registration forms, which have years of interpretive guidance behind them, than to create a new form seeking much of the same information as required by Forms BD and U4.”⁹⁹² To address this issue, some suggested that the Commission allow persons that are already registered with the Commission – such as broker-dealers, investment advisers, and municipal securities dealers – to check an additional box on their primary registration forms already filed with the Commission or to provide them with a short-form registration process.⁹⁹³ Short of this, commenters urged that, if such persons must complete Form MA, they should be allowed to incorporate by reference on Form MA any information that is included on another registration form and be required to provide on Form MA only such additional information as deemed essential regarding municipal advisory activities.⁹⁹⁴

The Commission notes that Form MA, both as proposed and adopted, allow for incorporation by reference of certain information that already has been submitted on certain other forms by the applicant, any of its associated persons, or another entity pursuant to the requirements of other regulatory regimes. Specifically, each of the Disclosure Reporting Pages (“DRPs”) of Form MA permits incorporation by reference to DRPs that are already on file with regulators.⁹⁹⁵

⁹⁹² See Financial Services Roundtable Letter. Form U4 is the Uniform Application for Securities Industry Registration or Transfer, available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf>.

⁹⁹³ See SIFMA Letter I. See also Managed Funds Association Letter, Financial Services Roundtable Letter.

Also, one commenter suggested that, instead of registering a second time as a municipal advisor, an investment adviser should be permitted to amend its Form ADV to reflect the fact that it engages in municipal advisory activities. This commenter also suggested permitting state-registered investment advisers to register as municipal advisors by amending their Forms ADV. See ABA Letter.

⁹⁹⁴ See SIFMA Letter I, ABA Letter.

⁹⁹⁵ As explained below, Item 9 of Form MA requires an applicant to provide certain information concerning any criminal, regulatory, and civil judicial actions relating to the

The DRPs are generally where the most significant amount of information is requested on Form MA and on which applicants will likely need to expend the most time and effort.

Form MA, as adopted, more prominently highlights the option to incorporate information by reference. Part A of each DRP asks for basic information regarding the person(s) or entity(ies) concerning whom the DRP must be filed. Immediately thereafter, in Part B, the form asks if there is another DRP or other disclosure already on file in the IARD, CRD, or EDGAR system containing the information required by the DRP. If the answer is "Yes," the form asks the applicant to identify where the disclosures may be found. In addition, for the benefit of regulators, municipal entities, and other interested parties, the DRPs ask for information that will enable such parties to locate the referenced document easily, by requiring the applicant to provide the name of the registrant on the referenced document, the relevant registration number, and other identifying information. Thus, for all persons for whom disclosures of criminal, regulatory, and civil judicial actions must be made, Form MA already allows for incorporation by reference. The Commission believes that the accommodation of incorporation by reference for these disclosures will eliminate a significant amount of redundancy to which the commenters refer.

The Commission believes that commenters' suggestion to allow applicants already registered with the Commission under other regulatory regimes to check an additional box on their primary registration forms⁹⁹⁶ would not achieve the aim of the municipal advisor registration

applicant or any of its associated persons. For each action reported in Item 9, the applicant is required to complete a DRP by providing for further details, such as the court where the charges were filed and when, a description of the charge and the circumstances relating to it (in the case of criminal actions); the authority that initiated the action and a description of the allegations and the product-type (in the case of regulatory actions); or the initiator of the court action, the relief sought, and the product type (in the case of civil judicial actions). The information sought in the DRPs of Form MA is similar to information sought in DRPs that must be filed, as applicable, with Forms BD, ADV, and U4.

⁹⁹⁶ See supra note 993.

regime. Specifically, the Commission believes that persons seeking to compile, compare, and analyze data pertaining to registered municipal advisors, as well as regulators overseeing compliance with rules and regulations applicable to registered municipal advisors, should generally be able to easily access within one system relevant information about municipal advisors.

The Commission notes that the vast majority of applicants registering under the permanent registration regime would be new Commission registrants.⁹⁹⁷ As such, the majority of all information pertaining to municipal advisors will be centralized in EDGAR. On the other hand, the Commission acknowledges that, because disclosures required by Form MA DRPs and Form MA-I DRPs may be incorporated by reference from other forms, some information will reside outside EDGAR. However, the Commission notes that, under the temporary registration regime, only about 15% of applicants on Form MA-T indicated a history of criminal, regulatory, or civil judicial action that would require the submission of DRPs under the permanent registration regime. Moreover, not all 15% of municipal advisors indicating such a history would have DRPs on file elsewhere, as many may not be broker-dealers or investment advisers and thus would not be required to file Form BD or Form ADV. Accordingly, the Commission believes that fewer than 15% of municipal advisors should have DRP information stored outside EDGAR, with the majority of information collected under the permanent municipal advisor regime centralized in EDGAR. The Commission also notes that, if applicants that are already registered with the Commission under other regulatory regimes can register as municipal advisors by only checking an additional box on their primary registration form, a municipal entity or investor seeking information about a municipal advisor may

⁹⁹⁷ According to MA-T data as of December 31, 2012, there were approximately 1,110 Form MA-T registrants. Of these Form MA-T registrants, 226 were also registered with the Commission as broker-dealers; 39 were also registered with the Commission as investment advisers; and 65 were registered with the Commission as both broker-dealers and investment advisers. Therefore, the vast majority of Form MA-T registrants were new Commission registrants.

not realize that the information they seek is available on a Form BD or ADV, rather than a Form MA or MA-I.

Description of the Form: Introduction

As previously noted, in addition to considering the comments, the Commission analyzed the entire proposed Form MA and its appended schedules and disclosure pages to make any necessary adjustments. The discussion below describes Form MA, as adopted, and notes the substantive changes to the proposed form. At the outset, the Commission notes that it is making some revisions to clarify questions asked in Form MA. Other revisions are intended to elicit additional information. The Commission believes that the additional required data should make the information provided by registrants more useful to examiners, investigators, and other regulatory authorities and/or to municipal entities and investors.⁹⁹⁸

As noted below, the Commission made some revisions to the form to eliminate unnecessary disclosure requirements. Other changes involve a reorganization of the requested information. In general, the Commission intends to improve the picture that municipal entities, investors, and regulators will be able to obtain from Form MAs, whether regarding municipal advisors, in particular, or regarding municipal advisory activities, as a whole. For example, while the proposed DRPs required information generally regarding the disposition of criminal charges or resolution of regulatory or civil proceedings, in the DRPs, as adopted, the questions are more specific and require certain additional details.⁹⁹⁹

Format of Form MA

⁹⁹⁸ Although some commenters believed, generally, that the forms, as proposed, required too much information, the Commission believes that the modifications it has made to the forms that ask for additional information will elicit information that can be of significant use to regulators and municipal entities. The discussion below includes the reasons why, in each significant case, the Commission has made the revision. See, e.g., infra notes 1028-1030.

⁹⁹⁹ See further the discussion below regarding Item 9 of Form MA.

Form MA, as proposed, required the applicant to provide information describing itself and its business through a series of fill-in-the-blank, multiple choice, and the check-the-box questions.¹⁰⁰⁰ In the form, as adopted, these questions have been adapted to an electronic, web-based format,¹⁰⁰¹ with minor revisions to the text as necessary or appropriate for online completion.¹⁰⁰² As stated above, EDGAR is designed to detect certain failures to respond to mandatory questions and, to detect, in certain instances, defective responses.¹⁰⁰³

¹⁰⁰⁰ No comments were received on the format of the form.

¹⁰⁰¹ For example, where the paper form asked a Yes or No question and, if the answer is Yes, other questions must be answered, in the electronic form those additional questions will appear only if the applicant selected Yes. In the paper form, in some instances when the applicant answers Yes, the form instructs the applicant to supply additional information in Schedule D of the form. In the electronic form, a pop-up screen appears that immediately enables the applicant to complete the additional information. Filers will be able to obtain a paper version of the form at any time through the electronic system, which should help them anticipate in advance the information they will need to gather to complete on the online form. In addition, filers will be able to print out a hard copy version of the form with their responses included in their appropriate places on the form.

¹⁰⁰² Certain documents, such as a signed and notarized Form MA-NR (required of certain non-residents as discussed below) or copies of court orders required as part of a DRP will need to be converted into a portable document file (PDF) meeting the specifications set forth in the EDGAR Filer Manual, supra note 961, and attached to the electronic submission.

¹⁰⁰³ Some examples: If an applicant provides an EDGAR CIK number, the name of the company will be pre-populated in the electronic form with the name assigned to that CIK number and the applicant will not be permitted to list a different name. When an applicant indicates that it is registered under another Commission regulatory regime but supplies a registration number for that regulatory regime that cannot be valid because it is not in the correct numbering format, the system will prevent the applicant from filing the form. If an applicant answers affirmatively to a question that asks whether it only engages in solicitation and does not advise clients, it will not be possible to indicate in response to another question that it advises clients and does not solicit. If an applicant indicates that it has three websites but provides the addresses of only two, the system will not permit submission of the form. If an applicant discloses that it or an associated person has been involved in a criminal, regulatory, or civil judicial action, the system will prevent the applicant from filing the form if the appropriate DRP is not completed. If the principal address of a firm in Form MA or the residence of an individual reported in Form MA-I is in a foreign country (which the system can detect because states and countries are indicated by selecting the appropriate name in a drop-down box), the system will not permit submission of the form unless, at the appropriate step in the form, a Form MA-NR is attached.

Form MA also contains several supplemental schedules that must be completed, where applicable, each of which is discussed further below: Schedule A asks for information about the municipal advisor's direct owners and executive officers; Schedule B asks for information about the municipal advisor's indirect owners; Schedule C is used to amend information on either Schedule A or Schedule B; and Schedule D asks for additional information when an applicant answers in the affirmative regarding certain questions in the form and also provides space for any explanations that a filer may wish to add to its application. Form MA also contains DRPs, which require further details about events and proceedings involving the municipal advisor and/or the municipal advisor's associated persons that the applicant was required to report in Item 9 of the main body of the form, and are discussed in the context of Item 9 below.

Form MA, as proposed, first required a municipal advisor to indicate whether it is submitting the form for initial registration as a municipal advisor or submitting an annual update or an amendment (other than an annual update) to a registration as a municipal advisor.¹⁰⁰⁴ In the electronic form, as adopted, Form MA asks the applicant to indicate, upon entry, whether it is filing an initial form, an annual update, or amendment. Once an initial form is submitted, when a filer subsequently enters the system and selects the choice of annual update or amendment, the most recently submitted version of the form will appear, pre-populated with the responses as completed at that time. Thus, the filer will need only to amend the outdated information.

Item 1: Identifying Information

The Commission proposed Item 1 of Form MA to require essential identifying information regarding the applicant. For the reasons discussed below and in the Proposal,¹⁰⁰⁵ the Commission is adopting Item 1 substantially as proposed but with the minor modifications discussed below.

¹⁰⁰⁴ Amendments to Form MA are discussed further below. See infra Section III.A.5.

¹⁰⁰⁵ See Proposal, 76 FR at 841.

As proposed and adopted, Items 1-A and B of Form MA require a municipal advisor to indicate the full legal name of the municipal advisor and, if different, the name under which it primarily conducts its municipal advisor-related business.¹⁰⁰⁶ As adopted, Item 1-A also asks for the municipal advisor's CRD Number, if it has one.¹⁰⁰⁷ Item 1-C of Form MA as proposed and adopted requires a municipal advisor also to provide its Employer Identification Number (or "EIN," a number used with respect to Internal Revenue Service matters) or, if the applicant (such as a sole proprietor) does not have an EIN, a social security number.¹⁰⁰⁸

In Item 1-D, as proposed and adopted, if the municipal advisor is also registered with the Commission as an investment adviser, broker, dealer, or municipal securities dealer, or if it has previously registered with the Commission as a municipal advisor on Form MA-T, such municipal advisor is required to provide its related SEC file number or numbers. Further, if the municipal advisor is a broker-dealer or an investment adviser and has a CRD Number assigned to it either under the CRD system or the IARD system, it is required to provide its CRD Number.

As proposed and adopted, Item 1-D also requires an applicant to indicate whether it is a state-registered investment adviser. In such case, as adopted, Item 1-D additionally requires the applicant to identify the state (or states) with which it is registered,¹⁰⁰⁹ and adds to this category

¹⁰⁰⁶ As proposed and adopted, Item 1-B requires any additional names under which the applicant conducts municipal advisor-related business and the jurisdictions in which they are used to be listed in Schedule D.

¹⁰⁰⁷ Obtaining a municipal advisor's CRD Number, if it has one, enables regulators, municipal entities, and investors in a most basic way to research the background of a registrant. See, e.g., supra text accompanying note 964.

¹⁰⁰⁸ As discussed in the Proposal, the Commission is asking for the social security number of sole proprietors to permit the electronic filing system to distinguish between persons who share the same name. This information is necessary in connection with the Commission's enforcement and examination functions pursuant to Section 15B(c) of the Exchange Act (15 U.S.C. 78o-4(c)). See Proposal, 76 FR at 840, note 176. See also supra note 968.

¹⁰⁰⁹ Requiring the place(s) of registration directly on Form MA can be helpful to regulators,

other U.S. jurisdictions where the applicant is registered.¹⁰¹⁰

Item 1-D, as adopted, additionally requires a municipal advisor to indicate if it is an “exempt reporting adviser” with respect to investment adviser registration and, if so, to provide the SEC file number and CRD Number. The category of exempt reporting advisers, discussed in Section III.A.1.c.v. herein, was created by Commission rule after Form MA was proposed. Because exempt reporting advisers are not exempt from municipal advisor registration, if applicable, the Commission believes that the information that such advisers must report to the Commission, and the identifying numbers necessary to ease access to such information, is no less important to regulators of the municipal market, municipal entities, and investors than the equivalent information available regarding municipal advisors who are registered investment advisers.¹⁰¹¹

The information provided in response to Item 1-D will allow the Commission to more effectively cross-reference those entities applying for registration as municipal advisors to those who are registered as brokers, dealers, municipal securities dealers, investment advisers, or otherwise registered¹⁰¹² with the Commission. As discussed in the Proposal, the ability to cross-

municipal entities, and investors while imposing little burden upon the applicant. The omission of this disclosure requirement in the proposed version of the form was unintentional.

¹⁰¹⁰ The revision to include other U.S. jurisdictions in addition to states has been made throughout the forms.

¹⁰¹¹ As proposed and adopted, an applicant is further asked in Item 1-D whether it is a government securities broker-dealer, and, if so, to provide the SEC file number and bank identifier; whether it has any other SEC registration, and, if so, to specify which registration and the file number; and whether it is registered with another federal or state regulator, and, if so, to specify the regulator’s name and the applicant’s registration number. As adopted, Item 1-D asks whether the applicant has any additional registrations that were not already reported, and, if so, to list the regulator and the applicant’s registration number in Schedule D. The addition of this last question clarifies that if there are additional registrations, the applicant must list all of them.

¹⁰¹² For example, as the Commission noted in the Proposal, pursuant to Section 764 of the Dodd-Frank Act, security-based swap dealers will be required to register with the Commission.

reference will allow the Commission to assemble more complete information concerning a municipal advisor to inform the Commission's decision to approve or institute proceedings to deny an application for registration as a municipal advisor. The ability to cross-reference will also permit the Commission or any designee¹⁰¹³ to plan for, and carry out, efficient and effective examinations of registered municipal advisors. By obtaining all of an applicant's regulatory file numbers, the Commission will be able to cross-reference disciplinary information in the CRD or IARD systems with the information on Form MA. This ability would provide the Commission with a more complete understanding of a municipal advisor's structure and business.

Item 1-E asks for the address of applicant's principal office and place of business¹⁰¹⁴ and the telephone and fax numbers at that location. As proposed, Item 1-E of Form MA required an applicant to list on Schedule D any additional names under which it conducts municipal advisor-related business and the offices at which such business is conducted. In consideration of comments, generally, that the form is too burdensome,¹⁰¹⁵ in Item 1-E, as adopted, the Commission has determined to require information pertaining only to the five largest offices.

Item 1-F of Form MA, as proposed, asked whether the applicant has one or more websites, and, if so, to list them in Schedule D of the form. As adopted, Item-F continues to require an

See Section 764(a) of the Dodd-Frank Act and 15 U.S.C. 78o-8(a). See Proposal, 76 FR at 841, note 178.

¹⁰¹³ See 15 U.S.C. 78o-4(c)(7)(A)(iii) (providing that examinations of municipal advisors shall be conducted by the Commission or its designee).

¹⁰¹⁴ Rule 15Ba1-1(l) defines principal office and place of business to mean: "the executive office of the municipal advisor from which the officers, partners, or managers of the municipal advisor direct, control, and coordinate the activities of the municipal advisor." See also Glossary.

In addition, the municipal advisor must supply its mailing address, if it is different from its principal office and place of business.

¹⁰¹⁵ See, e.g., supra note 979 and accompanying text and text following note 987.

applicant to list all its websites, but also requires the address of its principal website on the main part of the form and any additional website addresses on Schedule D.¹⁰¹⁶

Item 1-G of Form MA, as proposed, required applicants to supply the name, address, e-mail address, and telephone and fax numbers of its Chief Compliance Officer, if it has such an officer, and to list any other title(s) the officer holds. Item 1-H, as proposed, asked for the title of, and similar contact information for, any other person whom the municipal advisor has authorized to receive information and respond to questions about the registration (the “contact person”). Items 1-G and 1-H are being adopted, as proposed, with a clarification to advise applicants that they must provide the name and contact information for only one person (i.e., either a Chief Compliance Officer or another contact person). The intent of the Proposal was for the applicant to provide one or the other, and the form, as adopted, makes this clearer. The added note also advises, however, that information for both may be provided if the applicant so chooses. As discussed in the Proposal, the Commission is requesting the identifying and contact information in Item 1-G and/or 1-H to assist the Commission and the staff in evaluating applications for registration and overseeing registered municipal advisors.¹⁰¹⁷

As proposed and adopted, Item 1-I of Form MA requires the applicant further to state whether it maintains, or intends to maintain, some or all of its books and records required to be kept under MSRB or Commission rules somewhere other than at its principal office and place of business and, if so, to provide (on Schedule D) information about the other location(s).

Item 1-J of Form MA, as proposed and adopted, requires an applicant to answer whether it is

¹⁰¹⁶ The Commission believes that identification of the applicant’s principal website out of possibly many will increase the benefit of the information to regulators, municipal entities, and investors without adding any unreasonable burden on the applicant.

¹⁰¹⁷ See also Proposal, 76 FR at 841.

registered with any foreign financial regulatory authority,¹⁰¹⁸ and, if so, to provide the name (on Schedule D) of each such authority and the country. Item 1-J is being adopted as proposed, with the additional requirement to provide the applicant's registration number under the foreign authority.¹⁰¹⁹

Item 1-K, as proposed and adopted, requires an applicant to disclose whether it is affiliated with any other business entity, and, if so, to disclose on Schedule D the name and registration number of each such affiliate.¹⁰²⁰ As discussed in the Proposal, this information will help inform the Commission as to the structure of the municipal advisor's business, which will help staff prepare for examinations of the municipal advisor.¹⁰²¹

Item 2: Form of Organization

The Commission proposed Item 2 of Form MA to require information about a municipal advisor's form of organization. The Commission received no comments regarding Item 2 and is adopting this item substantially as proposed. Item 2 requires a municipal advisor to specify whether it is organized as a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, limited partnership, or other form of organization that the municipal advisor

¹⁰¹⁸ An added instruction in Item 1-J, as adopted, makes clear that an applicant should answer "No" to this question even if it is affiliated with a business that is registered with a foreign financial regulatory authority.

¹⁰¹⁹ Schedule D relating to Item 1-J, as adopted, clarifies that both the name of the country and the name of the authority must be provided in English, which may not have been evident in the proposed version. In general, throughout the forms, as adopted, when the name of a foreign country and/or authority is required, the filer is instructed that answers must be provided in English.

¹⁰²⁰ The text of Item 1-K has been revised to make explicit that "business entity" refers to any domestic or foreign entity. Similarly, the related questions in Schedule D, which, as proposed, asked only for "any federal or state registration" has been revised to include foreign registrations, as well. These revisions have been made in accordance with the description of this disclosure item in the Proposal, which included foreign affiliates among the required disclosures. See Proposal, 76 FR at 842.

¹⁰²¹ See *id.*

must specify; the month of its annual fiscal year end; the date on which it was organized; and the state or other U.S. jurisdiction¹⁰²² or foreign jurisdiction where it was organized. As discussed in the Proposal, this information will assist the Commission in evaluating the applications for registration and overseeing registered municipal advisors.¹⁰²³

Item 2 also requires an applicant to specify whether it is a public reporting company under Section 12 or 15(d) of the Exchange Act and, if so, to provide its Commission-assigned EDGAR CIK number. As discussed in the Proposal, the information that an applicant is a public reporting company will provide a signal that additional public information is available about the municipal advisor and/or its control persons.¹⁰²⁴

Item 3: Successions

The Commission proposed Item 3 of Form MA to require applicants to disclose whether they are succeeding to the business of a registered municipal advisor and, if so, the date of succession. Further, Item 3 requires, on Schedule D, the name of, and registration information for, the firm the applicants are succeeding.¹⁰²⁵ The Commission received no comments regarding Item 3 and is adopting this item as proposed. As discussed in the Proposal, this information will assist the Commission, among other things, in overseeing registered municipal advisors and in

¹⁰²² Proposed Item 2 did not specifically mention U.S. jurisdictions other than states. The Item, as adopted, makes clear that such jurisdictions are included. See supra note 1010 and accompanying text.

¹⁰²³ See Proposal, 76 FR at 842.

¹⁰²⁴ See id.

¹⁰²⁵ As discussed elsewhere in this release, depending on whether the succession is a result of a merger or acquisition, or a reorganization, the succeeding firm will be able to register by either submitting a new Form MA or amending the Form MA of its predecessor. See infra note 1318 and accompanying text and infra Section III.A.7. (discussing Rule 15Ba1-7 regarding registration of a successor to a municipal advisor).

determining whether there has been a change in control of a municipal advisor.¹⁰²⁶

Item 4: Information About Applicant's Business

The Commission proposed Item 4 to require certain information about the applicant's business. The Commission received several comments relating to Item 4, which are discussed below.¹⁰²⁷ The Commission is adopting Item 4 substantially as proposed, with certain modifications as discussed in the description of the item below.

As proposed and adopted, subparts A to C of Item 4 require an applicant to provide information regarding the approximate number of employees it has, approximately how many of those employees engage in municipal advisory activities, and approximately how many are registered representatives of a broker-dealer or investment adviser representatives.

Item 4-D, as proposed and adopted, requires an applicant to state approximately how many firms, or other persons (that are not employees or otherwise associated persons of the applicant) solicit municipal advisory clients on the applicant's behalf. As proposed, an applicant is required to disclose on Schedule D the names, addresses, and phone numbers of firms that solicit on its behalf. As adopted, Item 4-D additionally requires the applicant to disclose on Schedule D the same information for other persons who are not employed by, or otherwise associated persons of, the applicant but who solicit on its behalf.¹⁰²⁸ In addition, to make the information more useful, the Commission has determined to require an applicant also to provide the EDGAR CIK and/or individual CRD Number, if any, of the soliciting firm or other person.

¹⁰²⁶ See *id.* See also Proposal, 76 FR at 842.

¹⁰²⁷ See *infra* notes 1040-1046 and accompanying text.

¹⁰²⁸ Upon review of the form as proposed, the Commission determined that requiring a firm to list the names of all persons who solicit on its behalf will provide potentially valuable and more fulsome information, as it may yield the names of persons who are providing such services without themselves registering.

Further, Item 4-E, as proposed, required an applicant to state whether it has any employees that also do business independently on the applicant's behalf as affiliates of the applicant and, if so, to disclose in related Section 4-E of Schedule D the names of such employees.¹⁰²⁹ In the form, as adopted, Section 4-E of Schedule D requires the applicant, in addition, to provide the address, telephone and fax number, EDGAR CIK (if any) and individual CRD Number (if any) of each such employee.¹⁰³⁰

Item 4-F, as proposed and adopted, requires the applicant also to approximate the number of clients it served in the context of its municipal advisory activities in the past fiscal year and to specify by checking the appropriate box(es) whether its clients include: municipal entities, non-profit organizations (e.g., 501(c)(3) organizations) who are obligated persons, corporations or other businesses not listed previously who are obligated persons, or other types of entities (and specify which other types of entities); or whether the applicant engages only in solicitation and does not serve clients in the context of its municipal advisory activities.

As proposed and adopted, applicants also are required, in Item 4-G,¹⁰³¹ to specify approximately the number of municipal entities or obligated persons that were solicited by the

¹⁰²⁹ This category of employee includes persons who do not necessarily engage in municipal advisory activities on behalf of the firm, and for whom a Form MA-I would thus not be required. Regarding employees who do also engage in municipal advisory activities on behalf of the firm, the applicant must in any case obtain the information requested in Section 4-E, as adopted, to complete a Form MA-I for each such employee. See also *infra* note 1030.

¹⁰³⁰ The Commission believes that these additional details in Schedule D will further serve the purposes for which Item 4 is designed and that an applicant firm should be able to provide such information about employees that do business on its behalf. Item 4-E, as adopted, asks the applicant to state the number of employees of this kind. This does not require an applicant to search for any additional information, because each such employee must be named in Schedule D. However, it can serve as a helpful cross-check to the filer as well as to regulators, and is also a useful number for interested parties who do not need the additional details.

¹⁰³¹ The section of Item 4 that relates to solicitations of municipal entities and obligated persons

applicant on behalf of a third-party during its most recently completed fiscal year, including any clients that it solicits in addition to serving them in the context of its municipal advisory activities. However, Item 4-G, as adopted, requires the applicant to provide the numbers separately for municipal entities and obligated persons.¹⁰³²

Further, as proposed and adopted, applicants must indicate, in Item 4-H,¹⁰³³ whether they solicit public pension funds, 529 Savings Plans, local or state government investment pools, hospitals, colleges, or other types of municipal entities or obligated persons (and to specify which other types). Alternatively, an applicant is able to indicate that the question is inapplicable, because it serves only clients and does not engage in solicitation in the context of its municipal advisory activities.

As proposed and adopted, applicants are also required to disclose, in Item 4-I,¹⁰³⁴ whether they are compensated for their advice to or on behalf of municipal entities or obligated persons by hourly charges, fixed fees (not contingent on the success of solicitations), contingent fees, subscription fees (for a newsletter or other publications), or otherwise.¹⁰³⁵ If the applicant checks

has been restructured in Form MA, as adopted, into two parts. Item 4-G is the first part of Item 4-G as proposed, which requires the applicant to state the number of municipal entities and obligated persons that the applicant solicited on behalf of a third party, as described above. New Item 4-H is comprised of the questions regarding the types of persons solicited by the applicant that constituted the rest of Item 4-G as proposed. Hereinafter, subparts 4-H, I, J, and K of the Proposal will be referred to by their numbers in the adopted form, *i.e.*, 4-I, J, K, and L, respectively.

¹⁰³² The Commission believes that the information requested will be more useful for regulatory purposes, and for gaining an understanding of municipal advisory activities in general, when broken down in this manner. Municipal entities and other interested parties can also benefit from this breakdown in assessing the specific experience of a municipal advisor.

¹⁰³³ Item 4-H was a part of Item 4-G as proposed. *See supra* note 1031.

¹⁰³⁴ Item 4-I was Item 4-H as proposed. *See supra* note 1031.

¹⁰³⁵ An applicant may alternatively state that the question is inapplicable because the applicant engages only in solicitation.

“other,” the other kind of arrangement must be described. Item 4-J,¹⁰³⁶ as proposed and adopted, asks for similar information about compensation for solicitation activities. Item 4-K,¹⁰³⁷ as proposed and adopted, asks whether the applicant receives compensation, in the context of its municipal advisory activities, from anyone other than clients, and, if so, to provide an explanation.

As discussed in the Proposal, disclosure of information relating to the number of a municipal advisor’s employees and compensation arrangements will provide the Commission with a clearer understanding of the business structure of registered municipal advisors, including the size of each advisor, the number of its employees that engage in municipal advisory activities, and in what capacity these employees engage in such activities. Information about compensation arrangements also will identify possible conflicts of interest that the municipal advisor may have with its clients.¹⁰³⁸

The Commission received several comments regarding the five categories of compensation arrangements.¹⁰³⁹ One commenter believed that the Commission should “refrain from utilizing this limited information in making a determination as to the existence of conflicts of interest with respect to compensation” and that “a more comprehensive analysis of compensation arrangements and the rationale for such fees should be considered prior to making any determination as to the appropriateness of a particular fee arrangement.”¹⁰⁴⁰ Another commenter believed that, because investment advisers generally have “a completely different business model, approach to business and compensation model,” as well as “scale of business,” than municipal advisors, Form ADV is

¹⁰³⁶ Item 4-J was Item 4-I as proposed. See supra note 1031.

¹⁰³⁷ Item 4-K was Item 4-J as proposed. See supra note 1031.

¹⁰³⁸ See Proposal, 76 FR at 843.

¹⁰³⁹ See Joy Howard WM Financial Strategies Letter; Public FA Letter; and Fiscal Advisors and Marketing Letter, Inc., dated February 21, 2011 (“Fiscal Advisors and Marketing Letter”).

¹⁰⁴⁰ See Joy Howard WM Financial Strategies Letter.

“not a good model in this element of registration.”¹⁰⁴¹

The five choices from among which applicants are asked to select are not intended to give an exhaustive picture of a municipal advisor’s business model, but the Commission does believe that receiving responses regarding compensation, at least on the level of specificity requested in this item, will enable Commission staff to ask more targeted questions on routine examinations and may highlight relationships that should be more closely examined. Furthermore, the Commission notes that in addition to the five choices, an applicant may also check “Other” to describe its compensation arrangements. If selected, the applicant is required to specify the nature of such arrangements.

Item 4-L,¹⁰⁴² as proposed and adopted, also requires the municipal advisor to indicate the general types of municipal advisory activities in which it engages.¹⁰⁴³ The Commission understands

¹⁰⁴¹ See Public FA Letter. Another commenter stated that most municipal advisors “charge on a project or transaction specific basis and not on an annual all encompassing service basis” and thus believed that Form ADV is not a relevant document that would help in understanding “the nature of an ‘Independent Municipal Advisor,’ its corporate makeup, nor the fee relationship” and “does not afford any basis for analyzing potential conflict of interest.” See Fiscal Advisors and Marketing Letter.

¹⁰⁴² Item 4-L was Item 4-K as proposed. See supra note 1031.

¹⁰⁴³ The following eleven activities are listed: (1) advice concerning the issuance of municipal securities (including, without limitation, advice concerning the structure, timing, terms and other similar matters, such as the preparation of feasibility studies, tax rate studies, appraisals and similar documents, related to an offering of municipal securities), (2) advice concerning the investment of the proceeds of municipal securities (including, without limitation, advice concerning the structure, timing, terms and other similar matters concerning such investments), (3) advice concerning municipal escrow investments (including, without limitation, advice concerning their structure, timing, terms and other similar matters), (4) advice concerning the investment of other funds of a municipal entity or obligated person (including, without limitation, advice concerning the structure, timing, terms and other similar matters concerning such investments), (5) advice concerning guaranteed investment contracts (including, without limitation, advice concerning their structure, timing, terms and other similar matters), (6) advice concerning the use of municipal derivatives (including, without limitation, advice concerning their structure, timing, terms and other similar matters), (7) solicitation of investment advisory business from a municipal entity or obligated person (including, without limitation, municipal

that the listed activities are those in which the municipal advisors engage and are derived from the definition of municipal advisor in Exchange Act Section 15B(e)(4)¹⁰⁴⁴ or closely related to the activities included within that definition. As discussed in the Proposal, this information will help the Commission understand the scope of activities in which a municipal advisor engages and identify possible conflicts of interest and in preparing for examinations, and will also provide the Commission with data useful to making regulatory policy.¹⁰⁴⁵

One commenter believed that, due to competitive concerns, a municipal advisor should not be required to disclose the names and contact information of persons that solicit municipal clients on its behalf.¹⁰⁴⁶ The Commission notes that the definition of municipal advisor under the Exchange Act includes, specifically, persons who undertake solicitation of municipal entities and obligated persons. The Commission thus believes that requiring an applicant to provide information about persons who solicit clients on its behalf will help it carry out its oversight responsibilities with respect to the full range of persons who are municipal advisors. For example, as already stated,¹⁰⁴⁷ such information may yield the names of persons who are engaged in such activities without themselves registering. Moreover, as stated in the Proposal, the Commission believes that

pension plans) on behalf of an unaffiliated person or firm (e.g., third party marketers, placement agents, solicitors and finders), (8) solicitation of business other than investment advisory business from a municipal entity or obligated person on behalf of an unaffiliated broker, dealer, municipal securities dealer, municipal advisor or investment adviser (e.g., third party marketers, placement agents, solicitors and finders), (9) advice or recommendations concerning the selection of other municipal advisors or underwriters with respect to municipal financial products or the issuance of municipal securities, (10) brokerage of municipal escrow investments, or (11) other. Applicants who check "other" activities will be required to provide a narrative description of such activities.

¹⁰⁴⁴ See 15 U.S.C. 78o-4(e)(4).

¹⁰⁴⁵ See Proposal, 76 FR at 843.

¹⁰⁴⁶ See SIFMA Letter I.

¹⁰⁴⁷ See *supra* note 1028.

information requested in Item 4-L is important for discerning possible conflicts of interest.¹⁰⁴⁸ The Commission further notes that the requirement that a municipal advisor disclose all persons who solicit clients on its behalf applies equally to all applicants for registration. The Commission believes that such universal disclosure serves to mitigate the competitive concerns raised by the commenter.

Item 5: Other Business Activities

The Commission proposed Item 5 to require information about the applicant's other business activities. The Commission received no comments regarding Item 5 and is adopting Item 5 substantially as proposed, with minor modifications as discussed below.

As proposed and adopted, Item 5 requires applicants to indicate whether they are actively engaged any one of an enumerated list of businesses.¹⁰⁴⁹ In Item 5, as adopted, the applicant is required additionally to indicate, for each other business in which it is engaged, whether this is its primary business.¹⁰⁵⁰ As proposed and adopted, Item 5 requires an applicant also to state whether it

¹⁰⁴⁸ See supra note 1038 and accompanying text.

¹⁰⁴⁹ Specifically, in Item 5, as adopted, an applicant is asked whether it is actively engaged in business in, or as, a (1) broker-dealer, municipal securities dealer or government securities broker or dealer, (2) registered representative of a broker-dealer, (3) commodity pool operator (whether registered or exempt from registration), (4) commodity trading advisor (whether registered or exempt from registration), (5) futures commission merchant, (6) major swap participant, (7) major security-based swap participant, (8) swap dealer, (9) security-based swap dealer, (10) trust company, (11) real estate broker, dealer, or agent, (12) insurance company, broker, or agent, (13) banking or thrift institution (including a separately identifiable department or division of a bank), (14) investment adviser (including financial planners), (15) attorney or law firm, (16) accountant or accounting firm, (17) engineer or engineering firm, or (18) other financial product advisor (and, if so, to specify the type). Minor differences in this multiple choice list from the list, as proposed, are that engineer is now included, in addition to engineering firm (as in Item 6 as proposed and adopted), and swap dealer and security-based swap dealer are now two distinct categories.

¹⁰⁵⁰ Although this specific question was not included in the proposed form, the Commission notes that in the next subpart of Item 5, as proposed, if the applicant identifies any other businesses in which it is engaged that are not included in the list of choices described above, it is further asked whether this is its primary business. See infra note 1051.

is actively engaged in any other business that is not one of those enumerated above and whether that other business is its primary business. It also is required to describe the other business on Schedule D to Form MA. As discussed in the Proposal, this information will assist the Commission, among other things, in identifying conflicts of interest for municipal advisors and preparing for inspections and examinations of municipal advisors. The information also will assist the Commission and the MSRB in understanding municipal advisors in the context of their activities for regulatory purposes.¹⁰⁵¹

Item 6: Financial Industry and Other Activities of Associated Persons¹⁰⁵²

The Commission proposed Item 6 to require an applicant to disclose financial industry affiliations of its associated persons. The Commission received several comments on Item 6, as discussed below.¹⁰⁵³ The Commission has carefully considered these comments and is adopting Item 6 and the related information it requires on Schedule D of Form MA largely as proposed. Some modifications have been made, however, and these are discussed below.

Item 6, as proposed and adopted, requires an applicant to provide information about its associated persons¹⁰⁵⁴ that are engaged in activities other than those that relate to their association

¹⁰⁵¹ See Proposal, 76 FR at 844.

¹⁰⁵² The title of Item 6, which, as proposed, was “Financial Industry Affiliations of Associated Persons,” has been changed in Form MA as adopted to better reflect the range of activities that the item concerns – all of which may be a source of conflict of interest for the municipal advisor – and to avoid any possible confusion that could be caused by the use of the term “affiliations” in the title.

¹⁰⁵³ See *infra* notes 1064-1070.

¹⁰⁵⁴ Section 15B(e)(7) provides that the term “person associated with a municipal advisor” or “associated person of an advisor” means “(A) any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions); (B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and (C) any person

with the applicant. As discussed in the Proposal, Item 6 lists twenty activities that an associated person may engage in, some of which are not listed in Item 5 as other activities in which the applicant itself may be engaged.¹⁰⁵⁵ The collection of this information is designed to gather more complete information about the associated persons of a municipal advisor who are actually providing advice or are controlling the firm and help better inform the Commission's regulatory and examination programs.¹⁰⁵⁶

As proposed, Item 6 of Form MA required an applicant to list, on related Section 6 of Schedule D of the form, all associated persons, including foreign affiliates, that are broker-dealers,

directly or indirectly controlling, controlled by, or under common control with such municipal advisor." 15 U.S.C. 78o-4(e)(7). For purposes of Form MA, the Glossary defines "associated person or associated person of a municipal advisor" to have the same meaning as in Exchange Act Section 15B(e)(7) (15 U.S.C. 78o-4(e)(7)), but to exclude employees that are solely clerical or administrative. Specifically, the Glossary defines these terms to mean: "Any partner, officer, director, or branch manager of a municipal advisor (or any person occupying a similar status or performing similar functions); any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any municipal advisory activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities (other than employees who are performing solely clerical, administrative, support or other similar functions); and any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor."

¹⁰⁵⁵ Specifically, under Item 6, a municipal advisor is required to disclose whether any of its associated persons is: (1) a broker-dealer, municipal securities dealer, or government securities broker or dealer; (2) an investment company (including a mutual fund), (3) an investment adviser (including a financial planner), (4) a swap dealer, (5) a security-based swap dealer, (6) a major swap participant, (7) a major security-based swap participant, (8) a commodity pool operator (whether registered or exempt from registration), (9) a commodity trading advisor (whether registered or exempt from registration), (10) a futures commission merchant, (11) a banking or thrift institution, (12) a trust company, (13) an accountant or accounting firm, (14) an attorney or law firm, (15) an insurance company or agency, (16) a pension consultant, (17) a real estate broker or dealer, (18) a sponsor or syndicator of limited partnerships, (19) an engineer or engineering firm, or (20) another municipal advisor. See supra note 1049. As adopted, Item 6 includes an instruction that if an associated person is involved in more than one of these activities, each such activity must be reported.

¹⁰⁵⁶ See Proposal, 76 FR at 844.

municipal securities dealers, or government securities brokers or dealers, or investment advisers, municipal advisors, registered swap dealers, banking or thrift institutions, or trust companies. As adopted, the form requires the applicant also to list in Section 6 of Schedule D all associated persons that are investment companies (including mutual funds), major swap participants and major security-based swap participants, commodity pool operators, commodity trading advisors, futures commission merchants, accountants or accounting firms, attorneys or law firms, insurance companies or agencies, pension consultants, real estate brokers or dealers, sponsors or syndicators of limited partnerships, or engineers or engineering firms.¹⁰⁵⁷

Section 6 of Schedule D, as proposed and adopted, also requires the applicant to provide the legal and primary business names of each associated person listed, as well as to indicate the category or categories listed in Item 6 of the main form of which the associated person is a member. Finally, Section 6 of Schedule D, as proposed and adopted, requires the applicant to indicate whether it controls, or is controlled by, the associated person; whether the two are under common control;¹⁰⁵⁸ and/or whether the associated person is registered with a foreign financial regulatory authority and, if so, the country and name in English of that authority.¹⁰⁵⁹

As discussed above, the purpose of Item 6 is to elicit more complete information about who

¹⁰⁵⁷ In other words, the form, as adopted, requires the applicant to list in Section 6 of Schedule D the names of all associated persons in any of the categories in Item 6. See supra note 1055 and accompanying text.

¹⁰⁵⁸ See infra note 1080 for the definition of “control” as used in the municipal advisor registration forms.

¹⁰⁵⁹ To the extent that Item 6, as adopted, requires associated persons in additional categories to be listed in Schedule D, as discussed supra note 1057, the requirements to provide in Schedule D the legal and primary business names of each associated person, indicate the category or categories to which the person belongs, and respond to the questions relating to control now apply to persons in those additional categories. Similarly, the questions relating to registration with foreign financial regulatory authorities, as discussed further below, apply to associated persons in all the categories listed in Item 6, as adopted.

is providing advice or controlling the applicant. Moreover, as new Rule 15Bc4-1 underscores, all associated persons of municipal advisors are subject to censure.¹⁰⁶⁰ Thus, after further consideration, the Commission believes that requiring the applicant municipal advisory firm to identify associated persons that are involved in any of the above categories – each of which involves activities that can impact or be impacted by the advice the firm provides – will better assist the Commission in gaining an understanding of possible conflicts of interest or wrongful influence in the municipal advisor’s activities. The Commission notes that Form MA elsewhere already reflects a concern that involvement in a wider range of areas can lead to conflict of interest, as Item 5 of the form requires disclosure of whether the applicant firm itself is involved in any of 17 enumerated categories of that Item and must further indicate whether it acts as any other type of financial product advisor and specify the type.¹⁰⁶¹

As already noted,¹⁰⁶² in conformance with the additions to the categories of associated persons that must be identified in Item 6, Section 6 of Schedule D, as adopted, will require disclosure of foreign registration information with respect to associated persons in twenty categories. As discussed above, the Commission believes that an associated person’s involvement in any of these categories can impact or be impacted by the advice the firm provides, and foreign financial regulatory authorities can be of significant help in tracking such activity and uncovering possible wrongdoing. An additional change in Section 6 of Schedule D, as adopted, requires the applicant to provide, in the case of an associated person registered with a foreign financial

¹⁰⁶⁰ See *infra* Section III.A.9.

¹⁰⁶¹ Item 6, as adopted, also asks the applicant to state the total number of its associated persons that belong to any of the twenty categories (listed above in note 1055). Because, in Item 6, as adopted, all such persons must be identified in Schedule D, tallying the number involves no additional disclosure and will act as a cross-check to ensure that the information provided is complete.

¹⁰⁶² See *supra* note 1059.

regulatory authority, the relevant registration number. The Commission believes that, for associated persons that are active in foreign countries, having the registration number, if any, under foreign financial regulatory authorities can be particularly helpful in obtaining information for regulatory and investigative purposes.

The Commission received several comment letters opposing the extent of the disclosures required by Item 6 and, on a more general level, all the disclosures that Form MA requires regarding an applicant's associated persons.¹⁰⁶³ One commenter believed that the form requires "overly extensive disclosure" regarding affiliates of a municipal advisor, particularly for a municipal advisor that is a member of a large affiliated group of institutions.¹⁰⁶⁴ These requirements, the commenter said, would impose "a vast information-gathering burden on applicants."¹⁰⁶⁵ The commenter raised specifically the case of affiliates that are under common control with a municipal advisor ("sister affiliates"), whose activities "may have no connection to municipal advisory activities, let alone, in the case of financial institutions with global operations, a nexus or connection to any activities in the United States."¹⁰⁶⁶ The commenter suggested that disclosures regarding affiliates be limited to affiliates that control or are controlled by the municipal advisor or "at a minimum" to sister affiliates providing municipal advisory services in the U.S.¹⁰⁶⁷ This commenter also believed that a municipal advisory firm should not be required to provide information regarding its individual associated persons (citing the example of employees) on Form MA unless those persons "devote a significant amount of time or resources" to, or are "primarily

¹⁰⁶³ See, e.g., Acacia Financial Group Letter; Deloitte Letter; SIFMA Letter I.

¹⁰⁶⁴ SIFMA Letter I.

¹⁰⁶⁵ Id.

¹⁰⁶⁶ Id.

¹⁰⁶⁷ Id. See also infra notes 1119-1120 (related SIFMA comments regarding disclosure requirements with respect to the disciplinary history of affiliates and associated persons).

engaged” in, municipal advisory activities, particularly if those persons are already registered with a broker-dealer, investment adviser, municipal securities dealer, commodity trading advisor or swap dealer.¹⁰⁶⁸

Another commenter believed that requiring disclosures regarding associated persons performing “any activities” relating to advice could “impose significant costs” and “create a significant burden.”¹⁰⁶⁹ This commenter stated that the Commission should “establish a threshold for reporting and updating associated person information in Form MA” – a certain minimum of hours spent on municipal advisory activities over a specified time period. The commenter also suggested that, when personnel from an entity are subcontracted, the entity itself should not be required to register.¹⁰⁷⁰

The Commission notes that, for certain information pertaining to affiliates, it has determined to limit the required disclosures in Form MA to information regarding persons that control, or are controlled by, the municipal advisor (and not persons under common control).¹⁰⁷¹ However, with respect to financial industry and other activities represented on the list in Item 6, the Commission believes it is appropriate to extend its information base regarding such activities to all of a municipal advisor’s associated persons (which, by definition, includes persons under common control with the municipal advisor).¹⁰⁷² For example, the Commission believes that ascertaining

¹⁰⁶⁸ See SIFMA Letter I.

¹⁰⁶⁹ See Deloitte Letter.

¹⁰⁷⁰ See *id.*

¹⁰⁷¹ See also the discussion below regarding Item 8, *infra* notes 1079-1088 and accompanying text.

¹⁰⁷² See Section 15B(e)(7)(C) of the Exchange Act, which defines the term “person associated with a municipal advisor” or “associated person of an advisor” as including “any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor.”

such information may assist the Commission in identifying potential conflicts of interest.

The ability to discern connections within a large network of affiliations and other associations that otherwise would not be evident is particularly important to the Commission for purposes of enforcement, to enable regulators to detect possible trails of influence and to widen their potential sources of factual information relevant to investigations of wrongdoing. The Commission believes that establishing such an information base is consistent with the Dodd-Frank Act's amendments to Section 15B of the Act, which explicitly extend the Commission's regulatory authority (directly and through its oversight of the MSRB) to associated persons of municipal advisors.¹⁰⁷³

The Commission notes that Item 6 and Section 6 of Schedule D ask for little more than the names (legal and business) of any associated persons of the municipal advisor that do business in the specified fields and, if the associated person is registered with a foreign financial regulatory authority, the registration number. Otherwise, Section 6 asks only whether the municipal advisor controls or is controlled by the associated person or whether the two are under common control. Such control relationships are directly relevant to investigations of the municipal advisor.

The Commission believes that, in today's world of organizational and managerial sophistication and advanced information technology, including as is pertinent to cross-border affiliations, it should not be unreasonably difficult for a municipal advisor that finds itself within a larger family of affiliates, particularly of the size discussed by commenters, to obtain knowledge of

¹⁰⁷³ See, e.g., Section 15B(c)(4) of the Exchange Act (authority of Commission to censure or place limitations on the activities or functions of associated persons of municipal advisors); and Section 15B(b)(2)(A) (authority of MSRB to establish standards of training, experience, competence, and other qualifications for associated persons of municipal advisors). See also Section 15B(a)(2) (application for registration as a municipal advisor to contain such information and documents concerning associated persons of municipal advisors as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors).

its own place and the place of others within that family. Given the potential relevance and importance of such information, as discussed above, to assuring lawfulness and fairness in the field of municipal advisory services, as well as in maintaining confidence in the municipal securities markets, the Commission believes it is appropriate to require municipal advisors to obtain and provide such information.

With respect to the suggestions that a municipal advisory firm should not be required to provide information regarding its individual associated persons unless those persons devote a certain threshold of time or resources to municipal advisory activities, the Commission disagrees. In particular, the kind of activity that disclosure relating to associated persons is intended to bring to light may involve the kind of significant influence that often is wielded in very short timeframes of activity, e.g., a short phone call from a partner in the firm to a key person in a municipal entity “urging” the issuance of a particular offering, or soliciting the municipal entity’s investment.

Item 7: Participation or Interest in Municipal Advisory Client or Solicitee Transactions¹⁰⁷⁴

The Commission proposed Item 7 to require information about an applicant’s participation and interest in the transactions of its municipal advisory clients. The Commission received no comments referencing Item 7 that are not discussed elsewhere¹⁰⁷⁵ and is adopting Item 7 as proposed.¹⁰⁷⁶

¹⁰⁷⁴ The title of Item 7 has been revised in Form MA, as adopted, to include “solicitee” transactions to better reflect the information sought in this item. The term “solicitee” is defined in the discussion below and is included in the Glossary of Terms for the Form MA series as adopted.

¹⁰⁷⁵ As discussed above, the Commission received a general comment questioning whether useful information could be elicited from applicants with regard to some required disclosures. See supra note 984 and accompanying discussion.

¹⁰⁷⁶ The Commission notes that, as published in the Proposal, several of the questions in this item referred explicitly only to clients of the municipal advisor. It is clear from the context, however, that these questions were also intended to apply to persons that the municipal advisor solicits or intends to solicit in the context of its municipal advisory activities. Item

As discussed in the Proposal, the purpose of Item 7 is to identify possible conflicts of interest that the municipal advisor and its associated persons may have with the municipal advisor's clients and/or the persons the municipal advisor solicits.¹⁰⁷⁷ For example, a municipal advisor that receives commissions or other payments for sales of securities to clients may have a conflict of interest with its clients. This type of practice gives the municipal advisor and its personnel an incentive to base investment recommendations on the amount of compensation they will receive rather than on the client's best interests.

Specifically, Item 7 requires an applicant to disclose whether it, or any of its associated persons, has a proprietary interest in the securities or other investment or derivative product transactions of its clients or of persons whom it solicited or intends to solicit ("solicitees"). These disclosures include whether the applicant buys securities or other investment or derivative products from, or sells them to, its clients or solicitees; whether it buys or sells for itself securities (other than shares of mutual funds) or other investment or derivative products that it also recommends to such clients or solicitees; whether it enters into derivative contracts with such clients or solicitees; or whether it recommends to its clients or solicitees securities or other investment or derivative products in which it or any associated person has any proprietary interest (other than as already disclosed in response to the previous questions).

An applicant is also asked to disclose whether it or its associated persons recommend purchases of securities or derivative products to clients or solicitees for which the municipal advisor or its associated persons serve as underwriter, general or managing partner, or purchaser representative; recommend purchases or sales of securities or derivatives to clients or solicitees in

7, as adopted, has been modified to explicitly reference such solicitees in addition to clients in each of these instances.

¹⁰⁷⁷ See Proposal, 76 FR at 844.

which applicant or its associated person has any other sales interest (other than the receipt of sales commissions as a broker or registered representative of a broker-dealer); have certain discretionary authority over transactions in securities or other investment or derivative products for its clients or solicitees; and recommend brokers, dealers, or investment advisers to its clients or solicitees, and, if so, whether those brokers, dealers, or investment advisers are associated persons of the municipal advisor. Item 7 also requires the municipal advisor to disclose whether it or its associated persons give or receive compensation for municipal advisory client referrals.¹⁰⁷⁸

Item 8: Owners, Officers, and Other Control Persons¹⁰⁷⁹

The Commission proposed Item 8 of Form MA to require information about an applicant's control persons. As discussed below, the Commission received one comment specifically relating to Item 8. The Commission carefully considered issues raised by the commenter and is adopting Item 8 substantially as proposed, with minor modifications discussed below.

Item 8, as proposed and adopted, asks applicants to identify on Schedules A and B every person that owns a certain percentage of the applicant, that directly or indirectly controls the applicant, or that the applicant directly or indirectly controls.¹⁰⁸⁰ An initial applicant is required to

¹⁰⁷⁸ In Item 7, as adopted, the phrase "in the context of its municipal activities" has been deleted in instances where the intention may not have been clear. For example, Item 7.C, as proposed, asked: "Does applicant or any associated person have discretionary authority to determine the: (1) securities or other investment or derivative products to be bought or sold for the account of a client that it serves or person that it has solicited or intends to solicit in the context of its municipal advisory activities." The phrase "in the context of its municipal advisory activities" was not intended to limit the question to products bought or sold in such context, but to limit the kind of solicitation being referenced. To avoid confusion, it has been deleted.

¹⁰⁷⁹ The title of this item as proposed was "Control Persons." It has been changed in Form MA, as adopted, because the item, among other things, is seeking information about owners to determine whether such persons are control persons.

¹⁰⁸⁰ The term "control" is defined in the Glossary to mean, for purposes of the municipal advisor registration forms, "the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise." Further, the

complete Schedules A and B. Schedule C is used to amend information previously reported on Schedules A and B.

Schedule A requires information about the applicant's executive officers and, for firms, persons that directly own 5% or more of the applicant.¹⁰⁸¹ Schedule B requests information about persons that indirectly own 25% or more of the applicant. A clarifying instruction has been added to Schedule B, as adopted, explaining that, for these purposes, an "indirect owner" includes any owner of 25% or more of any direct owner listed in Schedule A and any owner of 25% or more of each such indirect owner going up the chain of ownership. Applicants are also asked to identify, on Schedule D, any person that controls the applicant's management or policies if not otherwise identified as an owner or officer in Schedule A or B. Further information is requested with respect to control persons that are public reporting companies under Sections 12 or 15(d) of the Exchange Act.¹⁰⁸²

For ease of use and clarity, Form MA, as adopted, asks for information separately on

Glossary provides that: (a) each of the municipal advisor's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the municipal advisor; (b) a person is presumed to control a corporation if the person: (i) directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or (ii) has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities; (c) a person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership; (d) a person is presumed to control a limited liability company ("LLC") if the person: (i) directly or indirectly has the right to vote 25 percent or more of a class of the interests of the LLC; (ii) has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the LLC; or (iii) is an elected manager of the LLC; and (e) a person is presumed to control a trust if the person is a trustee or managing agent of the trust. See Glossary.

¹⁰⁸¹ As detailed in the form, the 5% criterion varies in its applicability and does not always mean ownership in the ordinary sense of the word – depending on whether the applicant is a corporation, partnership, trust, or limited liability company.

¹⁰⁸² Section 8-B of Schedule D to Form MA requires the name and CIK number of each control person listed on Schedule A, B, C or Section 8-A of Schedule D.

Schedules A-1 and B-1 for owners and control persons that are business entities and on Schedules A-2 and B-2 for owners and control persons who are natural persons, as well as (in Schedule A-2) for executive officers.¹⁰⁸³ The information sought in these schedules, however, is the same as in the Proposal, with minor modifications.¹⁰⁸⁴

For each business entity listed, the applicant is required to provide its organization CRD Number, if it has one, or its IRS tax number, EIN, or, if not a domestic entity, any foreign business number. For each natural person listed, the applicant is required to provide the person's individual CRD Number, if any, or the person's social security number or foreign identity number, as well as date of birth.¹⁰⁸⁵

As discussed in the Proposal, the information requested and the definition of control are consistent with that requested and used by the Commission in other contexts.¹⁰⁸⁶ This information will help to inform the Commission's understanding of the ownership structure of the municipal advisor and who ultimately controls the municipal advisor. Such information in turn will provide useful information in preparing for examinations and also in identifying potential conflicts of interest. The information requested also will inform the Commission about changes in control of

¹⁰⁸³ The guidance provided in the form has been correspondingly revised to reflect this restructuring. Although these Schedules, as published in print, display the information requested in table form, the electronic version of Form MA – which is the only format in which the form can be completed and submitted – asks the questions in a series of pop-up boxes and instructions. See also supra note 1001.

¹⁰⁸⁴ In the form, as adopted, in addition to providing information about other registrations that the control person that is a firm or organization may have with the Commission, information about any registration on Form MA-T must also be provided. In addition, the nature of the control must also be described. If the control person is a natural person, his or her CIK number, if any, must be supplied in addition to the other basic information requested.

¹⁰⁸⁵ As noted above, the form, as adopted, makes clear that social security numbers, foreign identification numbers, and date of birth will not be publicly disseminated.

¹⁰⁸⁶ The requested information and definition of “control” are consistent with the information requested of, and definition used for, investment advisers required to register on Form ADV. See 17 CFR 279.1. See also Proposal, 76 FR at 845, note 195 and accompanying text.

the municipal advisor.

One commenter, as discussed above with respect to Item 6,¹⁰⁸⁷ cited Item 8 and Schedules A, B, C and D as another illustration of the burden imposed by the reach of Form MA's questions to information about affiliates. Although Item 8 refers to "control persons,"¹⁰⁸⁸ the Commission notes that the disclosure requirements in Item 8 apply only to "every person that, directly or indirectly, controls the applicant, or that the applicant directly or indirectly controls" and does not include sister affiliates (although a control relationship in other contexts is sometimes understood to include two persons under common control). The very point of registration is that, to be permitted to register as a municipal advisor, a firm must provide certain basic information that will enable the Commission to oversee the activities of, and exercise jurisdictional authority over, those who register. The Commission notes that Forms BD and ADV require filers to provide substantially similar information.

Item 9: Disclosure Information and Related DRPs

As discussed in the Proposal, Item 9 requires an applicant to provide certain information concerning any criminal, regulatory, and civil judicial actions relating to the applicant or any of its associated persons¹⁰⁸⁹ (collectively referred to hereinafter as "disciplinary history").¹⁰⁹⁰ If an applicant indicates in Item 9 that there has been a history of such actions involving itself or any of its associated persons, the applicant must report further information in the DRPs that comprise Part

¹⁰⁸⁷ SIFMA Letter I, *supra* note 1065.

¹⁰⁸⁸ The definition of "control" does not refer to persons under common control. On the other hand, the definition of "associated person" of a municipal advisor does include a person that is under common control with the municipal advisor.

¹⁰⁸⁹ See *supra* note 1054 (discussing the definition of "person associated with a municipal advisor" or "associated person of a municipal advisor").

¹⁰⁹⁰ However, as discussed further below, the disclosures regarding criminal actions are limited to the period of the past ten years.

II of Form MA, which are described below.¹⁰⁹¹ The Commission received several comments regarding the disclosures required by Item 9 and its related DRPs, which are discussed below.¹⁰⁹² The Commission is adopting Item 9 with certain changes. Although, as adopted, Item 9 generally seeks the same information as in the Proposal, some questions have been more narrowly tailored and broken down into subparts. These changes and the reasons for them are detailed below.

As discussed in the Proposal,¹⁰⁹³ Section 975(c)(3) of the Dodd-Frank Act amended Section 15B of the Exchange Act to direct the Commission, by order, to censure, place limitations on the activities, functions, or operations of, or suspend for a period not exceeding twelve months, or revoke the registration of any municipal advisor, if it finds¹⁰⁹⁴ that such municipal advisor has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (G) or (H)¹⁰⁹⁵ of paragraph (4) of Section 15(b) of the Exchange Act; has been convicted of any offense specified in Section 15(b)(4)(B)¹⁰⁹⁶ of the Exchange Act within ten years of the commencement of the proceedings under Section 15B(c); or is enjoined from any action, conduct, or practice specified in Section 15(b)(4)(C)¹⁰⁹⁷ of the Exchange Act.¹⁰⁹⁸

Generally, Item 9 was designed to elicit information from a municipal advisor concerning certain of its activities or the activities of its associated persons that could subject the municipal

¹⁰⁹¹ See infra note 1115 and accompanying text.

¹⁰⁹² See infra notes 1119-1121 and accompanying text.

¹⁰⁹³ See Proposal, 76 FR at 845.

¹⁰⁹⁴ Such findings must be on the record after notice and opportunity for hearing and include a finding that the particular disciplinary action is in the public interest. See 15 U.S.C. 78o-4(c)(2).

¹⁰⁹⁵ See 15 U.S.C. 78o(b)(4)(A), (D), (E), (G) and (H).

¹⁰⁹⁶ See 15 U.S.C. 78o(b)(4)(B).

¹⁰⁹⁷ See 15 U.S.C. 78o(b)(4)(C).

¹⁰⁹⁸ The Commission has the same authority with respect to municipal securities dealers. See 15 U.S.C. 78o-4(c).

advisor to disciplinary action by the Commission under these statutory provisions. The Commission intends to use this information to determine whether to approve an application for registration, to decide whether to institute proceedings to revoke registration, or to place limitations on an applicant's activities as a municipal advisor. In addition, the information will also identify potential problem areas on which to focus examinations.¹⁰⁹⁹

In addition to its value for the Commission's oversight of municipal advisors, generally, as well as to inform MSRB rulemaking, the Commission seeks this information because it may indicate that a municipal advisor is statutorily disqualified from acting as a municipal advisor.¹¹⁰⁰ Further, this information may be valuable to municipal entities and obligated persons who engage municipal advisors and to investors who may purchase securities from offerings in which municipal advisors have participated, as well as to other regulators.

The information to be disclosed is substantially similar to the information required to be disclosed in Form BD¹¹⁰¹ for broker-dealers and in Form ADV¹¹⁰² for investment advisers.¹¹⁰³ In addition to information sought on Forms BD and ADV with respect to investment-related activities Form MA also requests parallel information with respect to municipal advisory activities.

The requested information is also generally consistent with the disclosure requirements of

¹⁰⁹⁹ See infra Section III.B. (discussing approval or denial of registration). See also Proposal, 76 FR at 846, note 205 and accompanying text.

¹¹⁰⁰ See infra Section III.B. and Proposal, 76 FR at 846, note 206 and accompanying text. See also Section 15B(a)(2) of the Exchange Act, which directs the Commission to deny registration to an applicant municipal advisor if, among other things, it finds that if the applicant was registered, its registration would be subject to suspension or revocation.

¹¹⁰¹ See 17 CFR 249.501.

¹¹⁰² See 17 CFR 279.1.

¹¹⁰³ See Proposal, 76 FR at 846.

the temporary registration form, Form MA-T.¹¹⁰⁴ However, as discussed in the Proposal, in Form MA-T, the Commission limited the disciplinary history disclosure requirements to “associated municipal advisor professionals.”¹¹⁰⁵ As explained in the Proposal, due to the short timeframe between the passage of the Dodd-Frank Act and the deadline for registration of municipal advisors on October 1, 2010, the Commission believed it was appropriate to limit the disclosure requirement to this subgroup of associated persons, which is limited to persons who are closely associated with an advisor’s municipal advisory activities.¹¹⁰⁶

In connection with the permanent registration regime, however, the Commission believes it is appropriate to require in Item 9 that a municipal advisor disclose the disciplinary history, as applicable, of all its associated persons, as that term is defined in Exchange Act Section 15B(e)(7),

¹¹⁰⁴ As discussed in the Proposal, in Form MA-T, the disclosure required with respect to orders entered against the municipal advisor by regulatory authorities, and whether any court has enjoined the municipal advisor or associated person in connection with investment related activities, are limited to the past 10 years. See Proposal, 76 FR at 846, note 209. On Form MA, the Commission is not including any time limitation on this disclosure, as discussed further below.

¹¹⁰⁵ The Commission defined the term “associated municipal advisor professional” in the glossary section of Form MA-T to mean: (A) any associated person of a municipal advisor primarily engaged in municipal advisory activities; (B) any associated person of a municipal advisor who is engaged in the solicitation of municipal entities or obligated persons; (C) any associated person who is a supervisor of any persons described in subparagraphs (A) or (B); (D) any associated person who is a supervisor of any person described in subparagraph (C) up through and including, the Chief Executive Officer or similarly situated official designated as responsible for the day-to-day conduct of the municipal advisor’s municipal advisory activities; and (E) any associated person who is a member of the executive or management committee of the municipal advisor or a similarly situated official, if any; and excludes any associated person whose functions are solely clerical or ministerial. See also Proposal, 76 FR at 846, note 211 and accompanying text.

¹¹⁰⁶ This includes those persons who are primarily engaged in an advisor’s municipal advisory activities, have supervisory responsibilities over those primarily engaged in municipal advisory activities, are engaged in day-to-day management of the conduct of an advisor’s municipal advisory activities, or are responsible for executive management of the advisor. See Temporary Registration Rule Release, 67 FR at 54469. See also Proposal, 76 FR at 846, note 212 and accompanying text.

with the exclusion of employees who perform solely clerical, administrative, support, or other similar functions.¹¹⁰⁷ The Commission believes that, for purposes of the permanent registration regime, it is important to collect information about disciplinary matters for all such associated persons, because, under the Exchange Act, such matters may form the basis for an action to suspend or revoke a municipal advisor's registration.¹¹⁰⁸

Specifically, Item 9 as proposed and adopted requires disclosure of disciplinary history with respect to any partner, officer, director or branch manager of a municipal advisor, and any other employee who is engaged in the management, direction, supervision, or performance of any municipal advisory activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and any person that directly or indirectly controls, is controlled by, or under common control with the municipal advisor. As a result, Form MA will capture information with respect to employees that engage in municipal advisory activities, even if that is not their primary activity. Form MA, in contrast to temporary Form MA-T, also requires disclosure with respect to controlling persons and other affiliates of the municipal advisor.

As proposed and adopted, Item 9 asks whether the applicant or any associated person has, in the last ten years, been convicted of any felony, or pled guilty or nolo contendere to any charge of a felony in a domestic, foreign, or military court, or charged with any felony. Item 9 further asks whether the applicant or any associated person has been convicted of any misdemeanor or pled guilty or nolo contendere in a domestic, foreign, or military court to any charge of a misdemeanor in

¹¹⁰⁷ See supra note 1054.

¹¹⁰⁸ See Section 15B(c)(2) and (c)(4) of the Exchange Act and Rule 15Bc4-1 thereunder, discussed infra Section III.A.9. of this release, and Section 15(b)(4) of the Exchange Act. See also Proposal, 76 FR at 847, note 217 and accompanying text.

a case involving municipal advisor-related business,¹¹⁰⁹ investments or an investment-related business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion or a conspiracy to commit any of these offenses, or charged with any misdemeanor of the type described above.¹¹¹⁰ With respect to charges alone, an applicant must respond only with respect to charges that are currently pending.

A clarification has been added in Item 9, as adopted, regarding the provision that disclosure of an event in the Criminal Action Disclosure section is not required if the date of the event was more than ten years ago. The applicant is instructed that, for purposes of calculating the ten-year period, the date of an event is the date that the final order, judgment, or decree was entered, or the date that any rights of appeal from preliminary orders, judgments, or decrees lapsed. This instruction provides a clear-cut guideline by requiring any past cases to be resolved with finality before the ten-year period of no criminal history can begin. The Commission notes that this defining line has been set forth explicitly in other contexts.¹¹¹¹

In the Regulatory Action disclosure section of Item 9, Form MA as proposed and adopted asks for information regarding whether the SEC or the CFTC has ever: found the municipal advisor or any associated person to have made a false statement or omission; found the municipal advisor or any associated person to have been involved in a violation of its regulations or statutes; found the municipal advisor or any associated person to have been a cause of a municipal advisor- or investment-related business having its authorization to do business denied, suspended, revoked, or

¹¹⁰⁹ The term “municipal advisor-related” is defined as “[c]onduct that pertains to municipal advisory activities (including, but not limited to, acting as, or being an associated person of, a municipal advisor).” See Glossary.

¹¹¹⁰ The disclosures relating to felonies, in Form MA as in Form BD, concern felonies of any kind, and are not limited to felonies relating to municipal advisor-related and investment-related business.

¹¹¹¹ See, e.g., Item 11 of Form ADV.

restricted; entered an order against the municipal advisor or any associated person in connection with municipal advisor- or investment-related activity; or imposed a civil money penalty on the municipal advisor or any associated person, or ordered the municipal advisor or any associated person to cease and desist from any activity. Item 9 of the form also asks for similar information with respect to other federal regulatory agencies, any state regulatory agency, or any foreign financial regulatory authority.

Item 9 further asks for information regarding whether any SRO or commodity exchange ever found the municipal advisor or any associated person to have made a false statement or omission; found the municipal advisor or any associated person to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the SEC); found the municipal advisor or any associated person to have been the cause of a municipal advisor- or investment-related business having its authorization to do business denied, suspended, revoked, or restricted; or disciplined the municipal advisor or any associated person by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities. It also asks whether the municipal advisor or its associated persons have had authorization to do business or to act as an attorney, accountant or federal contractor revoked or suspended.

The Civil Judicial Disclosure section of Item 9, as proposed, asks whether any domestic or foreign court has ever (a) enjoined the applicant or any associated person in connection with any municipal advisor-related or investment-related activity; (b) found that the applicant or any associated person was involved in a violation of any municipal advisor- or investment-related activity; or (c) dismissed a municipal advisor- or investment-related civil action brought against the applicant or an associated person by a state or foreign financial regulatory authority. Form MA, as

adopted, retains the same questions, although the latter question has been revised to explicitly include actions brought by U.S. jurisdictions other than states.¹¹¹²

As already indicated, the Criminal Action Disclosure section of Form MA as proposed and adopted requires disclosure of events that occurred within the last ten years.¹¹¹³ With respect to Regulatory and Civil Judicial Actions, the form as proposed and adopted places no time limit on how far back in time events must be disclosed. The applicability of these disclosure requirements to any event in the past is consistent with the disclosure reporting requirements on Form BD, adopted pursuant to Section 15(b)(1) of the Exchange Act,¹¹¹⁴ with one exception. In Form BD, the requirement to disclose any civil judicial injunctions is limited to the past ten years. In contrast, the Commission proposed its corresponding question in Form MA regarding past civil injunctions without limiting the disclosure requirement to the past ten years. The Commission received no comment on this disclosure requirement and is adopting it as proposed.

As mentioned above, Form MA includes three separate kinds of DRPs to report information, as relevant, relating to criminal, regulatory, and civil actions involving the municipal advisor or its associated persons reported in Item 9.¹¹¹⁵ The Commission is adopting each of these DRPs as

¹¹¹² The Commission notes that the question, as proposed, relates to actions in “any domestic or foreign court.” The Commission believes this phrase implicitly includes courts in U.S. jurisdictions other than states, but is making this explicit to clarify its intent. If an action was brought and dismissed in a U.S. jurisdiction other than a state or a foreign jurisdiction, the information requested is no less pertinent to regulators and investors.

¹¹¹³ As is the case with respect to brokers and dealers pursuant to Section 15(b)(4) of the Exchange Act (15 U.S.C. 78o(b)(4)), Section 15B(c)(2) of the Exchange Act (15 U.S.C. 78o-4(c)(2)), as amended by the Dodd-Frank Act, limits the Commission’s ability to impose sanctions on municipal advisors for convictions of felonies and misdemeanors to convictions occurring within ten years preceding the filing of any application for registration.

¹¹¹⁴ See Proposal, 76 FR at 846.

¹¹¹⁵ An applicant is required to complete a separate DRP of the relevant kind for each event or proceeding in which the applicant itself or any of its associated persons was involved, but the same event or proceeding may be reported for more than one person or entity using one

proposed. Some modifications have been made, however, and these are discussed below.

Generally, each DRP requires detailed information about the reported action, such as the court where the charges were filed and when, a description of the charge and the circumstances relating to it (in the case of criminal actions); the authority that initiated the action and a description of the allegations and the product-type (in the case of regulatory actions); or the initiator of the court action, the relief sought, and the product type (in the case of civil judicial actions). Applicants are also required to indicate the status of the charge or action, including resolution details as appropriate. As discussed in the Proposal and consistent with the limitations set forth in Section 15(b)(4)(B)¹¹¹⁶ of the Exchange Act,¹¹¹⁷ however, information on the Criminal Action DRP is limited to matters within the last ten years.

The Commission believes that it is important to collect the information required by the DRPs in addition to the basic disclosures in Item 9 to further the aims described above regarding the information required in Item 9: to assist it in deciding whether to grant or institute proceedings to deny an application for registration or to revoke a registration; to manage the Commission's regulatory and examination programs; to make such information available to the MSRB; and to obtain information that can be of value to municipal entities engaging the services of municipal advisors and to investors who may purchase securities from offerings in which municipal advisors have participated, as well as to other regulators.¹¹¹⁸

One commenter expressed concerns about the "vast information-gathering burden on

DRP.

¹¹¹⁶ 15 U.S.C. 78o(b)(4)(B). See also 15 U.S.C. 78o-4(c)(2).

¹¹¹⁷ See Proposal, 76 FR at 847.

¹¹¹⁸ See Proposal, 76 FR at 847.

applicants” imposed by Item 9.¹¹¹⁹ The commenter indicated that its concerns, which focused on the requirement to collect information regarding sister affiliates of a municipal advisor, applied “particularly in the light of the required disciplinary history disclosures.”¹¹²⁰ This commenter observed that Form ADV, upon which Form MA is based, does not require disclosure of a sister affiliate’s disciplinary history. Another commenter stated that “[s]ome entities, such as banks, broker-dealers and investment advisers, may have many branches, and branch managers, that have nothing to do with the entity’s municipal advisory business” and urged that Form MA be amended to require disciplinary history “only with respect to branch managers of branches where a municipal advisory business is conducted.”¹¹²¹

In considering these comments, the Commission notes that Section 15B of the Exchange Act assigns the Commission oversight and disciplinary responsibilities with respect to all associated persons of a municipal advisor, a category that includes sister affiliates and branches. Moreover, as discussed elsewhere in this release,¹¹²² the Commission is clarifying with new Rule 15Bc4-1 that associated persons of municipal advisors are subject to censure, limitations on their activities, suspension, or being barred from being associated. As explained above, with regard to the value of obtaining information regarding financial industry and related activities of associated persons, the Commission believes that the ability to discern connections within a large network of affiliations and other associations is important for investigations of wrongdoing. The ability to gain, through disclosure requirements, a base of knowledge that includes actions of past wrongdoing is all the more important for these purposes.

¹¹¹⁹ See SIFMA Letter I. See also supra notes 1065 and 1087.

¹¹²⁰ See SIFMA Letter I.

¹¹²¹ See ABA Letter.

¹¹²² See infra Section III.A.9.

Regarding the comment concerning the burden of obtaining information about sister affiliates, the Commission notes that Form ADV, too, requests certain information regarding an investment adviser's sister affiliates – specifically, business information – as the commenter acknowledged. Moreover, as the commenter also acknowledged, Form ADV requests the disciplinary history of the investment adviser and all of its “advisory affiliates” (emphasis added) – i.e., all current employees, all officers, partners or directors, and all persons directly or indirectly controlling or controlled by the investment adviser. Given that a municipal advisor is in any case required to gather certain facts about its sister affiliates' business activities, the Commission believes that it is appropriate to request the added information about any disciplinary history of these affiliates, particularly in view of its potential value to regulators for purposes of investigation and enforcement discussed above.

The DRPs associated with the disclosures in Item 9 are being adopted substantially as proposed. However, as discussed below, some additional disclosure requirements and other revisions have been included in the DRPs, as adopted.¹¹²³

Generally in all the DRPs, as proposed, when an amendment was filed seeking to remove a previously-filed DRP, the applicant was asked for the reason. Some, but not all of the DRPs, gave the option of checking a box indicating that the DRP was filed in error. Some, but not all of the DRPs, additionally asked for an explanation of the circumstances that gave rise to the error. For the sake of consistency and to provide regulators, municipal entities, and others with important detail, all the DRPs, as adopted, have been revised to include these elements. Also, in the Criminal Action DRP, an additional option is given to indicate why the DRP was filed an error. The new option is

¹¹²³ Many of the same or similar revisions have also been made to the DRPs of Form MA-I, including those other than the Criminal, Regulatory, and Civil Judicial Action DRPs of that form, and a discussion of all of them will not be repeated in the section on Form MA-I below.

that the event or proceeding occurred more than ten years ago.¹¹²⁴

As proposed, if a DRP pertains to an associated person of the municipal advisor, the DRP asks whether that person is registered with the Commission. In the DRPs, as adopted, if the associated person is registered, the registration number must be provided.¹¹²⁵ The Commission believes that, if an applicant for registration with the Commission has an associated person that is otherwise registered with the Commission, such information is valuable for cross-referencing and enforcement and other regulatory purposes and providing it should not constitute an undue burden.¹¹²⁶

Each DRP, as proposed, asked if the municipal advisor or associated person whom the DRP concerned was registered through the IARD or CRD system or the municipal advisor was previously registered on Form MA-T, whether the advisor or associated person previously filed a DRP (with Form ADV, BD, or U4) or the advisor filed disclosure on Form MA-T regarding the same event. The adopted version of each DRP now asks whether an accurate and up-to-date DRP containing the information regarding the applicant or associated person required by the DRP is already on file in the IARD or CRD system (with a Form ADV, BD, or U4) or in the SEC's EDGAR system (with a Form MA or Form MA-I), and, if so, to specify the type of filing and provide specific information regarding the name of the filer, the CRD Number (where relevant), the

¹¹²⁴ See supra note 1116 and accompanying text.

¹¹²⁵ In all the DRPs, as adopted, if an applicant indicates that the DRP concerns one or more associated persons, the form asks how many. Because the names of all such associated persons must be identified in the DRP in any case, tallying the number involves no additional disclosure and will act as a cross-check to ensure that the information provided is complete.

¹¹²⁶ On the other hand, the requirement to name the employer of an associated person when the activity occurred that led to an action has been eliminated.

date, and disclosure or accession number of the relevant other form.¹¹²⁷ As discussed above,¹¹²⁸ the ability to incorporate by reference any required information about the disciplinary history of an applicant or associated person from a DRP that already has been filed relieves the regulatory burden on applicants who can do so. At the same time, however, sufficient information about where the information is filed is necessary for regulators, municipal entities, and investors to be able to access it with reasonable ease.

As proposed, some of the DRPs, where relevant, asked for the name of the federal, military, state or foreign court where a case was formally brought or appealed. In the DRPs, as adopted, an applicant is presented with a list of types of courts from which to choose and must specifically check the type of court in which the case was brought.¹¹²⁹ In addition, “international court” and “other” have been added to the choices (and, if the latter is checked, the applicant must specify the type) and the street address and postal code of the court will now need to be provided in addition to the city or county and state or country. Requests for information in all the DRPs regarding courts and other panels have been made consistent to require the name of the case (in addition to the docket number, as proposed). The Commission believes that these additions will enable regulators, municipal entities, and investors to more easily locate information that may be relevant to them and, if need be, address further inquiries. The Commission further believes that complete responses to the questions in the DRPs, as proposed, would have supplied most of this same information.¹¹³⁰

¹¹²⁷ The DRPs, as adopted, do not provide the option of indicating that the information is already on file in a Form MA-T, as Form MA-T does not require the disclosures required in the DRPs.

¹¹²⁸ See supra note 995 and accompanying text.

¹¹²⁹ In the electronic form, the applicant must make a selection and thus cannot avoid answering the question specifically.

¹¹³⁰ As proposed, the DRP asked the applicant to describe details of the event in narrative form, and to, among other things, “include charge(s)/charge Description(s), and for each charge

For the same reason, similar changes have been introduced into the DRPs regarding regulatory adjudications and civil judicial actions. Where the proposed Regulatory Action DRP asked the filer to indicate whether a regulatory proceeding was initiated by the SEC, another federal authority, state, SRO, or foreign authority, the forms as adopted add, as choices, the CFTC, a federal banking agency, the National Credit Union Administration, or other regulator or authority that the applicant must specify. In addition, the applicant must now indicate, as applicable, the name of the administrative proceeding, commission or agency hearing, or other regulatory proceeding or forum in which the action was brought and the street address and postal code of the location where the case was heard. Specific choices added with respect to who initiated a Civil Judicial Action include the CFTC, another federal authority (which the applicant must specify), and a municipal advisory firm.

As proposed, not all the DRPs contained instructions to the applicant regarding the language to be used in naming or describing the charges brought in a foreign jurisdiction. As adopted, the forms consistently require the applicant to provide all the information requested in English. The Commission believes that this requirement is appropriate in an application for U.S. registration designed to obtain information on behalf of U.S. regulators, municipal entities, and investors.

As proposed, in the Criminal Action DRP, in a case where criminal charges were brought

provide: (1) number of counts, (2) felony or misdemeanor, [and the] (3) plea for each charge” and “provide a brief summary of circumstances leading to the charge(s) as well as the disposition.” The proposed version separately required the applicant to “[i]nclude, for each charge, (a) Disposition Type (e.g., convicted, acquitted, dismissed, pretrial, etc.), (b) Date, (c) Sentence/Penalty, (d) Duration (if sentence-suspension, probation, etc., (e) Start Date of Penalty, (f) Penalty/Fine Amount, and (g) Date Paid.” It also required an applicant to provide “a brief summary of circumstances leading to the charge(s) as well as the disposition” and to include “the relevant dates when the conduct which was the subject of the charge(s) occurred.” The Commission also notes that the Criminal Action DRP of Form MA-I, both as proposed and adopted, asks for information about amended or reduced criminal charges.

against a firm or organization over which the applicant or associated person had control, the applicant was required to indicate whether the firm or organization was engaged in a municipal advisor-related business. In the DRP, as adopted, the question has been revised to ask, in addition, whether the firm or organization was engaged in an investment-related business.¹¹³¹ Because of the close relationship between investment-related business and municipal advisory activities, the Commission believes that it is important for regulators, municipal entities, and investors in municipal securities to have this information.

The instructions in the Criminal Action DRP on how to report an event or proceeding have been revised in the form as adopted.¹¹³² No substantive changes have been introduced in the reporting requirements. The revisions have been made solely for purposes of clarity. The adopted version of the instructions states: "Use this DRP to report all charges, including multiple counts of the same charge, arising out of the same event and filed in one criminal action. The same DRP may be used for more than one person with respect to the same event or proceeding. Separate criminal actions arising out of the same event, and unrelated criminal actions, must be reported on separate DRPs." The Commission believes that the revised instructions, which are similar to instructions that appear in the DRPs for Forms BD and ADV, will help assure that the disciplinary information provided in response can be easily understood.

An instruction has been added to the Criminal Action DRP advising applicants that

¹¹³¹ In the form, as proposed, the applicant would have been required to indicate only whether the firm or organization was in municipal advisor-related business.

¹¹³² In the Criminal Action DRP, as proposed, the applicant was instructed: "Use a separate DRP for each event of proceeding. The same event or proceeding may be reported for more than one person or entity using one DRP... Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Use this DRP to report all charges arising out of the same event. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. One event may result in more than one affirmative answer to the [questions asked earlier in the DRP]."

applicable court documents must be attached to, and filed with, the DRP if not previously submitted.¹¹³³

In the Criminal Action DRP, as proposed, an applicant was not required specifically to indicate whether the original criminal charge was amended or reduced. As adopted, the DRP asks for this information and for the relevant date. The Commission believes that the clearer picture of the disciplinary history that will emerge when this information is supplied should assist regulators, municipal entities, and investors in assessing the credentials and background of the municipal advisor and its associated persons.

In the Criminal Action DRP, as proposed, an applicant was not required to state, if the case was on appeal, to whom it was appealed and the date of the appeal. As adopted, the DRP now requires these disclosures.¹¹³⁴

The Criminal Action DRP, as proposed, asked for information generally about the disposition of the relevant action, in narrative form, and to include details concerning any sentence or penalty imposed, its start date, and its duration, and the amount and date of payment.¹¹³⁵ As adopted, the form requires the applicant to choose from among 16 types of disposition of a case (or to check "other," and specify the other), and to further identify any other type of disposition. Choices are also provided to describe specifically the disposition of any appeal.¹¹³⁶ The DRP, as

¹¹³³ This instruction, which was included in the proposed Criminal Action DRPs for Form MA-I, was not included in the proposed Criminal Action DRP for Form MA. The Commission notes that Form BD also requires applicable court documents to be attached to the Criminal Action DRP in that form.

¹¹³⁴ The Commission notes that the Regulatory and Civil Judicial Action DRPs, when proposed, already required similar information regarding appeals.

¹¹³⁵ See supra note 1130.

¹¹³⁶ These choices are: affirmed; vacated and returned for further action; or vacated/final. An applicant may also respond "other," in which case the other type of disposition must be specified.

adopted, further asks specifically whether any incarceration was imposed in connection with the action, and, if so, the duration, the start and end dates, and any concurrent sentences.¹¹³⁷ It also asks, in question-by-question format, whether any portion of a monetary penalty was reduced or suspended, whether it has been paid in full, and, if not, how much remains unpaid. The Commission believes that these revisions will help ensure that the description of the disposition is complete.

As proposed, the Regulatory Action DRP required the applicant to check off any of 14 types of “principal sanctions”¹¹³⁸ in the case (or to check “other,” and specify the other type), and to further identify any other sanctions. As adopted, the DRP does not differentiate between principal sanctions and any other kind of sanction, but adds more types to the list in addition to requiring the applicant to identify any others. This, too, will help ensure that the filer provides appropriate detail, thereby enabling interested parties to better assess the credentials and background of the applicant and its associated persons.

Similarly – and for the same reason – the Civil Judicial Action DRP no longer differentiates between “principal relief” sought and other relief, and provides a longer list of possible sanctions or relief sought from among which the applicant must select in addition to identifying any other sanctions or relief sought.

The questions in the Regulatory and Civil Judicial Action DRPs regarding how a case was resolved, like the questions in the Criminal Action DRP regarding disposition, have been revised in the DRPs, as adopted, to be more specific and to offer more choices from among which an applicant must select, for the same reason as in the Criminal Action DRP. The Commission believes that

¹¹³⁷ The DRP, as adopted, also asks specifically whether any sentence or any other penalty is ordered, and, if so, to list each type, giving the examples of prison, jail, probation, community service, counseling, education, or other (which must be specified).

¹¹³⁸ The DRP, as adopted, clarifies that the question refers to the sanctions sought.

these revisions will help ensure that the description of the disposition is complete. More possible answers are provided from among which the applicant must choose to describe specifically the type of resolution that resulted (acceptance, waiver, and consent, settlement, dismissal, judgment rendered, etc.) and choices are now given regarding how any appeal was resolved.

Similarly, more choices are presented to describe any sanctions that were ordered in the relevant Regulatory or Civil Judicial Action.¹¹³⁹ In addition, questions are broken out into separate sections regarding the details of three specific types of sanctions and/or conditions of sanctions: (a) bars, injunctions, and suspensions; (b) requalifications (by examination, retraining, or other process); and (c) monetary sanctions.¹¹⁴⁰

As proposed, the Regulatory and Civil Judicial Action DRPs asked the applicant to provide a brief summary of details relating to the action's status with relevant terms, conditions, and dates.

¹¹³⁹ For example, the choices in the Regulatory Action DRP, as proposed, were: monetary/fine; revocation/expulsion/denial; censure; disgorgement/restitution; cease and desist/injunction; bar; suspension; and other (which must be specified). The choices added in the adopted version include: civil and administrative penalties/fines; expulsion; prohibition; reprimand; rescission; requalification; revocation; and undertaking.

¹¹⁴⁰ For example, in the Regulatory and Civil Judicial Action DRPs, as proposed, the applicant was asked broadly to describe, in narrative form: "Sanction detail: if suspended, enjoined or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification by exam/retraining was a condition of the sanction, provide length of time given to requalify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against the applicant or an associated person, date paid and if any portion of penalty was waived."

By contrast, in the DRPs as adopted, similar information is requested in question-by-question format in each of the separate sections described above. Questions relating to bars, injunctions, and suspensions are further subdivided into a separate subsection for each, and the questions distinguish between temporary and permanent bars. The applicant is also instructed to report any additional details if one or more bars, injunctions, or suspensions were imposed with regard to different activities and the terms specify different time periods, and a similar instruction is included with regard to requalifications. Details similar to those specified in the Criminal Action DRP, as adopted, see supra notes 1135-1137 and accompanying text, are also requested.

As adopted, the DRPs specifically ask whether any limitations or restrictions are in effect while the case is pending or on appeal, as applicable. For pending cases, the DRPs also ask for the date that notice or other process was served.¹¹⁴¹ Here, too, the Commission believes that specifying these details as required elements will serve to ensure that the applicant's description is complete.

The Civil Judicial Action DRP, as proposed, did not ask for the full name of the defendant or ask whether the applicant is a named defendant. As adopted, the DRP requires this information, and, if the applicant is not a named defendant, further requires a description of how the action involves the defendant. This information should help interested parties more easily determine the role of the applicant or associated person in the civil judicial action as part of their assessment of the applicant.

The DRPs, as adopted, now ask for various minor additional disclosures reflecting a level of detail generally similar to the disclosures discussed above, which the Commission believes should serve to enhance the usefulness of the information to regulators and the benefit it will have for municipal entities and the investing public without unreasonably burdening applicants for registration.¹¹⁴²

¹¹⁴¹ As previously mentioned, the DRPs, as proposed, already requested the date of any appeal. See supra text accompanying note 1134.

¹¹⁴² Some examples, when an applicant is asked to check the type of product involved in a case, more choices are included in the list of possibilities than in the proposed version. When the resolution of a case is an order, the applicant is asked whether it is a final order based on violations of any laws or regulations that prohibit fraudulent or deceptive conduct. Several changes were made so that if one or more DRPs asks a follow-up question when a certain response is given, other DRPs are consistent and ask the same follow-up question. Thus, each time an applicant selects more than one resolution of a case as having occurred or if the choice that the applicant has selected does not adequately summarize the resolution, the applicant must provide an explanation. Each time an applicant indicates that a relevant date provided is not exact, an explanation is required. See also infra note 1147. In addition, throughout the DRPs, instructions have been revised to offer more clarity on how to file a DRP or when a separate DRP must be filed regarding the same event. See also supra note 968.

Item 10: Small Businesses

As described further in Section IX below, the Commission is required by the Regulatory Flexibility Act (“RFA”)¹¹⁴³ to consider the effect of its regulations on small entities. The Commission’s rules do not define “small business” or “small organization” for purposes of municipal advisors. As discussed in the Proposal, the Small Business Administration (“SBA”) defines small business for purposes of entities that provide financial investment and related activities as a business that had annual receipts of less than \$7 million during the preceding fiscal year and is not affiliated with any person that is not a small business or small organization.¹¹⁴⁴ The Commission proposed to use the SBA’s definition of small business to define municipal advisors that are small entities for purposes of the RFA.¹¹⁴⁵ This definition will remain unchanged in the rules as adopted.

The Commission proposed Item 10 of Form MA to enable it to determine how many applicants meet the SBA’s definition of “small business” or “small organization” as applied to municipal advisors. Thus, Item 10 requires each applicant to disclose whether it had annual receipts of less than \$7 million during its most recent fiscal year (or during the time it has been in business, if it has not completed its first fiscal year in business). Item 10 also requires each applicant to disclose whether any business or organization with which it is affiliated had annual receipts of more than \$7 million in its most recent fiscal year (or during the time it has been in business, if it has not completed its first fiscal year in business).

The Commission received no comments on the information requested by Item 10 and is

¹¹⁴³ 5 U.S.C. 601 et seq.

¹¹⁴⁴ See 13 CFR 121.201. See also Proposal, 76 FR at 848, note 222 and accompanying text.

¹¹⁴⁵ See Proposal, 76 FR at 848.

adopting this item as proposed.¹¹⁴⁶

Technical and Other Changes

In addition to the modifications discussed above, a number of non-substantive, technical and clarifying changes have been made to Form MA, its schedules and the DRPs as adopted.¹¹⁴⁷

Further, some of the multi-pronged questions have been broken down into separate parts to make the form clearer and more user-friendly.¹¹⁴⁸ The Commission has also made certain additional changes to correct inadvertent omissions in the form, as proposed.¹¹⁴⁹

Execution Page

Form MA includes an Execution Page that an authorized person of the municipal advisor filing the form is required to sign electronically before the form can be submitted.¹¹⁵⁰ The

¹¹⁴⁶ Several commenters did raise issues with respect to the impact that the new registration requirements could have, generally, on small businesses. See, e.g., supra note 986, and see also supra note 980. Such concerns are addressed in Section IX below.

¹¹⁴⁷ For example, new guidance is included on Form MA, as adopted, that reminds applicants that they must supply supporting documents where applicable, and that Form MA-NR must be included for non-residents. Filers are also advised that false statements or omissions may result in administrative or civil actions, in addition to the other legal consequences mentioned in the Proposal. Instructions have been included regarding non-US telephone and fax numbers. References to U.S. state jurisdictions have been amended to consistently include other types of U.S. jurisdictions, and the choices on the forms, accordingly, include such jurisdictions by name. See also supra note 968.

¹¹⁴⁸ For example, the questions in the DRPs regarding associated persons are divided into separate sections for firms and organizations, on the one hand, and natural persons on the other. Many of the questions now present applicants with a series of choices that they can check off. Some questions are renumbered, and some subsections have been given titles where there were none in the proposed version.

¹¹⁴⁹ For example, the Criminal Action DRP requires that if the applicant is amending a previously filed DRP pertaining to an associated person because it was filed in error, the applicant is required to explain the circumstances. The Proposal inadvertently omitted a requirement to explain the circumstances when the error pertained to the applicant itself. The Regulatory and Civil Judicial Action DRPs as previously proposed and now adopted require an explanation in both cases.

¹¹⁵⁰ See Proposal, 76 FR at 849. As proposed, the Execution Page (except for the self-certification section) is similar in purpose to the Execution Page of Form ADV (see 17 CFR

Commission received no comments regarding the Execution Page, other than on the self-certification contained therein. For reasons discussed below, the Commission is removing the self-certification section of the Execution Page in Form MA but otherwise is adopting the Execution Page substantially as proposed.¹¹⁵¹

An authorized person signs the form by typing his or her name and submitting the form on behalf of the municipal advisor. The authorized person is required to sign one of two different Execution Pages, depending on whether the municipal advisor is resident in the United States or a “non-resident” municipal advisor. In either case, by signing the Execution Page, the authorized person states that he or she is signing Form MA on behalf, and with the authority, of the municipal advisor and affirms that the information in Form MA is true and correct.

The Execution Page for both resident and non-resident municipal advisors requires the signatory to certify that the books and records of the municipal advisor will be preserved and available for inspection and to authorize any person with custody of the books and records to make them available to federal representatives. On the Execution Page for non-resident municipal advisors, the signatory, in signing the form, also states that the municipal advisor agrees that it will provide to the Commission, at its own expense, copies of all books and records that the municipal advisor is required to maintain by law. As discussed in the Proposal, the Commission believes that, before granting registration to a domestic or non-resident municipal advisor, it is appropriate to obtain assurance that such person has taken the necessary steps to be in the position to provide the Commission with prompt access to its books and records and to be subject to inspection and

279.1), but deletes references to state registration, bonding requirements and other inapplicable components, and will require a non-resident municipal advisor to execute a separate form (Form MA-NR) to designate agent for service of process. See infra Section III.A.6.

¹¹⁵¹ The description immediately below relates to the Execution Page as adopted. Discussion of the removal of the self-certification section follows.

examination by the Commission.¹¹⁵²

On the Execution Page for domestic municipal advisors, the signatory also states that it appoints certain officials as agents for service of process in the state where the advisor maintains its principal office or place of business. Specifically, a domestic municipal advisor appoints the Secretary of State or other legally designated officer in the state where it maintains its principal office and place of business. As discussed in the Proposal, this appointment allows private parties and the Commission to bring actions against the municipal advisor by delivering necessary papers to the appointed agent.¹¹⁵³ The agent is able to receive any process, pleadings, or other papers in any action that arises out of or relates to or concerns municipal advisory activities of the municipal advisor. The agent also is able to receive service for investigation and administrative proceedings.

On the Execution Page for non-resident municipal advisors, the signatory on behalf of the registrant also states that an opinion of counsel is attached as an exhibit to Form MA and that the municipal advisor can, as a matter of law, provide the Commission with access to the books and records of the municipal advisor, as required by law, and that the municipal advisor can, as a matter of law, submit to inspection and examination by the Commission.¹¹⁵⁴ As discussed in the Proposal, each jurisdiction may have a different legal framework with respect to its laws (e.g., privacy laws) that may limit or restrict the Commission's ability to receive information from a municipal advisor.¹¹⁵⁵ Providing an opinion of counsel that a municipal advisor can provide access to its

¹¹⁵² See Proposal, 76 FR at 848.

¹¹⁵³ See id. Appointment of agent for service of process for non-resident municipal advisors is discussed further below. See infra Section III.A.6 (discussing Form MA-NR).

¹¹⁵⁴ The opinion of counsel is required by Rule 15Ba1-6, as adopted. General Instruction 13 (General Instruction 14 as proposed) now states that the non-resident municipal advisor filing Form MA must attach the opinion as an exhibit to the Execution Page.

¹¹⁵⁵ The Execution Page for non-resident municipal advisors, as adopted, however, does not require the opinion of counsel to state that the municipal advisor is able, as a matter of law,

books and records and can be subject to inspection and examination allows the Commission to better evaluate a municipal advisor's ability to meet the requirements of registration and ongoing supervision.¹¹⁵⁶ Failure to provide an opinion of counsel may be a basis for the Commission to deny an application for registration.¹¹⁵⁷

As proposed, Form MA required the authorized person of a municipal advisor completing the Execution Page to certify separately on behalf of the municipal advisor that it and every natural person associated with it had met, or within any applicable required timeframes would meet, such standards of training, experience, and competence, and such other qualifications, including testing, for a municipal advisor and natural persons associated with it, required by the Commission, the MSRB, or any other relevant SRO. Under the Proposal, the authorized person, on behalf of the municipal advisor also would have been required to certify that the municipal advisor had conducted an initial or annual review, as applicable, of the municipal advisor's business, and had reasonably determined that the municipal advisor: (a) could carry out the activities described in the items that are checked in Item 4-K (Applicant's Business Relating to Municipal Securities) of Form MA;¹¹⁵⁸ (b) could comply with all applicable regulatory obligations; and (c) had met such

to submit specifically to "onsite" inspection.

¹¹⁵⁶ See Proposal, 76 FR at 848.

¹¹⁵⁷ See Section 15B(a)(2), providing that a municipal advisor applying for registration must file with the Commission an application for registration in such form and containing such information and documents concerning such municipal advisor as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Thus, failure to provide an opinion of counsel, as required, is a basis under the statute for the Commission to conclude that the requirements of Section 15B(a)(2) are not satisfied.

¹¹⁵⁸ Under the Proposal, factors to be considered in determining whether a municipal advisor can carry out the described activities included, but were not limited to, whether the municipal advisor has, with respect to the described activities, the appropriate technology systems and equipment; the appropriate financial resources; adequate staffing with appropriate skill sets, training, and expertise; and adequate facilities, such as office space, as appropriate. See

regulatory obligations during the last year (or during such shorter period if the application was an initial application for registration). For these purposes, such applicable regulatory obligations were to include obligations under the federal securities laws and rules promulgated thereunder and applicable rules promulgated by the MSRB, or any other relevant SRO.

Under the Proposal, the authorized person also would have been required to certify that the municipal advisor had documented this review process and would maintain all documents relating to the review in accordance with Rule 15Ba1-7 under the Exchange Act.¹¹⁵⁹ Such certification would have been required in conjunction with the filing of an initial application for registration as a municipal advisor and annually thereafter.¹¹⁶⁰

The Commission received one comment letter opposing the proposed self-certification requirement.¹¹⁶¹ The commenter provided that self-certification should not be required and noted

Proposal, 76 FR at 849.

¹¹⁵⁹ Proposed Rule 15Ba1-7 also required municipal advisory firms to make and keep a record of the initial or annual review, as applicable, conducted by the municipal advisory firm of its business in connection with its self-certification on Form MA. Because the Commission is not adopting a self-certification requirement, the Commission is also not adopting this corresponding books and records requirement. See infra note 1344.

¹¹⁶⁰ See proposed Rule 15Ba1-4(e). The rule required the annual self-certification to be filed by municipal advisory firms within 90 days of the end of the municipal advisor's fiscal year, or within 90 days of the end of the calendar year for municipal advisors that are sole proprietors.

¹¹⁶¹ Further, the Commission received two comment letters that, although did not object to the proposed self-certification requirement, related to the Commission's request for comment on an alternative to self-certification. See infra notes 1164 and 1165. The Commission also received many letters commenting, in the context of opposing the Commission's proposal to exclude appointed members of the governing body of a municipal entity from its interpretation of "employee of a municipal entity," that the cost to comply with "reporting, record keeping, and certification requirements" and the related continuing education requirements and training, would take away from the board members' full-time jobs and families, and that such costs were unjustified. See, e.g., letter from Susan N. Kelly, Senior Vice President of Policy Analysis and General Counsel, and Diane Moody, Director, Statistical Analysis, American Public Power Association, dated February 22, 2011; Nick Costanzo, Vice President Strategic, Financial, and Management Services, City of El Paso,

that similar certifications are not required with Form BD and Form ADV.¹¹⁶² The commenter also asserted that requiring a municipal advisory firm to conduct an annual review of its business and determine that it can carry out its municipal advisory activities, including requiring the applicant to document the review process, would be costly, burdensome, and confusing. Further, the commenter noted that the Commission and the MSRB have yet to propose standards that are the subject of the certification. Accordingly, the commenter believed that, without such standards or related guidance, it is premature for prospective advisors to even comment. The commenter added that a municipal advisor would be unsure as to how to conduct the review, which may lead to unnecessary expense and exposure to liability (since the certification would be “reports” and therefore subject the municipal advisor to criminal liability). The commenter suggested that, if the Commission’s interest is in ensuring competence of a municipal advisor, a better approach would be to create an MSRB examination process with qualifications clearly defined by the MSRB.

After careful consideration of the comment received, the Commission is not requiring self-certification in Form MA, as adopted. As the commenter notes, Forms BD and ADV, on which Form MA is based, do not require self-certification. Further, as pointed out by the commenter, the MSRB has yet to propose standards that are the subject of the certification. Accordingly, at this time, the Commission does not believe that self-certification should be required of municipal advisors.

In response to the Commission’s request for comment regarding an independent third party review and whether the Commission should mandate a minimum level of review as an alternative to

Texas, dated February 22, 2011; and letter from Ben Gorzell, Chief Financial Officer and Michael D. Bernard, City Attorney, City of San Antonio, dated February 18, 2011.

¹¹⁶² See SIFMA Letter I.

the self-certification requirements,¹¹⁶³ the Commission received two letters. The two commenters did not object to the self-certification requirement but did oppose any third-party review or audit.¹¹⁶⁴ Both commenters assert that such a review would impose unnecessary costs, and that Commission review would be sufficient. One of these commenters also opposed any minimum review standards.¹¹⁶⁵ In concurrence with these commenters, the Commission has determined at this time not to establish a minimal level of review or require review by an independent third-party.

c. Information Requested in Form MA-I

As discussed above, although Form MA-I was proposed as a registration form for all natural person municipal advisors, Rule 15Ba1-3, as adopted, exempts a natural person municipal advisor from the requirement to register, if such person is associated with a registered municipal advisory firm and engages in municipal advisory activities solely on behalf of a registered firm.¹¹⁶⁶ Rule 15Ba1-2(b)(1), as adopted, requires a municipal advisory firm, on behalf of which an associated natural person engages in municipal advisory activities, to file Form MA-I with the Commission with respect to each such individual. Pursuant to Rule 15Ba1-2(b)(2), as adopted, a natural person who is a sole proprietor must file Form MA-I in addition to filing an application to register as a municipal advisor on Form MA.

The Commission received more than 30 comment letters relating to proposed Form MA-I. About 25 of these letters concerned the impact that the registration requirement for natural person municipal advisors would have if applied to volunteer members of public boards, in view of the fact

¹¹⁶³ See Proposal, 76 FR at 850.

¹¹⁶⁴ See NAIPFA Letter I and Joy Howard WM Financial Strategies Letter. The Commission also received a third comment letter opposing, as overly-burdensome, any independent party review either prior to the filing of an initial application or on an annual or periodic basis thereafter. See Public FA Letter.

¹¹⁶⁵ See NAIPFA Letter I.

¹¹⁶⁶ See *supra* note 938.

that registration would require completing a Form MA-I. Because, under the rules as adopted, volunteer public board members would generally not be required to register, the Commission believes the concerns of these commenters have been otherwise addressed.¹¹⁶⁷

The remaining comment letters concerned the nature and scope of the information requested by Form MA-I and are discussed below.¹¹⁶⁸ After considering the comments, the Commission is adopting Form MA-I substantially as proposed. However, the Commission is modifying Form MA-I to require a few additional points of information and is also eliminating some data requests. In addition, some of the language in Form MA-I has been modified to reflect the fact that, under the rules, as adopted, the form is no longer an application for registration and, except in the case of sole proprietors, will be completed by a firm, rather than by the individual with respect to whom the form is being filed.¹¹⁶⁹

As a general matter, the information requested on Form MA-I, as proposed and adopted, is similar to information requested on FINRA's Form U4.¹¹⁷⁰ Some questions on Form U4 have been adapted for purposes of Form MA-I to relate specifically to municipal advisors. Other questions have been omitted as not necessary or appropriate in the municipal advisor context.

One commenter argued that information sought by Form MA-I largely duplicates

¹¹⁶⁷ See supra Section III.A.1.c.i. See also infra note 1187.

¹¹⁶⁸ In addition, the Commission notes that a number of the comments received regarding proposed Form MA apply similarly to proposed Form MA-I. Examples include concerns about the duplicative nature of seeking information already gathered through other registration programs; confidentiality issues; and compliance burdens. These comments have been discussed in the section on Form MA above and are not further addressed here. See, e.g., supra notes 991-992 and 995-996 and accompanying text and the Commission's response in the discussion following these comments.

¹¹⁶⁹ For example, the form will now no longer refer to the individual as "the applicant" or "the registrant."

¹¹⁷⁰ See Form U4, supra note 992. See also Proposal, 76 FR at 851, note 237 and accompanying text.

information relating to associated persons sought by Form MA.¹¹⁷¹ The Commission acknowledges that a municipal advisory firm that registers by filing Form MA must already provide information on that form concerning the disciplinary history of each of its associated persons, including employees providing advice on behalf of the firm. However, there is very little overlap between the information required by Form MA and that required by Form MA-I that cannot be incorporated by reference.¹¹⁷² Moreover, Form MA-I elicits additional information that would not be provided by the firm as part of its Form MA. For example, Form MA-I requires the following information about each relevant natural person that would not be found on his or her firm's Form MA if engaged in municipal advisory activities on behalf of a firm or on his or her own Form MA if acting as a sole proprietor: social security number of the individual; other names of the individual; his or her residential and employment history; the offices of the firm where the individual is located and from which he or she is supervised; the names of any other municipal advisory firms that employ the individual; and any other businesses in which the individual is engaged.¹¹⁷³

¹¹⁷¹ See SIFMA Letter I. The concern over duplication of information was raised as an argument against separate registration of individuals on Form MA-I. The rules, as adopted, no longer require registration for natural person municipal advisors acting solely as employees of a municipal advisory firm. However, because Form MA-I is being retained in the rules, as adopted, the Commission believes it important to address concerns that the information required by Form MA-I is redundant of information already available from the firm's Form MA.

¹¹⁷² Regarding incorporation by reference, see *supra* notes 994-995 and accompanying text. The Commission acknowledges that a municipal advisory firm must already provide information on Form MA concerning the disciplinary history of each of its associated persons – a term that includes employees who are “engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities.” However, to the extent that the disciplinary history of an individual is reported in Form MA, it can be incorporated by reference in Form MA-I.

¹¹⁷³ As noted above, the Commission believes that, in fact, there is very little overlap between the information required by Form MA and that required by Form MA-I. For example, when Form MA asks for the number of employees of the firm engaged in municipal advisory activities, such information might be gleaned, technically, by counting all the Form MA-I

Therefore, in completing a Form MA-I for each employee, the Commission believes that a firm will be supplementing, rather than duplicating, the information provided on Form MA. For this reason, as proposed and adopted, the rules require a sole proprietor to complete and file both forms.

Among the comments received by the Commission, specifically with regard to Form MA-I, as has already been discussed, several commenters questioned the need for separate registration forms for firms and their individual employees.¹¹⁷⁴ One commenter believed that separate registration of individuals on Form MA-I could “lead to confusion” and “inadvertent inconsistencies in the information.”¹¹⁷⁵ Another commenter believed that processing the estimated 21,800 forms expected to be filed would put “significant strain” on the Commission.¹¹⁷⁶ In addition to these comments, one commenter suggested that, in lieu of requiring individuals to register separately with the Commission on Form MA-I, the Commission could “work with the MSRB to

submissions filed by the firm, but is not readily apparent. When Form MA asks for the names of all associated persons of the firm and requires the firm to indicate whether each such person is active in certain municipal advisory related fields, the firm is not required to state whether the associated person is an employee and it does not capture information on other businesses in which the person is engaged. The requirement to list the firm’s registration information (which, of course, is available on the firm’s Form MA) on the Form MA-I of the individual will better serve to identify the individual and locate his or her firm when only the database of individuals reported on Form MA-I is being searched, separately from the database in which information obtained in Forms MA is collected. Similarly, the responses to Form MA’s questions in Item 9, in which a firm must disclose whether any of its associated persons has had a disciplinary history, do not shed light on the history of any particular employee unless the relevant DRPs are consulted. Moreover, the disciplinary history questions in Item 6 of Form MA-I, other than those concerning criminal, regulatory, and civil judicial actions, do not appear in Form MA.

¹¹⁷⁴ See Deloitte Letter; JP Morgan Chase Letter; SIFMA Letter I. Deloitte stated that registration for natural persons should be eliminated altogether; or that individuals at least be required to register only as “registered representatives.” See also MSRB Letter I, stating that “forms relating to individuals at municipal advisor entities should be viewed as officially submitted by the municipal advisor entity.”

¹¹⁷⁵ See Deloitte Letter.

¹¹⁷⁶ SIFMA Letter I.

establish, through the MSRB, a licensing and registration mechanism for individuals who are municipal advisors, which would be similar to the program used to register a broker-dealer's licensed associated persons with FINRA."¹¹⁷⁷ Further, the commenter stated that, if the Commission believes it is necessary to formally register individuals (in addition to licensing them), the MSRB could adopt Form U4 and require it to be filed in connection with granting a license to individuals who engage in municipal advisory activities on behalf of a Commission- and MSRB-registered municipal advisory firm.¹¹⁷⁸ The Commission believes that these comments have been addressed by the exemption created in the rules, as adopted, for natural persons who engage in municipal advisory activities solely on behalf of a registered municipal advisor.¹¹⁷⁹

Commenters also expressed concerns regarding the disclosures required by Form MA-I and the plan to make them publicly available.¹¹⁸⁰ For example, one commenter believed that some of the information required in Form MA-I "could not be disclosed by a law enforcement agency, such as the individual's detailed criminal history – which includes arrests that do not result in prosecution

¹¹⁷⁷ Id. SIFMA stated that because the MSRB is already planning to develop qualification tests for individuals engaged in municipal advisory activities, "having only the MSRB, as opposed to both the SEC and MSRB, involved in the licensing and registration of individuals would eliminate duplication and reserve the SEC resources for regulation of municipal advisory firms."

¹¹⁷⁸ See id. SIFMA added that, because many individual municipal advisors may also be associated persons of a broker-dealer or investment adviser, it would better serve the interests of the public to have a single source of information—on Form U4—about a licensed individual. It would also be easier for an individual and his or her employer to ensure that the individual is properly licensed under all applicable regulatory programs if only a single form is required to be filed with any applicable regulator. See also Financial Services Roundtable Letter (advocating use of Form U4 for individuals).

¹¹⁷⁹ See supra note 938.

¹¹⁸⁰ The comments cited in this paragraph appeared in the context of letters opposing the application of the definition of municipal advisor to appointed members of public boards, see supra note 1161, but are treated here separately because of their possible relevance to any municipal advisor.

or conviction.”¹¹⁸¹ The commenter further believed that “[g]overnment disclosure of a compiled criminal history is a criminal offense.”¹¹⁸²

The Commission believes that it is consistent with the Exchange Act to require disclosure of such information in order to permit persons whom Form MA-I concerns to lawfully engage in municipal advisory activities.¹¹⁸³ Regarding a commenter’s concern about government disclosure of compiled criminal history, the Commission notes that engaging in municipal advisory activities is voluntary. Persons engaging in municipal advisory activities are on notice that the information supplied to the Commission on Form MA and MA-I will not be kept confidential (except where indicated otherwise). Therefore, if a person does not wish to disclose his or her criminal history, such person may choose to not engage in municipal advisory activities. In addition, the Commission notes that the information requested on Form MA-I is consistent with comparable provisions in Forms BD and ADV, as well as Form U4.¹¹⁸⁴

One commenter focused on the impact that Form MA-I could have on bank employees, believing that it would require such information as the addresses of all offices at which the employee will be physically located or supervised and noting that it was not uncommon for bank branch employees such as tellers to work at multiple branch locations in a geographic region.¹¹⁸⁵ As discussed above, the Commission is limiting the application of the term investment strategies, providing a limited exemption for banks, and permitting the registration of SIDs.¹¹⁸⁶ Due to these

¹¹⁸¹ See letter from Jo Anne Bernal, County Attorney, El Paso County, Texas.

¹¹⁸² Id.

¹¹⁸³ See Section 15B(c)(2) and (4) of the Exchange Act.

¹¹⁸⁴ Except where indicated otherwise, the information supplied on Forms BD, ADV, and U4 is not kept confidential.

¹¹⁸⁵ Capital One Letter.

¹¹⁸⁶ See supra Sections III.A.1.b.viii.

changes, few, if any, bank employees of the type described by the commenter will be engaging in municipal advisory activities that would require filing of a Form MA-I. For those who are, the Commission believes that it is as important to obtain this information as it is with respect to any other natural person who is engaged in municipal advisory activities.

The Commission also received comment letters on Form MA-I from many municipal entities and agencies concerned about the impact of requiring appointed members of public boards to make the disclosures required by the form.¹¹⁸⁷ As discussed in Section III.A.1.c.i., the Commission is exempting all members of the governing body of a municipal entity (acting in their capacity as such), including appointed members, from the requirement to register as municipal advisors. Thus, the concerns of these commenters should be alleviated.

Items 1 and 2: Identifying Information and Other Names

Item 1 of Form MA-I is being adopted substantially as proposed, with minor modifications as discussed below.¹¹⁸⁸ Item 1 requires certain basic identifying information to be disclosed about any natural person engaged in municipal advisory activities.¹¹⁸⁹ Although, as discussed above, certain information about an employee of a firm would already be available through the firm's Form MA, the individual's Form MA-I requires more information, including:

- the individual's CRD Number, if he or she has one;

¹¹⁸⁷ See, e.g., letter from Barry Moline, Executive Director, Florida Municipal Electric Association, dated February 22, 2011; and Pennsylvania Public School Employees' Retirement Board Letter.

¹¹⁸⁸ No comments were received concerning Item 1.

¹¹⁸⁹ This includes, for example, the individual's full legal name. It also requires the registration and other identifying numbers of the individual's firm to be provided directly in the Form MA-I, to make it easier for regulators, municipal entities and investors to gather the information they need.

- the individual's social security number;¹¹⁹⁰
- the date of the individual's employment or contract with the firm;
- whether the individual has an independent contractor relationship with the firm;
- the firm's registration status;
- all the offices of the firm where the individual may be physically located and all the offices from which the individual is or will be supervised; and
- whether any of these offices are located in a private residence.

These elements of Item 1 are being adopted as proposed. With respect to information about the employee's firm, Item 1, as proposed, would have required the filer to provide any SEC file and registration numbers assigned to the firm in any registered capacity and also the firm's CRD Numbers, if any. To ease the completion of the form, Item 1, as adopted, requires a filer only to indicate whether the firm is currently registered as a municipal advisor on a Form MA and, if not, whether it has filed an application for registration on Form MA. If the latter, the filing date and the firm's EDGAR CIK number must be provided.

Item 1, as adopted, additionally requires a filer to provide the name under which the firm primarily conducts its municipal advisor-related business, if different from its legal name. It further also takes into account that an individual may be employed at more than one municipal advisory firm and requires entry of the relevant information for each such firm.¹¹⁹¹ The Commission

¹¹⁹⁰ This information will not be made publicly available. As stated in the Proposal, this information is necessary in connection with the Commission's enforcement and examination functions pursuant to Section 15B(c) of the Exchange Act (15 U.S.C. 78o-4(c)). See Proposal, 76 FR at 851, note 240. See also generally *supra* note 968.

¹¹⁹¹ The form also asks the filer for the total number of such firms. This question does not require a filer to research any further information than indicated above, but it can serve as a helpful cross-check to the filer as well as to regulators, and is also a useful number for interested parties who do not need the additional details.

believes that this additional information would be useful to the Commission's oversight of the municipal advisory market, without unreasonably increasing the burdens upon registrants in completing the form.

As proposed, Item 2 requires a filer to disclose all other names that the natural person engaged in municipal advisory activities is using or has been known by since the age of 18, such as nicknames, aliases, and names before and after marriage. No comments were received concerning Item 2, and it is being adopted substantially as proposed.

As stated in the Proposal, the Commission believed that the information sought by Items 1 and 2 would be useful to municipal entities and obligated persons in exploring the background, credentials, reliability, and trustworthiness of an individual in the course of making a decision whether to engage that natural person or his or her firm as a municipal advisor.¹¹⁹² The same information will be valuable to regulators in overseeing municipal advisors and investigating possible instances of wrongdoing.

Item 3: Residential History

In Item 3, which is being adopted substantially as proposed,¹¹⁹³ Form MA-I requires disclosure of each location where the natural person engaged in municipal advisory activities has resided for the past five years, including the time period at each residence.¹¹⁹⁴ Changes in residence must be reported (via an amendment) as they occur. In addition, no gaps greater than three months between addresses are permitted.

¹¹⁹² See Proposal, 76 FR at 851.

¹¹⁹³ No comments were received concerning Item 3, other than in the general context of concerns that the degree of detail required by the forms was overly burdensome and, in particular, in the context of concerns about registration requirements for appointees to municipal entity boards, which concerns are discussed elsewhere in this release.

¹¹⁹⁴ Non-substantive, technical, and clarifying changes have been made to Item 3. See *infra* note 1237.

As stated in the Proposal, the Commission believes that the residential history of a natural person engaged in municipal advisory activities, like the additional identifying information Form MA-I seeks, will be useful for municipal entities and other interested parties in exploring the background, credentials, reliability, and trustworthiness of the individual and be valuable to regulators in overseeing municipal advisors and investigating possible instances of wrongdoing. The information that is required regarding residential history is similar to the information requested on Form U4.¹¹⁹⁵

Item 4: Employment History

In Item 4, which is being adopted substantially as proposed,¹¹⁹⁶ Form MA-I requires a listing of the complete employment history of the natural person engaged in municipal advisory activities for the past ten years, including full and part-time employment, self-employment, military service, and homemaking. All statuses during the ten-year period, such as unemployed, full-time education, extended travel, and other similar circumstances must be included. In addition, the filer may not leave a gap longer than three months between entries. As discussed in the Proposal, the information required is similar to the information requested on Form U4.¹¹⁹⁷ Such information will help inform an understanding of an employee's business experience and provide useful information in preparing for regulatory examinations.¹¹⁹⁸

¹¹⁹⁵ See Proposal, 76 FR at 852. As stated in the Proposal, the Commission does not intend to make the information required by Item 3 publicly available. See *id.*, at 852, note 241. A statement to this effect has been added to the introduction to Item 3, as adopted.

¹¹⁹⁶ No comments were received concerning Item 4, other than in the general context of concerns that the degree of detail required by the forms was overly burdensome and, in particular, in the context of concerns about registration requirements for appointees to municipal entity boards, which concerns are discussed elsewhere in this release.

¹¹⁹⁷ The Commission intends to make this information publicly available.

¹¹⁹⁸ See Proposal, 76 FR at 852. Because no separate blanks are provided for statuses other than employment at a firm or company, (*e.g.*, military service, homemaking, unemployment,

Item 5: Other Business

Item 5 of Form MA-I is being adopted substantially as proposed.¹¹⁹⁹ Item 5 requires information about the individual's other business activities, if any, in which he or she is currently engaged, as a proprietor, partner, officer, director, employee, trustee, agent or otherwise. The form asks for the name of the other business, its address, whether it is municipal advisor-related and, if not, the nature of the business in which it is engaged.

The filer is required to provide the individual's position, title, or relationship with the other business, the start date of the relationship, the approximate number of hours per month the individual devotes to the other business, and a brief description of his or her duties relating to the other business. As discussed in the Proposal, the information sought in this section is similar to the information sought by the equivalent section in Form U4. Such information will help the Commission understand the other business activities of a natural person engaged in municipal advisory activities and will help staff prepare for examinations.¹²⁰⁰

Item 6: Disclosures Relating to Any Criminal Action, Regulatory Action, Investigation, Civil Judicial Action, Customer Complaint/Arbitration/Civil Litigation, Termination, Certain Financial Matters, and Judgments and Liens

Item 6 of Form MA-I, regarding the disciplinary history of the individual, is being adopted substantially as proposed.¹²⁰¹ However, the Commission has made some modifications to the information sought in the DRPs, which are discussed below.

education, or travel), guidance has been included in Item 4, as adopted, instructing the filer to enter such statuses in the space provided for "Name of Municipal Advisory Firm or Company." Regarding non-substantive, technical, and clarifying changes, generally, see infra note 1237.

¹¹⁹⁹ No comments were received concerning Item 5. Only slight clarifying changes have been made in the wording of this item as adopted.

¹²⁰⁰ See Proposal, 76 FR at 853.

¹²⁰¹ The Commission received no comments specifically relating to Item 6 in the Proposal.

Item 6 of Form MA-I includes three sections that require the same general types of information regarding an individual's criminal, regulatory, and civil judicial history, if any, as required regarding municipal advisory firms in corresponding sections in Form MA,¹²⁰² although the questions in these sections of Form MA-I differ somewhat from those in the corresponding sections of Form MA, as will be discussed below. As in Form MA, certain responses in the criminal, regulatory, and civil judicial action sections of Form MA-I require disclosure of complete details of all events or proceedings in DRPs pertaining to these areas.

Item 6 of Form MA-I also has five additional disclosure sections¹²⁰³ relating to an individual, which are also discussed below. Four of these ask about any investigations, terminations, customer complaints/arbitration/civil litigation, or judgments/liens relating to the individual. Each of these four sections has an associated DRP requiring further detail where applicable. The fifth additional section, which has no associated DRP, asks for certain financial disclosures. As discussed in the Proposal, the Commission believes that additional disclosures in these five areas, which are also required of individuals associated with broker-dealers and investment advisers on Form U4, are appropriate to aid municipal entities, obligated persons, and other members of the public in researching the background of municipal advisors and to aid regulators in enhancing their oversight of municipal advisors.¹²⁰⁴

As discussed in the Proposal, the Commission believes that the additional disclosure items in the DRPs will be helpful to municipal entities and obligated persons as clients or prospective

¹²⁰² See supra Section III.A.2.b.

¹²⁰³ In the proposed version of Item 6, the question about investigations appeared at the end of the Regulatory Action section. In the adopted version, a separate section has been created for this question (which remains the same) for the sake of clarity, as it concerns both criminal and regulatory investigations. Form MA-I, both as proposed and adopted, has a separate DRP that concerns only investigations reported in this question.

¹²⁰⁴ See Proposal, 76 FR at 853.

clients of municipal advisors.¹²⁰⁵ The information may also serve as the basis for granting or instituting proceedings to deny a registration or for revoking a registration or imposing other sanctions by the Commission with respect to an individual.¹²⁰⁶

As a general matter, as was the case with the proposed DRPs of Form MA, many of the questions in the proposed DRPs of Form MA-I did not ask for specifics. The Commission believes that, with regard to certain questions, additional details of the kind requested in the adopted versions of Form MA's DRPs will help regulators, municipal entities, and other interested parties more easily research and better assess the background of the individual that is the subject of the DRP of Form MA-I.¹²⁰⁷ Thus, many of the revisions made to the DRPs of Form MA have also been made to the DRPs of Form MA-I.

Among these are changes in questions relating to: removing a DRP filed in error;¹²⁰⁸ incorporation by reference of disclosures already filed elsewhere;¹²⁰⁹ names and types of courts, regulatory authorities and forums and their locations, and parties who initiated the relevant action;¹²¹⁰ how to report an event;¹²¹¹ appeals;¹²¹² disposition of a case and sanctions imposed in criminal cases;¹²¹³ sanctions and/or relief sought, type of resolution, and sanctions ordered in

¹²⁰⁵ See id., at 854.

¹²⁰⁶ See supra notes 1093-1097 and accompanying text (discussing grounds for revocation of a municipal advisor's registration or imposing other sanctions).

¹²⁰⁷ See supra note 1123.

¹²⁰⁸ See supra text following note 222.

¹²⁰⁹ See supra notes 1127-1128 and accompanying text.

¹²¹⁰ See supra notes 1129-1130 and accompanying and following text.

¹²¹¹ See supra text accompanying note 1132.

¹²¹² See supra note 1134 and accompanying text.

¹²¹³ See supra notes 1135-1137 and accompanying text.

regulatory and civil judicial actions;¹²¹⁴ and other matters.¹²¹⁵

The following discussion summarizes Item 6 and its related DRPs as well as additional revisions made in their adopted versions:

Criminal Action Disclosures

With respect to felonies, Item 6 of Form MA-I – in contrast to the disclosures required by Item 9-A of Form MA – requires disclosure of:

- any past conviction of, or plea of guilty or nolo contendere to, a felony by the individual, rather than limiting the disclosure to the past ten years, as in a firm's or solo practitioner's Form MA;
- any charges of felony against the individual in the past, rather than limiting disclosure to currently pending charges, as in a firm's or sole proprietor's Form MA; and
- any convictions of, or plea of guilty or nolo contendere to, a felony by an organization based on activities that occurred when the individual exercised control over the organization – a disclosure not required in Form MA.

With respect to misdemeanors, while Form MA requires only disclosures of convictions and pleas concerning an individual looking back ten years, and requires only disclosures of charges that are currently pending, Form MA-I requires disclosure of such convictions, pleas, and charges that occurred at any time in the individual's past. Misdemeanors, and convictions, pleas, and charges of misdemeanor against an organization while the individual exercised control over the organization are also required to be disclosed.

These criminal action disclosure requirements regarding individuals beyond the information

¹²¹⁴ See supra notes 1137-1139 and accompanying text.

¹²¹⁵ See supra notes 1140-1142 and accompanying text.

required in Form MA, are consistent with the disclosure requirements on Form U4. In addition, as discussed in the Proposal, these disclosures provide additional information with respect to natural persons engaged in municipal advisory activities that will be useful to the Commission's regulatory and examination programs, and may be useful to municipal entities and obligated persons who are clients or prospective clients of the individual or his or her firm.¹²¹⁶

As proposed and adopted, the Criminal Action DRP of Form MA-I asks for additional details regarding, among other things: the charges, number of counts, and the court in which they were brought; status of the action; details of its disposition and sanctions ordered; and the date of amended charges, if any. It also provides an option and space for comment consisting of a brief summary of the circumstances leading to the charge(s) as well as their current or final disposition.

Certain revisions have been made in the adopted version of the DRP. For example, in its disclosure requirements concerning the charges, the DRP, as adopted, asks specifically whether the charge is (a) municipal advisor-related or (b) investment-related; and, if so, in each case, (c) what product type it involved.¹²¹⁷

Moreover, as proposed, the DRP required a description, in narrative form, of details concerning any sentence or penalty imposed, its start date, and its duration, and the amount and date of payment.¹²¹⁸ As adopted, the DRP asks specifically whether any sentence or any other penalty is

¹²¹⁶ See Proposal, 76 FR at 853.

¹²¹⁷ The Commission believes that these additional details contribute to an accurate picture of the individual's disciplinary history and notes that the same questions are asked in the equivalent DRP of Form MA, as both proposed and adopted. On the other hand, specific questions regarding pleas to amended charges have been removed as unnecessary because the requested information should be provided in responses to other questions.

¹²¹⁸ The form provided a blank space for: "Sentence/Penalty, Duration (if suspension, probation, etc.), Start Date of Penalty: (MM/DD/YYYY), End date of Penalty (MM/DD/YYYY); If Monetary penalty/fine – Amount paid, Date monetary/penalty fine paid: (MM/DD/YYYY), if not exact, provide explanation." It also gave the filer the option of providing "a brief summary of circumstances leading to the charge(s) as well as the current status or final

ordered, and requires, if so, a description of whether it involved prison, jail, probation, community service, counseling, education, or other. It further asks, in question-by-question format, for the duration in days, months, and/or years of any incarceration, the start and end dates, whether any concurrent sentence is to be served, and, if so, the end date. It also asks, in question-by-question format, whether any portion of a monetary penalty was reduced or suspended, whether it has been paid in full, and, if not, how much remains unpaid. These details should contribute to the clarity of the picture received by regulators, municipal entities, and investors of the individual's disciplinary background.

Finally, the proposed Criminal Action DRP of Form MA-I did not ask specifically about appeals. In its adopted version, the DRP asks whether the criminal action was appealed, and, if so, the name and location of the appeals court, and other details. Choices are also provided to describe specifically the disposition of any appeal.¹²¹⁹ The Commission believes that obtaining this information will better enable regulators, municipal entities, and other interested parties to research the complete criminal history of the individual.¹²²⁰

Regulatory Action Disclosures

As proposed and adopted, the questions in Item 6 of Form MA-I relating to regulatory actions by the Commission or the CFTC, similar to those in Form U4, require the same disclosures as in proposed Item 9 of Form MA and additional disclosures, including whether the Commission or the CFTC has ever found the individual to have:

disposition.”

¹²¹⁹ These choices are: affirmed; vacated and returned for further action; or vacated/final. An applicant may also respond “other,” in which case the other type of disposition must be specified.

¹²²⁰ See also supra note 1134.

- willfully violated, or been unable to comply with, any provision of the federal securities laws, the Commodity Exchange Act, and the rules thereunder, and any rule of the MSRB;
- willfully aided, abetted, commanded, induced, or procured the violation by any other person of these laws and rules; and
- failed reasonably to supervise another person subject to his or her supervision with a view to preventing violation of these laws and rules.

As proposed and adopted, Form MA-I requires the same disclosures as proposed Form MA with respect to findings and actions relating to the individual by other federal regulatory agencies, state regulatory agencies, and foreign financial regulatory authorities. It also requires additional disclosures, including whether the individual has ever been subject to a final order of a state securities commission or similar agency or office; state authority that supervises or examines banks, savings associations, or credit unions; state insurance commission; an appropriate federal banking agency; or the National Credit Union Administration that:

- bars the individual from association with an entity regulated by such commission, agency, authority or office, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or
- constitutes a final order based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

In addition to the disclosures required of a municipal advisory firm regarding its individual associated persons on proposed Form MA, Form MA-I as proposed and adopted requires disclosure of any finding by an SRO that the individual:

- willfully violated, or is unable to comply with, any provision of the federal securities laws, the Commodity Exchange Act and the rules thereunder, or the rules of the MSRB;

- willfully aided, abetted, counseled, commanded, induced, or procured the violation of any of these laws or rules; or
- failed reasonably to supervise another person subject to his or her supervision, with a view to preventing such violations.

Like Form MA, Form MA-I as proposed and adopted also requires disclosure of whether the individual had an authorization to act as an attorney, accountant or federal contractor revoked or suspended.

Item 6 of Form MA-I as proposed and adopted also requires disclosure of whether the individual has been notified in writing that he or she is currently the subject of a regulatory complaint or proceeding that could result in any occurrence of the kind that would trigger any of the disclosure requirements described above relating to regulatory actions, except the latter occurrence pertaining to attorneys, accountants, and federal contractors. The form advises that if the answer is affirmative, the filer must complete a Regulatory Action DRP.¹²²¹

The DRP for regulatory action disclosure in Form MA-I, as proposed and adopted, requires the filer to provide further details, including: the allegations, which regulatory authority initiated the action, the kind of product involved, and the sanctions sought; the status of the action; the disposition or resolution of the action, the sanctions ordered, and their duration; the registration capacities of the individual that were affected; whether requalification was a condition of any sanction reported, and whether it was by exam, retraining, or other process; the length of time given to requalify; and whether the requalification condition was satisfied. Disclosures required in the

¹²²¹ Form MA does not include an analogous question and advisory in its regulatory action section. Item 6, as proposed, also asked whether the individual has been notified in writing that he or she is the subject of an investigation that could result in affirmative answers to questions about criminal and regulatory actions above in the form. This question has been separated into a separate section in the form, as adopted, titled "Investigation Disclosures." See infra note 1223 and accompanying text.

Regulatory Action DRP, as proposed, also include details of any monetary sanction imposed, including amount; portion levied against the individual; any amount waived; payment plan; whether such plan was current; date paid; and whether the sanction was a civil or administrative penalty or fine, a monetary penalty other than a fine, disgorgement, or restitution. Revisions made in the Regulatory Action DRP, as adopted, include the following:

- In the DRP, as proposed, a filer was asked to identify every type of product involved in the action. As adopted, the DRP requires the filer to distinguish between principal product types and other products.
- As proposed, the DRP asked about any bars and suspensions of the individual from his or her registration capacities. As adopted, the DRP also requires information specific to any injunction that was imposed as a regulatory sanction.
- In addition to the questions about requalification and exams, as described above, the DRP as adopted asks for a description in narrative form of any examination, re-training, or other process that was required as a condition for the person to re-qualify.

The Commission believes that these additional details will provide regulators, municipal entities, and investors with a more accurate picture of disciplinary history of the individual.¹²²²

Disclosure of Investigations¹²²³

Item 6 of Form MA-I, as proposed and adopted, asks whether the individual has been notified in writing that he or she is currently the subject of any investigation that could result in a positive answer to any of the questions in either the criminal and regulatory sections of Item 6

¹²²² Other revisions in the adopted version of the Regulatory Action DRP: The form now asks for date of service of process in pending actions; and additional details when one or more injunctions specify different time periods; and more choices to describe sanctions sought, how the action was resolved, and sanctions ordered.

¹²²³ See supra note 1203.

described, except the question pertaining to attorneys, accountants, and federal contractors. If the answer is positive, an Investigation DRP must be filed.

The Investigation DRP requires details of any such investigation, including the date the investigation was initiated and whether it was initiated by an SRO, a foreign financial regulatory authority (giving the specific jurisdiction), the Commission, other federal agency, or "other." The Investigation DRP requires that the full name of the authority that initiated the investigation be specified. Space is provided for the filer to briefly describe the nature of the investigation, if known; whether it was pending or resolved; and details of any resolution. Space for optional comment is also provided to present a brief summary of the circumstances leading to the investigation and its current status or final disposition and/or findings.

The Investigation DRP also asks for similar details regarding a criminal investigation by a federal, military, state, foreign or international authority or court. Although Item 6 requires a DRP for criminal investigations, the DRP, as proposed, did not specifically reference criminal investigations or authorities.

Civil Judicial Action Disclosure

The disclosures required by Form MA-I with respect to certain matters relating to an individual's civil judicial history are the same as disclosures required on Form MA. Thus, a filer is required to disclose on Form MA-I whether the individual:

- was ever enjoined by a domestic or foreign court in connection with any investment-related or municipal advisor-related activity;
- was ever found by a domestic or foreign court to be involved in a violation of any investment-related or municipal advisor-related statute or regulation; or

- ever had an investment-related or municipal advisor-related civil action brought against him or her dismissed, pursuant to a settlement agreement, by a domestic jurisdiction¹²²⁴ or foreign financial regulatory authority; or
- was ever named in any such pending action that could result in a positive answer to the three previous questions.

As discussed in the Proposal, the Commission believes that it is appropriate to seek information regarding investment-related activities as well as municipal advisor-related activities due to the significant similarities that exist between the two advisory functions. Moreover, such information could serve as a basis to institute proceedings to deny registration of a municipal advisor or to impose other sanctions on the municipal advisor's activities.¹²²⁵

A DRP is required for affirmative responses to questions under this item. Specifically, the DRP requires, among other things, information regarding: by whom the court action was initiated; the name of the party initiating the proceeding; information about the relief sought; the date on which the action was filed and notice or process was served; the types of financial products involved; a description of the allegations relating to the civil action; the current status, including whether the action is on appeal and details relating to any such appeal; sanction details; and if the disposition resulted in a fine, disgorgement, restitution or monetary compensation, information relating thereto. The DRP also provides the opportunity for a filer to provide additional comment, including a summary of the circumstances leading to the action and current status.

¹²²⁴ The phrase "domestic jurisdiction" is used in the form, as adopted, in place of "state" in the proposed version. The question of whether such an occurrence is part of the individual's history was not intended to be limited to state actions.

¹²²⁵ See Proposal, 76 FR at 854-855.

The Civil Judicial Action DRP, as adopted, has been modified to ask whether the individual is a named defendant in the action for which the DRP is being completed;¹²²⁶ indicate, if an order was issued, whether the order is a final order based on violations of any laws or regulations that prohibit fraudulent or deceptive conduct; and indicate whether a condition of any sanction was requalification by examination, retraining, or other process. The Commission believes that these changes generally will add clarity for filers in determining the type of information that must be provided.¹²²⁷

Customer Complaints/Arbitration/Civil Litigation

Form MA does not require a municipal advisory firm to disclose any customer complaints, arbitration matters, and civil litigation concerning natural person municipal advisors. Form MA-I, however, requires disclosure of whether an individual engaged in municipal advisory activities has ever been:

- the subject of a complaint initiated by a customer, whether written or oral, regarding investment-related or municipal advisor-related matters, which alleged that he or she was involved in fraud, false statements, omissions, theft, embezzlement, wrongful taking of property, bribery, forgery, counterfeiting, extortion, and dishonest, unfair or unethical practices; or

¹²²⁶ In addition, this DRP, as proposed and adopted, asked for the full name(s) of the plaintiff(s) in the action. The adopted version further asks the filer whether all plaintiffs were fully identified, to make clear that the information needs to be complete.

¹²²⁷ In addition, the list of sanctions or relief that are specified as required to be reported has more detail in order to provide more choices for filers. The list of specific possible resolutions of the action that the applicant can indicate as applicable has also been expanded. More information also is sought regarding details of how the action was resolved, and, if resolved with sanctions, more details about those sanctions.

- the subject of an arbitration or civil litigation initiated by a customer regarding investment-related or municipal advisor-related matters, which alleged that he or she was involved in fraud, false statements, omissions, theft, embezzlement, wrongful taking of property, bribery, forgery, counterfeiting, extortion, and dishonest, unfair or unethical practices.

In the case of a complaint, the filer must indicate whether the complaint is still pending or was settled. In the case of arbitration or civil litigation, the filer must indicate whether the arbitration or litigation is still pending; resulted in an arbitration award or civil judgment against the individual in any amount; or was settled.

A DRP is required for affirmative responses to questions under this item. Specifically, the relevant DRP requires the filer to disclose the customer's name; the customer's state of residence and other states of residence; the employing firm of the individual when the activities occurred that led to the complaint, arbitration, CFTC reparation or civil litigation; and the allegations and a brief summary of events related to the allegations, including the dates when they occurred; the product type; and the alleged compensatory damage amount.

For customer complaints, arbitration, CFTC reparation, or civil litigation in which the individual is not a named party, the DRP requires disclosure of whether the complaint is oral or written, or whether it is an arbitration, CFTC reparation or civil litigation (and the arbitration or reparation forum, docket or case number, and the filing date); whether the complaint, arbitration, CFTC reparation or civil litigation is pending, and if not, the status. The DRP requires disclosure of the status date and the settlement award amount, including the individual's contribution amount.

If the matter involves an arbitration or CFTC reparation and the individual is a named respondent, the DRP requires disclosure of the entity with which the claim was filed; the docket or

case number; the date process was served; whether the arbitration of CFTC reparation is pending, and if not pending the form of disposition; the disposition date; and the amount of the monetary award, settlement or reparation (including the individual's contribution).

If the matter involves a civil litigation in which the individual is a defendant, the DRP requires disclosure of the court in which the case was filed; the location of the court; the docket or case number; the date the complaint was served on or received by the individual; whether the litigation is still pending; if not still pending the form of its disposition; the disposition date; the judgment, restitution or settlement amount, including the individual's contribution amount; whether the action is currently on appeal, and if so, the date the appeal was filed, the court in which the appeal was filed, the location of the court, and the docket or case number for the appeal. The DRP also provides for optional additional comment, such as a summary of the circumstances leading to the complaint.

As discussed in the Proposal, these disclosures, too, mirror similar disclosures in Form U4, provide additional information about natural persons engaged in municipal advisory activities that may be useful to municipal entities or obligated persons as clients or prospective clients, and help the Commission prepare for and plan examinations.¹²²⁸

Several revisions have been made to this DRP, as adopted. In the questions relating to settlements, awards, and monetary judgments, the DRP now additionally asks whether any portion of the individual's settlement, award, or monetary judgment amount was waived, and, if so, how much; and whether the final amount was paid in full, and, if so, the date. In the section relating to

¹²²⁸ See Proposal, 76 FR at 855.

civil litigation, the DRP now additionally asks whether the individual appealed, and, if so, to which court, its location, and other details.¹²²⁹

Termination Disclosure

Unlike Form MA, Form MA-I requires disclosure regarding the termination of a natural person's employment. Specifically, consistent with Form U4, Form MA-I asks whether the individual ever voluntarily resigned or was discharged or permitted to resign after allegations were made that accused him or her of:

- violating investment-related or municipal advisor-related statutes, regulations, rules, or industry standards of conduct;
- fraud or the wrongful taking of property; or
- failure to supervise in connection with investment-related or municipal advisor-related statutes, regulations, rules or industry standards of conduct.

An affirmative response to the questions described above requires additional information on a related DRP. Specifically, the DRP requires disclosure of the name of the firm, the type of termination (whether discharged, permitted to resign, or voluntary resignation), the termination date, the allegations, and the product types. The DRP also provides for optional additional comment, such as a summary of the circumstances leading to the termination.

As discussed in the Proposal, this disclosure will provide information that will be useful to the Commission in planning and preparing for inspections and examinations. The disclosure also will be useful to the public generally (including municipal entities and obligated persons, as clients or prospective clients).¹²³⁰

¹²²⁹ See generally *supra* notes 1208-1215.

¹²³⁰ See Proposal, 76 FR at 856.

Financial Disclosures

Item 6 of Form MA-I, as proposed and as adopted, also requires financial disclosures regarding individuals that are not required to be made on Form MA by municipal advisory firms, generally, regarding their associated persons or by sole proprietors regarding themselves.

Specifically, the form asks the filer whether, within the past ten years:

- the individual has made a compromise with creditors, filed a bankruptcy petition, or been the subject of an involuntary bankruptcy petition;
- an organization controlled by the individual has made a compromise with creditors, filed a bankruptcy petition, or been the subject of an involuntary bankruptcy petition based upon events that occurred while he or she exercised control over it; or
- a broker or dealer controlled by the individual has been the subject of an involuntary bankruptcy petition, had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act based upon events that occurred while he or she exercised control over it.

In addition, a filer must disclose whether a bonding company ever denied, paid out on, or revoked a bond for the individual. There is no DRP associated with these financial disclosures.

Judgment / Lien Disclosure

Item 6 of Form MA-I also asks whether the individual has any unsatisfied judgments or liens against him or her. An affirmative response requires additional disclosure on a DRP. Specifically, the filer must disclose the amount, holder, and type of the judgment or lien. The form also requires information about the date the judgment or lien was filed, the court in which the action was brought, the name and location of the court, the docket or case number,¹²³¹ whether the judgment or lien is

¹²³¹ See *supra* note 968.

outstanding, and if the judgment or lien is not outstanding, the status date and how the matter was resolved. The DRP also provides for optional comment, such as a brief summary of the circumstances leading to the action.¹²³²

As discussed in the Proposal, the Commission believes that the information that is required, which is consistent with that required by Form U4, will be useful for its regulatory purposes, including planning and preparing for inspections and examinations. The Commission also believes that the information will be useful to the public generally (including municipal entities and obligated persons, as clients or prospective clients).¹²³³

Other Changes in Form MA-I, As Adopted

Additional modifications to the DRPs

The Commission has made the following modifications to the DRPs in addition to those discussed above. An instruction has been added at the beginning of all the DRPs, regarding incorporation by reference, to clarify that the filer of Form MA-I may incorporate information either from a DRP that was filed by the firm, or from a DRP filed by another Commission registrant about the individual. This should help filers avoid the inconvenience and burden of completing the additional information.

When a DRP is being filed to remove a previously filed DRP, the filer in each case is asked whether the reason is because the matter was resolved in the individual's favor, or because the DRP was filed in error.¹²³⁴ Moreover, as proposed, several of the DRPs asked for the name of the employing firm of the individual when the relevant event occurred only if the firm was a municipal

¹²³² Modifications made to the DRPs of Form MA-I as adopted are discussed below under the sub-heading, "Other Changes in Form MA-I, As Adopted."

¹²³³ See Proposal, 76 FR at 856.

¹²³⁴ This question is adapted from a similar question in the DRPs to Form MA, and should help clarify the status of the applicant for users of the information.

advisory firm.¹²³⁵ The Commission has concluded, however, that the name of the individual's employer when the activity occurred can be useful to regulators, municipal entities, and investors regardless of whether the individual was employed specifically by a municipal advisory firm, and is not limiting the requested information to such firms. In the case of a municipal advisory firm employer, however, the DRPs as adopted ask for the municipal advisor registration number of the firm.¹²³⁶

As proposed, the Regulatory and Civil Action DRPs asked the filer to identify the principal product types that were the subject of the activity regarding which the formal action involving the individual was taken. As adopted, they also ask for any other product types. Finally, the adopted versions of the Regulatory and Civil Action DRPs ask for the date on which notice or other process was served if the action being reported on the DRP is still pending.

An Associated Person Who Ceases to be Engaged in Municipal Advisory Activities

Because Form MA-I, as adopted, is not a registration form, when a natural person associated with a registered municipal advisor ceases to engage in municipal advisory activities on its behalf, Form MA-W – which is a form designed for withdrawal of registration – will not be required. Instead, the change must be reported by the registered municipal advisor that filed the Form MA-I relating to that person. This is accomplished by filing an amendment to the Form MA-I, which must be submitted promptly, like any other amendment.

For this purpose, a filer submitting an amendment to Form MA-I can indicate that the purpose of the amendment is to report that the individual to whom the form relates is no longer an associated person of the municipal advisory firm or no longer engages in municipal advisory

¹²³⁵ Included are the Regulatory, Civil Judicial Action, Termination, and Customer Complaint/Arbitration/Civil Litigation DRPs.

¹²³⁶ The Commission believes this specific information is particularly relevant for municipal advisor regulation.

activities on its behalf. When submitting an amendment of this kind, the filer must complete only the portion of the form asking for the name of the individual, his or her social security number, and CRD Number if any (Item 1-A) and the Execution Page of the form (Item 7).

Non-Substantive, Technical, and Clarifying Changes

In addition, a number of non-substantive, technical and clarifying changes have been made to Form MA-I, as adopted, to make the form clearer and more user-friendly. These include, where applicable, the same kinds of changes made to Form MA.¹²³⁷

Item 7: Execution of the Form

If Form MA-I is being filed by a municipal advisory firm with respect to a natural person engaged in municipal advisory activities on its behalf, the authorized representative of the firm who signs the Execution Page of Form MA-I must attest to the truth and correctness of the information provided in the form. He or she must also attest that the firm has obtained and retained written consent from the individual that service of any civil action brought by, or notice of any proceeding before, the SEC or any self-regulatory organization in connection with the individual's municipal advisory activities may be given by registered or certified mail to the individual's address given in Item 1 of the firm.

If Form MA-I is being filed by a natural person municipal advisor who is a sole proprietor, by signing the Execution Page of Form MA-I, the filer must represent that the information and statements made in the form are true and correct. He or she must also consent that service of process of any civil action or notice of any proceeding before the Commission or an SRO regarding its municipal advisory activities may be given by registered or certified mail to the address he or she

¹²³⁷ See supra note 1147. Examples of other revisions of this nature in Form MA-I include: Guidance advising filers to refer to the Specific Instructions for Form MA-I; corrections of inaccurate references; clarifying and editorial changes; and additional instructions to aid the filer that do not introduce any substantive changes.

has supplied in Item 1 of the form.

As proposed, Form MA-I also required its signatory to certify that he or she has: (a) sufficient qualifications, training, experience, and competence to effectively carry out his or her designated functions; (b) met, or within any applicable required timeframes will meet, such standards of training, experience, and competence, and such other qualifications, including testing, for a municipal advisor, required by the Commission, the MSRB or any other relevant SRO; and (c) the necessary understanding of, and ability to comply with, all applicable regulatory obligations.

The Commission received comment letters on the self-certification requirement in Form MA-I from many municipal entities and agencies concerned about the impact of requiring appointed members of public boards to make such certifications. As discussed in Section III.A.1.c.i., the Commission is exempting all members of the governing body of a municipal entity (acting in their capacity as such), including appointed members, from the requirement to register as municipal advisors. Thus, the Commission believes that the concerns of these commenters have been addressed. However, one comment received by the Commission regarding the self-certification requirement in Form MA-I, as proposed, called the requirement "problematic."¹²³⁸

In view of the change in the nature of Form MA-I, as adopted, including who is required to sign the form, the Commission has decided to eliminate the self-certification requirement in Item 7. Because, under the rules, as adopted, individuals who engage in municipal advisory activities on behalf of a registered firm are exempt from registration, and, with respect to these individuals, the function of Form MA-I is only to provide information, the self-certification requirement is no longer a propos. Moreover, as discussed above, the Commission has determined to remove the self-certification requirement with respect to firms in Form MA. Thus, Form MA-I, as adopted, will no

¹²³⁸ See SIFMA Letter I.

longer require self-certification.

3. Rule 15Ba1-3: Exemption of Certain Natural Persons Associated with Registered Municipal Advisors From Registration¹²³⁹

Rule 15Ba1-3, as adopted, exempts certain natural persons from registration with the Commission as a municipal advisor if the natural person is associated with a registered municipal advisor and engages in municipal advisory activities solely on behalf of a registered municipal advisor. This exemption is discussed above in Section III.A.2.a.¹²⁴⁰

4. Rule 15Ba1-4: Withdrawal From Municipal Advisor Registration; Form MA-W

a. Rule 15Ba1-4: Withdrawal From Municipal Advisor Registration

Proposed Rule 15Ba1-3 provided that notice of withdrawal from registration as a municipal advisor must be filed on Form MA-W, in accordance with the instructions to the form, and set forth other requirements regarding withdrawal of a municipal advisor from registration. The Commission received one comment letter regarding this proposed rule which supported the proposed rule.¹²⁴¹ The Commission is adopting Rule 15Ba1-4 as it was set forth in proposed Rule 15Ba1-3, with certain minor, technical modifications.¹²⁴² The rule as adopted, however, only applies to municipal advisors registered on Form MA, because the Commission is exempting from registration certain natural persons who are associated persons of a registered municipal advisor and who engage in municipal advisory activities solely on behalf of a registered municipal advisor.¹²⁴³

¹²³⁹ Rule 15Ba1-3, under the Proposal, contained the requirements for a municipal advisor to withdraw an existing registration. This provision is being adopted as Rule 15Ba1-4, which is discussed below.

¹²⁴⁰ See supra notes 938-939 and accompanying text.

¹²⁴¹ See MSRB Letter I.

¹²⁴² See Rule 15Ba1-4, as adopted. The modifications are non-substantive and are limited to updating citations in the rule text or changing the article "such" to the article "the."

¹²⁴³ In the Proposal, the Commission proposed to require natural person municipal advisors to

As with Forms MA and MA-I, Form MA-W must be filed electronically with the Commission.¹²⁴⁴ Form MA-W also constitutes a “report” for purposes of Sections 15B(c), 17(a), 18(a), 32(a) (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Exchange Act.¹²⁴⁵

Rule 15Ba1-4 also provides that a notice of withdrawal from registration becomes effective for all matters on the 60th day after the filing of the Form MA-W. It may also become effective within a longer time period to which the municipal advisor consents or which the Commission by order determines as necessary or appropriate in the public interest or for the protection of investors, or within a shorter time if the Commission so determines.¹²⁴⁶

The rule further provides that if a municipal advisor filed a notice of withdrawal from registration with the Commission at any time subsequent to the date of issuance of a Commission order instituting proceedings pursuant to Section 15B(c) of the Exchange Act¹²⁴⁷ to censure, place limitations on the activities, functions or operations of, or suspend or revoke the registration of the municipal advisor or if, prior to the effective date of the notice of withdrawal, the Commission institutes such a proceeding or a proceeding to impose terms and conditions upon the withdrawal, the notice of withdrawal will not become effective except at the time and upon the terms and

register on proposed Form MA-I and accordingly proposed that these natural person municipal advisors would be required to file a Form MA-W to withdraw from registration with the Commission as a municipal advisor. See Proposal, 76 FR at 850, 857. As discussed in more detail in Section III.A.2.a. and Section III.A.3., the Commission is adopting an exemption from registration for certain natural persons and Form MA-I will not be an application for registration.

¹²⁴⁴ See Rule 15Ba1-4(b).

¹²⁴⁵ See Rule 15Ba1-4(d). As a consequence, it will also be unlawful for a municipal advisor to willfully make or cause to be made, a false or misleading statement of a material fact or omit to state a material fact in Form MA-W.

¹²⁴⁶ See Rule 15Ba1-4(c).

¹²⁴⁷ 15 U.S.C. 78o-4(c).

conditions as deemed by the Commission as necessary or appropriate in the public interest or for the protection of investors.¹²⁴⁸

b. Form MA-W

The Commission received one comment letter regarding Form MA-W, which was generally supportive of the form.¹²⁴⁹ As discussed in more detail above,¹²⁵⁰ the Commission is exempting certain natural persons from municipal advisor registration. Accordingly, the Commission is adopting Form MA-W substantially as proposed, but is modifying it solely to remove all references to individual registration of natural persons associated with a municipal advisor and engaged in municipal advisory activities on its behalf and to Form MA-I as an application for registration¹²⁵¹ and to add an introductory direction to refer to the General Instructions for the forms in the MA series before completing Form MA-W. Form MA-W for municipal advisors is designed to be generally consistent with the requirements of Form ADV-W for investment advisers withdrawing from registration. First, Form MA-W requires a municipal advisor to provide identifying information keyed to the identifying information on, and the SEC file number of, the municipal advisor's Form MA. A municipal advisor is required to provide on Form MA-W the name of a

¹²⁴⁸ See Rule 15Ba1-4(c).

¹²⁴⁹ See MSRB Letter I.

¹²⁵⁰ See supra note 1243 and supra Section III.A.2.a. and Section III.A.3.

¹²⁵¹ The Commission has removed references in certain instructions that contemplated individual registration of certain natural persons on Form MA-I and that designated Form MA-I as a registration form. Additionally, on the Execution Page, the Commission has also removed the certification for natural person municipal advisors other than sole proprietors.

When a natural person for whom a municipal advisory firm filed a Form MA-I is no longer an associated person or no longer engages in municipal advisory activities on behalf of the firm, the firm must file an amendment to the Form MA-I to indicate this change. See General Instruction 2.d. of the General Instructions and supra Section III.A.2.c., under sub-heading "An Associated Person Who Ceases to be Engaged in Municipal Advisory Activities."

principal or employee of the municipal advisor who is authorized to receive information and respond to questions about the Form MA-W. Contact information for a municipal advisor's outside counsel is insufficient.

A municipal advisor filing to withdraw its registration is required to indicate on Form MA-W whether it has received any pre-paid fees for municipal advisory activities that have not been delivered, including subscription fees for publications, and, if so, to specify the amount. In addition, the withdrawing municipal advisor is required to indicate how much money, if any, it has borrowed from clients and has not repaid. If the municipal advisor responds affirmatively to either question, it is required to disclose on Schedule W2 to Form MA-W the nature and amount of its assets and liabilities and its net worth as of the last day of the month prior to the filing of the Form MA-W.

A municipal advisor that is filing to withdraw its registration is required to indicate on Form MA-W whether it has assigned any municipal advisory contracts to another person that engages in municipal advisory activities, and if so, the municipal advisor is required to list in Section 4 of Schedule W1 to Form MA-W each person to whom it has assigned any such municipal advisory contracts and provide the requested information.

A municipal advisor filing to withdraw its registration also is required to indicate whether there are any unsatisfied judgments or liens against it. If the municipal advisor responds affirmatively that it owes money or has any judgments or liens against it, it is required to disclose on Schedule W2 to Form MA-W the nature and amount of its assets and liabilities and its net worth as of the last day of the month prior to the filing of the Form MA-W.

As discussed in the Proposal, the Commission believes that requiring such information from a withdrawing municipal advisor is appropriate for the protection of investors and those persons

who do business with municipal advisors.¹²⁵² The filing of Form MA-W and the information contained in the form will provide notice that the municipal advisor is no longer registered and, therefore, is not able to engage in municipal advisory activities without violating federal securities laws.¹²⁵³ Additionally, the information provided will alert clients and prospective clients to a municipal advisor's financial stability if the municipal advisor received fees from clients for services not yet delivered, borrowed any money from clients that has not been repaid, or has any unsatisfied judgments or liens at the time of withdrawal because the municipal advisor would be required to disclose the nature and amount of its assets and liabilities and net worth on Schedule W2. This information also will help regulators' investigative and enforcement efforts. Additionally, as noted in the Proposal, an investment adviser that withdraws from registration must supply similar information on its Form ADV-W.¹²⁵⁴

As discussed below, Rule 15Ba1-8(c), as adopted, requires a municipal advisor withdrawing from registration to preserve its books and records.¹²⁵⁵ Therefore, a municipal advisor filing a Form MA-W is required to list the name and address of each person who has or will have custody or possession of the municipal advisor's books and records and the location at which such books and records are or will be kept. In addition, as discussed above, a withdrawing municipal advisor also is required to identify on Schedule W1 each person to whom it has assigned any of its contracts. As discussed in the Proposal, the Commission believes that such a requirement – which also exists for investment advisers – is important for the protection of participants in the municipal securities

¹²⁵² See Proposal, 76 FR at 857.

¹²⁵³ See *id.*

¹²⁵⁴ See 17 CFR 279.2. See also Proposal, 76 FR at 857.

¹²⁵⁵ See *infra* Section III.C.

markets.¹²⁵⁶

The signatory to the Form MA-W is required to certify, under penalty of perjury, that the information and statements made in the Form MA-W, including any exhibits or other information submitted, are true. If the form is being filed on behalf of a municipal advisor that is not a sole proprietor,¹²⁵⁷ the signature constitutes such certification by both the municipal advisor and the signatory. Similarly, the signatory is required to certify that the municipal advisor's books and records will be preserved and available for inspection as required by law. The signatory is also required to authorize any person having custody or possession of these books and records to make them available to authorized regulatory representatives.

The certification includes a statement that all information previously submitted on the municipal advisor's most recent Form MA (and Form MA-I for sole proprietors) is accurate and complete as of the date the Form MA-W was signed. It also includes an understanding by the signatory that if any information contained in items on the Form MA-W is different from the information contained on the most recent Form MA (and MA-I for sole proprietors), the information on the Form MA-W will replace the corresponding entry on the municipal advisor's Form MA (and/or MA-I for sole proprietors). As discussed in the Proposal, the Commission believes that the certification requirement should serve as an effective means to assure that the information supplied in Form MA-W is correct.¹²⁵⁸

¹²⁵⁶ See Proposal, 76 FR at 857.

¹²⁵⁷ As discussed in the Proposal, in the case of a municipal advisor that is not a sole proprietor, the signatory's certification includes a statement that he or she has signed on behalf of and with the authority of the municipal advisor firm withdrawing the registration. See *id.*, at 857, note 254.

¹²⁵⁸ See *id.*, at 858.

5. Rule 15Ba1-5: Amendments to Form MA and Form MA-I

Proposed Rule 15Ba1-4 set forth requirements regarding when amendments to Form MA and Form MA-I are required and how such amendments must be filed. The Commission received one comment letter regarding this proposed rule which supported the proposed rule.¹²⁵⁹ The Commission is adopting Rule 15Ba1-5 substantially as proposed in Rule 15Ba1-4, but is modifying the rule primarily to be consistent with the exemption of certain natural persons from municipal advisor registration that the Commission is adopting in Rule 15Ba1-3. Specifically, the Commission's modifications to Rule 15Ba1-5 are limited to removing or revising rule text to reflect that natural persons who are associated with a municipal advisor and engaged in municipal advisory activities on its behalf are not required to register as municipal advisors on Form MA and that Form MA-I is not an application for registration and to update citations in the rule text. Therefore, the requirement in Rule 15Ba1-5 to amend promptly Form MA and Form MA-I applies exclusively to registered municipal advisors since they will be responsible for amendments to their own Form MA and amendments to Form MA-I for each natural person who is a person associated with the municipal advisor and engaged in municipal advisory activities on its behalf.¹²⁶⁰

Rule 15Ba1-5(a) requires that a registered municipal advisor must promptly amend the information in its Form MA: (1) at least annually, within 90 days of the end of the municipal advisor's fiscal year, or of the end of the calendar year for a sole proprietor;¹²⁶¹ and (2) more frequently than annually if required by the General Instructions.¹²⁶²

¹²⁵⁹ See MSRB Letter I.

¹²⁶⁰ See Rule 15Ba1-5(a) and (b).

¹²⁶¹ See Rule 15Ba1-5(a)(1).

¹²⁶² See Rule 15Ba1-5(a)(2). See also *infra* Section III.A.8. (discussing the General Instructions and Glossary).

In addition to the annual update amendment to Form MA, General Instruction 8 specifies that a municipal advisory firm must amend its Form MA promptly whenever a material event has occurred that changes the information provided in the form. General Instruction 8 further states that, for purposes of Form MA, a material event will be deemed to have occurred if information provided in response to Item 1 (Identifying Information), Item 2 (Form of Organization), or Item 9 (Disclosure Information) becomes inaccurate in any way; or if information provided in response to Item 3 (Successions), Item 7 (Participation or Interest of Applicant, or of Associated Persons of Applicant in Municipal Advisory Client or Solicitee Transactions), or Item 8 (Owners, Officers and Other Control Persons) becomes materially inaccurate.¹²⁶³

In addition, General Instruction 8 provides that a non-resident municipal advisory firm must promptly file an amendment to Form MA to attach an updated opinion of counsel after any changes in the legal or regulatory framework or the firm's physical facilities that would impact its ability, as a matter of law, to provide the Commission with access to its books and records or to inspect and examine the municipal advisory firm.¹²⁶⁴ As the Commission stated in the Proposal,¹²⁶⁵ an amendment in such case should include a revised opinion of counsel describing how, as a matter of law, the municipal advisor will continue to meet its obligations to provide the Commission with the required access to the municipal advisor's books and records and to be subject to the Commission's

¹²⁶³ See General Instruction 8 in the Instructions for the Form MA Series. General Instruction 8 further notes that a municipal advisor submitting an amendment between annual updates is not required to update the responses to Item 4 (Information About Applicant's Business), Item 5 (Other Business Activities), Item 6 (Financial Industry and Other Related Affiliations of Associated Persons), or Item 10 (Small Businesses), even if the responses to those items have become inaccurate.

¹²⁶⁴ See General Instruction 8 in the Instructions for the Form MA Series. See also infra note 1308 and accompanying text. For a discussion of Rule 15Ba1-6 (Consent to Service of Process to be Filed by Non-Resident Municipal Advisors) and Form MA-NR (Designation of U.S. Agent for Service of Process for Non-Residents), see Section III.A.6.

¹²⁶⁵ See Proposal, 76 FR at 858.

onsite¹²⁶⁶ inspection and examination under the new regulatory regime. If a registered non-resident municipal advisory firm becomes unable to comply with this requirement, then this may be a basis for the Commission to institute proceedings to revoke the municipal advisor's registration.

Regarding amendments to Form MA-I, Rule 15Ba1-5(b) provides that a registered municipal advisor must promptly amend the information contained in Form MA-I by filing an amended Form MA-I whenever the information contained in the Form MA-I becomes inaccurate for any reason. As discussed above, registered municipal advisors will be responsible for filing and amending Form MA-I for each natural person associated with the municipal advisor and engaged in municipal advisory activities on its behalf.¹²⁶⁷ As discussed in the Proposal, unlike municipal advisors filing Form MA, who must file annual updating amendments, the Commission is not requiring municipal advisory firms to update annually the Forms MA-I for each natural person who is associated with the municipal advisor and engaged in municipal advisory activities on its behalf.¹²⁶⁸ The Commission believes that the additional gains obtained by requiring the confirmation of an annual update would impose unnecessary burdens on municipal advisors and that the standard adopted in Rule 15Ba1-5(b) strikes an appropriate balance between maintaining

¹²⁶⁶ As adopted, General Instruction 8 does not require the opinion of counsel to state that the municipal advisor is able, as a matter of law, to be subject specifically to "onsite" inspection and examination.

¹²⁶⁷ See supra note 1260 and accompanying text.

¹²⁶⁸ See Proposal, 76 FR at 858. As discussed in the Proposal, in the case of firms, changes commonly occur over the course of a year, and a wide range of changes is possible – e.g., changes in control persons and personnel, number of employees, nature of services provided, types of clients, and compensation arrangements, among others, as well as new disclosures that may be necessary for all of the firm's associated persons, rather than just one natural person. Accordingly, the Commission believes it is appropriate to require a firm to confirm through an annual update that its registration is up-to-date. With respect to natural person municipal advisors, however, an amendment to Form MA-I is promptly required whenever information previously provided becomes inaccurate. The Commission believes that any additional benefits of an annual update would not justify the burden such a requirement would impose. See id.

current information regarding natural persons and minimizing the burden on municipal advisors to provide this information.

All amendments to Form MA and Form MA-I are required to be filed electronically with the Commission.¹²⁶⁹ In addition, amendments to Form MA and Form MA-I constitute “reports” for purposes of Sections 15B(c), 17(a), 18(a), 32(a) (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Exchange Act.¹²⁷⁰ As discussed in the Proposal, these rules are consistent with the Commission’s requirements for other registrants (e.g., national securities exchanges, securities information processors (“SIPs”), broker-dealers) to file updated and annual amendments with the Commission.¹²⁷¹ The Commission believes that such amendments are important for obtaining updated information for registered municipal advisory firms and their associated natural persons engaged in municipal advisory activities on the firms’ behalf so that the Commission can assess whether such persons continue to be in compliance with the federal securities laws and the rules and regulations thereunder.¹²⁷² Obtaining updated information will also assist the Commission in its inspection and examination of municipal advisors and better inform the MSRB’s regulation of municipal advisors. In addition, the Commission believes it is important for municipal entities and obligated persons, as well as the public generally, to have access to current information regarding advisors registered with the Commission.

¹²⁶⁹ See Rule 15Ba1-5(c).

¹²⁷⁰ See Rule 15Ba1-5(d).

¹²⁷¹ See, e.g., Rules 6a-2 and 15b3-1 under the Exchange Act. 17 CFR 240.6a-2 and 240.15b3-1. See also 17 CFR 249.1001 (Form SIP, application for registration as a securities information processor or to amend such an application or registration).

¹²⁷² See Proposal, 76 FR at 858.

6. Rule 15Ba1-6: Consent to Service of Process to be Filed by Non-Resident Registered Municipal Advisors; Legal Opinion to be Provided by Non-Resident Municipal Advisors; and Form MA-NR

a. Rule 15Ba1-6: Consent to Service of Process to be Filed by Non-Resident Registered Municipal Advisors; Legal Opinion to be Provided by Non-Resident Municipal Advisors

Proposed Rule 15Ba1-5 required each non-resident¹²⁷³ municipal advisor and each non-resident general partner and managing agent¹²⁷⁴ of a municipal advisor to furnish to the Commission, at the time of filing Form MA or Form MA-I, a written irrevocable consent and power of attorney on Form MA-NR to appoint an agent in the United States upon whom may be served any process, pleadings, or other papers in any action brought against the non-resident municipal

¹²⁷³ The definition of “non-resident” in Rule 15Ba1-1(j) that the Commission is adopting is substantially similar to the definition of “non-resident” that the Commission set forth in proposed Rule 15Ba1-1(h). However, the Commission is modifying this definition so that it includes only those persons residing, having their principal office and place of business, or incorporated in any place not subject to the jurisdiction of the United States. Therefore, persons residing; having their principal office and place of business; and incorporated in the United States or a territory of the United States would not be considered non-residents. Rule 15Ba1-1(j), as adopted, defines “non-resident” as “(1) [i]n the case of an individual, one who resides in or has his principal office and place of business in any place not subject to the jurisdiction of the United States; (2) [i]n the case of a corporation, one incorporated in or having its principal office and place of business in any place not subject to the jurisdiction of the United States; or (3) [i]n the case of a partnership or other unincorporated organization or association, one having its principal office and place of business in any place not subject to the jurisdiction of the United States.” As adopted, this definition of “non-resident” is similar to the definition of “non-resident broker-dealer” in Rule 15b1-5 under the Exchange Act. See 17 CFR 240.15b1-5. See also 17 CFR 275.0-2 (defining the term “non-resident” for purposes of serving non-residents in connection with Form ADV).

¹²⁷⁴ Rule 15Ba1-1(c) defines a “managing agent” as “any person, including a trustee, who directs or manages, or who participates in directing or managing, the affairs of any unincorporated organization or association other than a partnership.” As discussed in the Proposal, this definition is consistent with the definition of a “managing agent” as used in Rule 15b1-5 under the Exchange Act relating to consent to service of process to be furnished by non-resident brokers or dealers and by non-resident general partners or managing agents of brokers or dealers. See 17 CFR 240.15b1-5. See also 17 CFR 275.0-2 (discussing general procedures for serving non-resident investment advisers in connection with Form ADV); and Proposal, 76 FR at 859, note 262 and accompanying text.

advisor, general partner or managing agent.¹²⁷⁵ Proposed Rule 15Ba1-5 also specified circumstances when each non-resident municipal advisor, general partner and managing agent would be required to amend Form MA-NR. In addition, proposed Rule 15Ba1-5 required that each non-resident municipal advisor, other than a natural person, provide an opinion of counsel that the municipal advisor can provide the Commission with access to the advisor's books and records and submit to onsite inspection and examination by the Commission. The Commission received one comment letter regarding this proposed rule which supported the proposed rule.¹²⁷⁶

While adopted Rule 15Ba1-6 retains the same purpose and focus of the proposed rule, the Commission is adopting Rule 15Ba1-6 with certain modifications to reflect the Commission's decision to exempt certain natural persons from municipal advisor registration in Rule 15Ba1-3, as adopted, and to clarify and update the rule text as described below. First, the Commission is removing certain references that contemplate individual registration on Form MA-I of natural persons associated persons with a municipal advisor and is revising the rule text to clarify that a municipal advisor is required to file a Form MA-NR for each of its non-resident general partners, managing agents, and associated natural persons engaged in municipal advisor activities on the municipal advisor's behalf. Second, since the term registered municipal advisor no longer includes natural persons who are associated with a municipal advisor and engaged in municipal advisory activity on its behalf, the Commission is adding new language to Rule 15Ba1-6 to address such persons. For example, Rule 15Ba1-6(a)(2) requires a registered municipal advisor, at the time of the Form MA-I filing, to file with the Commission a Form MA-NR for each non-resident natural person associated with a municipal advisor and engaged in municipal advisory activities on its

¹²⁷⁵ See Rule 15Ba1-5(a). The agent may not be a Commission member, official, or employee.

¹²⁷⁶ See MSRB Letter I.

behalf.¹²⁷⁷ Third, the Commission is modifying the rule to require registered municipal advisors to file a new Form MA-NR in the instances where the proposed rule required an amendment because, unlike Form MA and Form MA-I, Form MA-NR is not completed online and signed electronically.¹²⁷⁸ Form MA-NR must be printed out and signed manually and a scanned copy of the signed and notarized form must be attached as a PDF file to the Form MA or Form MA-I being submitted.¹²⁷⁹ Finally, the Commission made other clarifying revisions to and updated the citations in the rule text.¹²⁸⁰

As discussed in the Proposal,¹²⁸¹ the provisions in Rule 15Ba1-6, as adopted, are designed to allow the Commission and others to provide service of process to a registered non-resident municipal advisor, a non-resident general partner or managing agent of a registered municipal advisor, and non-resident natural person associated with a municipal advisor and engaged in municipal advisory activities on its behalf by requiring the municipal advisor to file a written irrevocable consent and power of attorney on Form MA-NR to appoint an agent in the United States for service of process.¹²⁸² Rule 15Ba1-6 also requires a municipal advisor to file promptly a new Form MA-NR to reflect any change to the name or address of the agent for service of process for

¹²⁷⁷ Similarly, Rule 15Ba1-6(c)(2), as adopted, sets forth requirements regarding when a registered municipal advisor is required to file a new Form MA-NR for its non-resident natural persons who are associated with the municipal advisor and engaged in municipal advisory activities on its behalf.

¹²⁷⁸ See General Instruction 2.c. in the Instructions for the Form MA Series.

¹²⁷⁹ See id.

¹²⁸⁰ For example, the Commission removed “onsite” from Rule 15Ba1-6(d), as adopted, because the Commission does not conduct all inspections and examinations onsite.

¹²⁸¹ See Proposal, 76 FR at 859.

¹²⁸² See Rule 15Ba1-6(a)(1) and (2) (requiring a non-resident municipal advisor to file a Form MA-NR on its own behalf and requiring municipal advisors to file a Form MA-NR for each of the municipal advisor’s non-resident general partners, managing agents, or natural persons associated with the municipal advisor and engaged in municipal advisory activities on its behalf).

itself if the municipal advisor is a non-resident and for each of a municipal advisor's non-resident general partners, managing agents, or natural persons associated with the municipal advisor and engaged in municipal advisory activities on its behalf.¹²⁸³ The rule further requires a registered non-resident municipal advisor to appoint promptly a successor agent and file a new Form MA-NR if the non-resident municipal advisor discharges its agent or if its agent becomes unwilling or unable to accept service on behalf of the non-resident municipal advisor.¹²⁸⁴ Similarly, Rule 15Ba1-6(c)(2) provides that each registered municipal advisor must require each of its non-resident general partners or non-resident managing agents, or non-resident natural persons associated with the municipal advisor and engaged in municipal advisory activities on its behalf to appoint promptly a successor agent and the registered municipal advisor must file a new Form MA-NR if such non-resident general partner, managing agent, or associated natural person discharges the agent or if the agent is unwilling or unable to accept service on behalf of such person. Rule 15Ba1-6 also requires each non-resident municipal advisor applying for registration to provide an opinion of counsel on Form MA that the municipal advisor can, as a matter of law, provide the Commission with access to the municipal advisor's books and records and that the municipal advisor can, as a matter of law, submit to inspection and examination by the Commission.¹²⁸⁵ Finally, similar to the other forms in the MA series, Form MA-NR must be filed electronically.¹²⁸⁶

b. Form MA-NR

The Commission received one comment letter on proposed Form MA-NR, which generally

¹²⁸³ See Rule 15Ba1-6(b).

¹²⁸⁴ See Rule 15Ba1-6(c)(1).

¹²⁸⁵ See Rule 15Ba1-6(d). See also *supra* notes 1264-1265 and accompanying text (discussing when a non-resident municipal advisory firm must file an amendment to Form MA to attach an updated opinion of counsel).

¹²⁸⁶ See Rule 15Ba1-6(e).

supported Form MA-NR.¹²⁸⁷ While Form MA-NR, as adopted, retains the same purpose and focus of the proposed Form MA-NR, the Commission is adopting Form MA-NR with certain modifications. First, the Commission has provided more detailed instructions to improve the form's readability and ease of use. For example, the Commission included an introductory direction to refer to the General Instructions for the forms in the MA series before completing Form MA-NR, a paragraph explaining the purpose of the form, and a specific instruction providing technical guidance for how to attach Form MA-NR to Form MA or Form MA-I. Second, the Commission has expanded its discussion of certain concepts in Form MA-NR so that persons executing the form have a clearer and more complete understanding of the information they are required to provide. For example, Section A of Form MA-NR, as adopted, instructs the person executing the form to "[i]dentify the agent for service of process for the non-resident municipal advisor, for the non-resident general partner or managing agent of a municipal advisor, or for the non-resident natural person associated with the municipal advisor and engaged in municipal advisory activities on its behalf. Fill in all lines."¹²⁸⁸ The Commission expanded the discussions in several other parts of Form MA-NR, such as the description relating to the designation and appointment of the agent for service of process immediately following the agent's address and phone number in Section A.2, including language addressing the effect on partnerships of the irrevocable power of attorney appointment and consent to service of process, the designator's certification, and the method by which the designator discloses the capacity in which he or she is signing the form. Third, the Commission has included Section B and Section C in Form MA-NR, as adopted. Section B requires the municipal advisor to obtain the signature of the United States person identified in

¹²⁸⁷ See MSRB Letter I.

¹²⁸⁸ Section A in Form MA-NR, as proposed, consisted only of "Name of United States person applicant designates and appoints as agent for service of process" with space for the name provided in a blank box immediately underneath.

Section A as the agent for service of process to demonstrate that this person has accepted the designation and appointment as the agent for service of process. This certification that the agent for service of process has accepted the designation and appointment is necessary to ensure effective service of process upon a non-resident municipal advisor, non-resident general partner or managing agent of a municipal advisor, or non-resident natural person associated with the municipal advisor and engaged in municipal advisory activities on its behalf. Additionally, the Commission believes that the additional burden imposed on municipal advisors to obtain the signature of the U.S. agent for service of process would be minimal. Section C requires the person executing the form to disclose whether any signature is pursuant to a written authorization and whether there is a written contractual agreement or other written document evidencing the designation and appointment of the named agent for service of process and/or the agent's acceptance, and if so, to identify the document and provide an accurate and complete copy with submission of the Form MA or Form MA-I.

Pursuant to General Instruction 2, and consistent with the rule, every non-resident municipal advisor must file Form MA-NR in connection with the municipal advisor's initial application for registration on Form MA and file a new Form MA-NR when required.¹²⁸⁹ In addition, regardless of

¹²⁸⁹ See General Instruction 2.c. As discussed in the Proposal, failure to attach a signed and notarized Form MA-NR, where required, for a non-resident municipal advisor or for any non-resident general partner or managing agent of a municipal advisory firm or non-resident natural person associated with a municipal advisor who engages in municipal advisory activities on behalf of the advisor, may delay SEC consideration of the municipal advisor's application for registration. Additionally, an SEC-registered municipal advisory firm that becomes a non-resident after the municipal advisor firm's initial application has been submitted must file a Form MA-NR within 30 days of becoming a non-resident. The same applies when a general partner or managing agent of a municipal advisory firm becomes a non-resident, or a non-resident becomes a general partner or managing agent of a municipal advisory firm, after the firm's initial application. Also, a municipal advisory firm must file a Form MA-NR together with Form MA-I if, after the firm's initial registration, a non-resident natural person becomes associated with the firm and engages in municipal advisory

whether a municipal advisory firm is a resident of the United States, the firm must file a separately completed and executed Form MA-NR for (i) non-resident general partners and managing agents of the firm, and (ii) every non-resident natural person associated with the firm and engaged in municipal advisory activities on the firm's behalf.¹²⁹⁰ Form MA-NR for general partners and managing agents is filed by the firm together with the firm's Form MA.¹²⁹¹ Form MA-NR for natural persons associated with the firm and engaged in municipal advisory activities on the firm's behalf is filed by the firm together with the Form MA-I relating to the natural person associated with the firm.¹²⁹²

7. Rule 15Ba1-7: Registration of Successor to Municipal Advisor

Proposed Rule 15Ba1-6 was designed to govern the registration of a successor to a registered municipal advisor.¹²⁹³ The rule is substantially similar to Rule 15b1-3 under the

activities on the firm's behalf. In addition, a municipal advisory firm must file a form MA-NR if a natural person associated with the firm and engaged in municipal advisory activities on behalf of the firm becomes a non-resident after the firm has filed a Form MA-I relating to that individual. The firm must file the Form MA-NR within 30 days of such individual becoming a non-resident. See Instruction 3 in the General Instructions to Form MA-NR. See also Proposal, 76 FR at 859, note 263.

¹²⁹⁰ See General Instruction 2.c.

¹²⁹¹ See id.

¹²⁹² See id.

¹²⁹³ As discussed in the Proposal, the purpose of Rule 15Ba1-7 is to enable a successor municipal advisor to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor municipal advisor until the successor's own registration becomes effective. See Proposal, 76 FR at 860. The rule is intended to facilitate the legitimate transfer of business between two or more municipal advisors and to be used only where there is a direct and substantial business nexus between the predecessor and the successor municipal advisor. The rule is not designed to allow a registered municipal advisor to sell its registration, eliminate substantial liabilities, spin off personnel, or facilitate the transfer of the registration of a "shell" organization that does not conduct any business. As discussed in the Proposal, no entity is permitted to rely on Rule 15Ba1-7 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's municipal advisor business, or there has been no practical change of control. See General Instruction 1 to Form MA.

Exchange Act, which governs the registration of a successor to a registered broker-dealer.¹²⁹⁴ The Commission received no comments on the proposed Rule 15Ba1-6 and is adopting the rule as Rule 15Ba1-7 without modification.

Succession by Application

Rule 15Ba1-7(a) provides that in the event that a municipal advisor succeeds to and continues the business of a municipal advisor registered pursuant to Exchange Act Section 15B(a), the registration of the predecessor will be deemed to remain effective as the registration of the successor if the successor, within 30 days after the succession, files an application for registration on Form MA and the predecessor files a notice of withdrawal from registration with the Commission on Form MA-W. The rule further provides that the registration of the predecessor municipal advisor will cease to be effective as the registration of the successor municipal advisor 45 days after the application for registration on Form MA is filed by the successor.¹²⁹⁵ In other words, the 45-day period will not begin to run until a complete Form MA has been filed by the successor with the Commission. This 45-day period is consistent with Exchange Act Section 15B(a)(2), pursuant to which the Commission has 45 days to grant a registration or institute proceedings to determine if a registration should be denied.¹²⁹⁶

Succession by Amendment

The Commission will not apply Rule 15Ba1-7 to a reorganization that involves only registered municipal advisors. See Proposal, 76 FR at 860. In those situations, the registered municipal advisors need not rely on the rule because they can continue to rely on their existing registrations. The rule also will not apply to situations in which the predecessor intends to continue to engage in municipal advisory activities. Otherwise, confusion may result as to the identities and registration statuses of the parties.

¹²⁹⁴ See 17 CFR 240.15b1-3. See also Registration of Successors to Broker-Dealers and Investment Advisers, Exchange Act Release No. 31661 (December 28, 1992), 58 FR 7 (January 4, 1993) (providing interpretive guidance regarding amendments to Rule 15b1-3).

¹²⁹⁵ See Rule 15Ba1-7(a).

¹²⁹⁶ See 15 U.S.C. 78o-4(a)(2).

Rule 15Ba1-7(b) provides that, notwithstanding Rule 15Ba1-7(a), if a municipal advisor succeeds to and continues the business of a registered predecessor municipal advisor, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor municipal advisor on Form MA to reflect these changes. Such an amendment will be deemed an application for registration filed by the predecessor and adopted by the successor.

In all three types of successions specified in Rule 15Ba1-7(b) (change in the date or state of incorporation, change in form of organization, and change in composition of a partnership), the predecessor must cease operating as a municipal advisor. As stated in the Proposal, the Commission believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form MA in these types of successions because such successions do not typically result in a change of control of the municipal advisor.¹²⁹⁷

8. General Instructions and Glossary

The Commission proposed a set of instructions, which includes general instructions for proper completion and submission of Forms MA, MA-I, MA-W, and MA-NR ("General Instructions"),¹²⁹⁸ as well as specific instructions relating to each of the forms individually, as applicable. A glossary of terms ("Glossary") is included at the end of the General Instructions to help applicants complete the forms. As discussed in the Proposal, the definitions in the Glossary

¹²⁹⁷ See Proposal, 76 FR at 860.

¹²⁹⁸ Form MA-W is for withdrawal from registration as a municipal advisor, and Form MA-NR is for the appointment of an agent for service of process by a non-resident municipal advisor, non-resident general partner or managing agent of a municipal advisor, or non-resident natural person associated with a municipal advisor and engaged in municipal advisory activities on behalf of the municipal advisor. See *supra* Sections III.A.4.b. and III.A.6. (discussing Forms MA-W and MA-NR, respectively).

generally are derived from the terms in Exchange Act Section 15B(e),¹²⁹⁹ the definitions in Rule 15Ba1-1,¹³⁰⁰ and Form ADV.¹³⁰¹ For ease of reference, the Commission proposed one Glossary to define terms that may appear in any or all of the forms. All terms that are defined or described in the Glossary appear in the forms in italics.

The Commission did not receive any comments on the General Instructions and Glossary and is adopting the General Instructions and Glossary generally as proposed. However, some revisions have been made to clarify or modify instructions and definitions or to provide additional guidance, as discussed more fully below. In particular, the instructions are being revised to reflect that Form MA-I, as adopted, will not serve as a registration form and that municipal advisory firms, rather than natural persons (other than sole proprietors), have the obligation to file and complete Form MA-I. In addition, some sections of the General Instructions have been reorganized to enhance their readability, three new instructions have been added, additional defined terms have been introduced and included in the Glossary, and one term has been removed from the Glossary.

General Instruction 1, as proposed, directed applicants to the Commission's website for additional information about the Commission's rules regarding municipal advisors and the Exchange Act. General Instruction 1, as adopted, notes that a comprehensive explanation of the form requirements is provided in this release.

General Instruction 2, as proposed, discussed who should file Form MA and Form MA-I and explained that these forms must be used to register with the Commission and to amend previously submitted Forms MA and MA-I. The instruction also discussed the responsibility of sole proprietors to file both forms. General Instruction 2, as proposed, further included information

¹²⁹⁹ See 15 U.S.C. 78o-4(e).

¹³⁰⁰ See Rule 15Ba1-1. See also Proposal, 76 FR at 839.

¹³⁰¹ See 17 CFR 279.1.

regarding voluntary registration for certain individuals; the requirement that a Form MA-NR must be submitted for municipal advisors and general partners and managing agents of municipal advisors that are not residents of the United States; and the requirement that a municipal advisor that is no longer required to be registered must file Form MA-W.

As adopted, General Instruction 2 has been revised for clarity and now also provides more details about the use of Form MA. For example, it now notes the requirement for a municipal advisor that registers on Form MA to submit an annual update of that form.¹³⁰²

General Instruction 2 has been revised to reflect the fact that Form MA-I is no longer a registration form. It explains that municipal advisory firms must complete and file Form MA-I on behalf of natural persons associated with the firm and engaged in municipal advisory activities on behalf of the firm, including employees of the firm. In addition, General Instruction 2 notes that independent contractors are included in the definition of “employee” of a municipal advisor for purposes of a firm’s obligation to complete and file Form MA-I.¹³⁰³ The instruction explains that Form MA-I is also used to amend a previously submitted Form MA-I.

With regard to Form MA-NR, General Instruction 2 now more clearly indicates that every municipal advisory firm must file with the firm’s Form MA a separately completed and executed Form MA-NR for every general partner and/or managing agent of a firm that is a non-resident. In addition, the instruction has been revised to indicate that municipal advisory firms must also file Form MA-NR for every non-resident natural person associated with the firm and engaged in municipal advisory activities on the firm’s behalf together with the Form MA-I related to the

¹³⁰² The instruction, as proposed, referred only to amendments, which may have implied that additional filings are required only in the instance of changes in the information provided on previously-submitted forms.

¹³⁰³ Although independent contractors are included in the definition of employee for purposes of these forms in the Glossary (as both proposed and adopted), their inclusion is noted in General Instruction 2, as adopted, because it might otherwise be overlooked.

person. General Instruction 2 indicates that firms have an obligation to file Form MA-NR in these circumstances, regardless of whether the firm itself is domiciled in the United States or is a non-resident filing a Form MA-NR on its own behalf. In addition, General Instruction 2 clarifies that a Form MA-NR for a non-resident general partner or managing agent of a municipal advisor must be filed with the Form MA of the municipal advisor. The instruction, as adopted, also explains that, unlike the other forms in the Form MA series, which are completed online and signed electronically, Form MA-NR must be printed out and signed manually by both the non-resident and the person designated as agent for service of process. Each of the signatures must be separately notarized, and a scanned copy of the signed and notarized form must then be attached as a PDF file to the electronically-completed Form MA or Form MA-I. To emphasize the importance of submitting a Form MA-NR, where required, General Instruction 2, as adopted, includes a warning that failure to attach a signed and notarized Form MA-NR for a non-resident municipal advisor, any non-resident general partner or managing agent of a municipal advisory firm, or non-resident natural person associated with a municipal advisory firm who engages in municipal advisory activities on behalf of the firm may delay Commission consideration of the municipal advisor's application for registration.

General Instruction 2 indicates that Form MA-W does not need to be completed when a natural person with respect to whom a municipal advisory firm filed Form MA-I is no longer associated with the firm or no longer engaged in municipal advisory activities on behalf of the firm. The instruction now explains that the firm must indicate this change by filing an amendment to Form MA-I.

The proposed instructions in General Instruction 2 regarding voluntary registration as a municipal advisor have been deleted, as the purpose for which this option was created is no longer

relevant.¹³⁰⁴

General Instruction 3, as proposed, instructed applicants with respect to the organization of Form MA (for example, that Form MA also includes Schedules A, B, C, and D, as well as Criminal Action, Regulatory Action, and Civil Judicial Action DRPs) and made clear that an applicant must complete all items in Form MA. General Instruction 3 is being adopted substantially as proposed, with only minor revisions, including an explanation that Form MA includes an "Execution Page" where the form is signed.

General Instruction 4, as proposed, provided comparable instructions with respect to the organization and completion of Form MA-I and the schedules and the DRPs required by that form. General Instruction 4 is being revised to state that Form MA-I asks questions about sole proprietors and natural persons associated with a municipal advisory firm and engaged in municipal advisory activities on behalf of the firm, and to reflect the fact that Form MA-I, as adopted, is not a

¹³⁰⁴ The Commission notes that several commenters raised concerns regarding the interaction of the Commission's proposed rule regarding voluntary municipal advisor registration with amendments that had been proposed in November 2010 to the Commission's "Pay-to-Play Rule." See, e.g., ICI Letter and MFA Letter. See also Investment Advisers Act Release No. 3010 (November 10, 2010), 75 FR 77052 (December 10, 2010) (Pay-to-Play Proposed Amendments); and Proposal, 76 FR at 832 n.104 and accompanying text. The Commission notes that it adopted amendments to its Pay-to-Play Rule on June 22, 2011. See Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011), 76 FR 42950 (July 19, 2011). As proposed, the amendments to the Pay-to-Play Rule would have excepted only registered municipal advisors from that rule's ban on compensating third-party solicitors. If the amendments had been adopted as proposed, an investment adviser may have been unable to hire an affiliated solicitor to solicit government entities on its behalf (absent the option for voluntary municipal advisor registration) because affiliated solicitors would not fall within the statutory definition of municipal advisor. The final amendments to the Pay-to-Play Rule, however, permit advisers to compensate municipal advisors and Commission registered investment advisers and broker-dealers for soliciting government entities if they are subject to restrictions substantially equivalent to or more stringent than the Pay-to-Play Rule. See id. See also Rule 206(4)-5 under the Investment Advisers Act (17 CFR 275.206(4)(5)). Consequently, the option of voluntary registration as a municipal advisor for persons undertaking solicitation of a municipal entity is no longer necessary.

registration form.

General Instructions 5-7 are being adopted substantially as proposed, with revisions to reflect the fact that municipal advisory firms, not natural persons associated with the firms and engaged in municipal advisory activities on behalf of the firms, must sign and file Form MA-I. However, the order of these instructions has been rearranged in their adopted version for purposes of clarity.

First, General Instruction 5 (in the order as adopted) sets forth who must sign Form MA or MA-I. General Instruction 5 explains that such person will be a sole proprietor (in the case of a sole proprietorship), a general partner (in the case of a partnership), an authorized principal (in the case of a corporation), and, for all others, an authorized individual who participates in managing or directing the municipal advisor's affairs.¹³⁰⁵ It further makes clear that in all cases the signature should be a typed name. Next, General Instruction 6 makes clear where Form MA must be signed, explaining that domestic municipal advisors are required to execute the Domestic Execution Page to Form MA, while non-resident municipal advisors are required to execute the Non-Resident Municipal Advisor Execution Page.¹³⁰⁶ General Instruction 7 provides that a municipal advisory firm signs Item 7 of Form MA-I.

General Instructions 8 and 9 discuss when to amend and/or update Forms MA and MA-I respectively, as discussed above.¹³⁰⁷ General Instruction 8 (which pertains to Form MA), has been adopted substantially as proposed, but has been revised to distinguish more clearly between an amendment and an annual update. To clarify how amendments and updates will work in the

¹³⁰⁵ Because natural persons that are not sole proprietors are not required to file Form MA-I, the part of General Instruction 5 set forth in the Proposal that stated that a natural person filing Form MA-I on his or her own behalf must sign the form has been deleted.

¹³⁰⁶ See supra Section III.A.6. (discussing Rule 15Ba1-6 and Form MA-NR).

¹³⁰⁷ See supra Section III.A.5.

electronic filing system, the instruction also now explains that each time a firm accesses its Form MA after its initial filing of the form, the information from the firm's most recent previous filing will appear. Only the information that has changed will need to be amended; the applicant will not need to complete the entire form again. The statement in General Instruction 8 regarding the requirement for a non-resident municipal advisor to amend its form and attach an updated opinion of counsel has been revised to more accurately reflect the required content of the opinion of counsel as stated on Form MA.¹³⁰⁸ General Instruction 9, as proposed, concerned when Form MA-I (for natural person municipal advisors) needs "to be updated." The instruction has been revised in its adopted form to state generally that Form MA-I must "be amended" whenever information previously provided on the form becomes inaccurate.¹³⁰⁹

General Instruction 10, as proposed, provided that an applicant must complete and file the forms electronically. As adopted, General Instruction 10 provides that a municipal advisor must complete and submit the relevant form, including any required attachments, electronically. General Instruction 10 reflects the change to Rule 15Ba1-2(c), as adopted,¹³¹⁰ that Form MA is considered filed upon submission of a completed Form MA, together with all additional required documents, including all required filings of Form MA-I (17 CFR 249.1410), to EDGAR. General Instruction 10 also explains that when a municipal advisor's submitted Form MA is accepted by the Commission, the municipal advisor will receive an SEC file number. General Instruction 11 is being adopted to provide more specific information about how to electronically file the forms in the

¹³⁰⁸ See supra note 1264 and accompanying text for the revised language.

¹³⁰⁹ The instruction no longer states that every "natural person municipal advisor" must amend Form MA-I because the rule, as adopted, requires municipal advisory firms, and not natural persons (other than sole proprietors), to complete and file Form MA-I. See Rule 15Ba1-2(b)(1) of the adopted rules.

¹³¹⁰ See supra note 971 and accompanying text.

Form MA series and, specifically, how to obtain access to EDGAR to do so.¹³¹¹

A new General Instruction 12 has been added to the General Instructions, as adopted, to clarify what a municipal advisor (or, in the case of a firm, its authorized representative) represents by signing and executing the form as a whole.¹³¹² General Instruction 12 explains that, by signing the Execution Page of Form MA, the authorized signatory of a domestic municipal advisory firm is appointing the Secretary of State or other legally designated officer of the state in which the firm maintains its principal office and place of business as the firm's agent to receive service of process.¹³¹³ The signatory is also attesting to the truth and correctness of the information provided in the form and declaring that the firm's books and records will be preserved and available for inspection and that any person having custody of the books and records is authorized to make them available to federal regulators.

General Instruction 12 further explains that a signatory on behalf of a non-resident municipal advisory firm must use the version of the Execution Page of Form MA that is specifically required for non-resident firms. Besides attesting to the truth and correctness of the information provided on the form and making the same representations as a U.S. firm regarding books and records, the signatory on behalf of the firm is agreeing to provide, at the firm's own expense, current, correct, and complete copies of its books and records to the SEC upon request. The instruction explains that a non-resident firm must designate an agent for service of process on a

¹³¹¹ See supra note 961. General Instructions 12 and 13 as proposed, regarding self-certification by municipal advisors filing on Form MA and Form MA-I, have been removed, because, as discussed above, the Commission has eliminated the self-certification requirement in Form MA and Form MA-I as adopted.

¹³¹² General Instruction 12 does not introduce new substantive requirements that are being added in the adopting phase of this rulemaking. They were set forth in the forms, as proposed, and are now being added to the General Instructions in order to highlight them for applicants preparing to file. See also supra notes 1150-1156 and accompanying text.

¹³¹³ See also supra notes 1275-1287 and accompanying text.

separate form, Form MA-NR.

General Instruction 12 explains that an authorized signatory of a domestic municipal advisory firm filing Form MA-I with respect to a natural person who is associated with the firm and engaged in municipal advisory activities on behalf of the firm, by signing the Execution Page of Form MA-I, is attesting to the truth and correctness of the information provided in the form. The instruction also explains that the authorized signatory is attesting that the firm has obtained and retained written consent from the natural person associated with the firm that service of any civil action brought by, or notice of any proceeding before, the SEC or any SRO in connection with the individual's municipal advisory activities may be given by registered or certified mail to the individual's address provided in Item 1 of the form.

General Instruction 12 further explains that by signing the Execution Page of Form MA-I, a sole proprietor filing Form MA-I is consenting that service of process may be given by registered or certified mail to the address the sole proprietor has supplied in Item 1 of the form and is also attesting to the truth and correctness of the information he or she has provided in the form.

General Instruction 13, as adopted, (General Instruction 14 as proposed) discusses the requirement for a non-resident municipal advisory firm to attach a legal opinion to its Form MA that the municipal advisor can, as a matter of law, provide the Commission with access to its books and records and that the municipal advisor can, as a matter of law, submit to inspection and examination by the Commission.¹³¹⁴ As adopted, General Instruction 13 reflects the fact that the opinion of counsel that non-residents must file no longer needs to state that the municipal advisor can submit to "onsite" inspection and examination.¹³¹⁵

The Commission has also added new General Instruction 14 to list together in one place all

¹³¹⁴ See supra note 1154 and accompanying text.

¹³¹⁵ See supra note 1280 and accompanying text.

the circumstances in which additional documents must be attached to a Form MA or Form MA-I. The list of such documents does not include any new requirements that were not included in the Proposal. General Instruction 14 has been added for purposes of clarity and convenience. The required documents enumerated include: (1) any documents relating to criminal actions, as specified in the Criminal Action DRPs of Form MA and Form MA-I, and any other supporting documentation; (2) a manually-signed Form MA-NR for each non-resident for whom such form is required;¹³¹⁶ (3) any written document (e.g., board resolution or power of attorney) authorizing a signatory to sign a Form MA-NR; and (4) any written contractual agreements relating to Form MA-NR; and (5) the required opinion of counsel for non-resident municipal advisory firms.

The Commission has added new General Instruction 15 to provide clarity with respect to filing deadlines. General Instruction 15 provides that if the deadline for submitting an initial filing, annual update, or amendment to a form occurs on a Saturday, Sunday, or holiday on which the Commission is not open for business, then the deadline shall be the next business day.

The General Instructions also provide some instructions and explanations specific to certain items in Form MA and Form MA-I.¹³¹⁷ In addition, the General Instructions provide some instructions and explanations specific to Form MA-NR. Specific Instruction 1 for Form MA, as adopted, explains that a municipal advisor that is not currently registered as a municipal advisor and

¹³¹⁶ Form MA-NR, by which a non-resident municipal advisor designates an agent for service of process in the U.S., is accessed electronically via links within Form MA and Form MA-I. The information requested by the form may be entered online. However, the form must be printed out and signed manually – both by the applicant (an authorized signatory in the case of a firm) and by the designated agent for service of process – and each of the signatures must be notarized. After the signatures and notarizations are completed, Form MA-NR must be attached in PDF format to the Form MA or Form MA-I.

¹³¹⁷ As proposed, the sections of the General Instructions that explained how to complete certain items in Form MA and Form MA-I did not have names. As adopted, these sections are now called “Specific Instructions for Certain Items in Form MA” and “Specific Instructions for Certain Items in Form MA-I.”

has taken over the business of another municipal advisor or was registered as a municipal advisor but has changed its structure or legal status will be a new organization with registration obligations under the Exchange Act.¹³¹⁸ It further explains that an applicant not registered with the SEC as a municipal advisor that is acquiring or assuming substantially all of the assets and liabilities of the advisory business of a registered municipal advisor will be required to file a new application for registration on Form MA within 30 calendar days after the succession. The instruction also provides that, once the new registration is effective, Form MA-W (as described above) must be filed to withdraw the registration of the acquired municipal advisor. The instruction also explains that, if a new municipal advisor is formed solely as a result of a change in the form of organization or in the composition of a partnership or the date or the state of incorporation, and there has been no practical change in control or management, the applicant will be permitted to amend the existing registration to reflect the changes by filing an amendment within 30 calendar days after the change or reorganization.

Specific Instruction 2 for Form MA is being adopted substantially as proposed and has been revised only for clarity and to correct certain citations that have changed. The instruction provides guidance for newly-formed municipal advisors regarding how to respond to several questions in Item 4 of Form MA (described above) that may be difficult to answer when the applicant for registration has not been in existence for a significant amount of time. The instruction advises that, for a newly-formed municipal advisor, responses should reflect the applicant's current municipal advisory activities (*i.e.*, its activities at the time of filing, with certain exceptions). With respect to specified questions regarding the applicant's compensation arrangements, the instructions provide

¹³¹⁸ Specific Instruction 1 for Form MA as adopted has been significantly revised for purposes of clarity but includes no substantive changes. See also *infra* Section III.A.7, regarding Rule 15Ba1-7, adopted as part of this rulemaking, upon which this instruction is based.

that the applicant base its responses on the types of compensation it expects to accept. Further, with respect to its business activities relating to municipal securities, the applicant is instructed to base its responses on the types of municipal advisory activities in which it expects to engage during the next year.

Specific Instruction 3 for Form MA is being adopted substantially as proposed, with non-substantive revisions. The instruction explains that Schedule D is to be completed if any response to Form MA requires further explanation, or if the applicant wishes to provide additional information.

The Specific Instructions for Certain Items in Form MA-I, as adopted, have been revised to reflect the fact Form MA-I is not a registration form and that municipal advisory firms, rather than natural persons (other than sole proprietors), have the obligation to complete and file Form MA-I. Specific Instruction 1 for Form MA-I explains that, in Item 1 of Form MA-I, the municipal advisory firm must enter the individual's CRD Number (if assigned), the individual's social security number,¹³¹⁹ and the addresses of all offices at which the individual is or will be physically located or from which the individual is or will be supervised, even if the individual does not work at that location.¹³²⁰

Specific Instruction 2 for Form MA-I is being adopted substantially as proposed, with revisions made for clarity. The instruction emphasizes that, for purposes of completing Item 2 to Form MA-I, the firm must enter all the other names that the individual is using, has used, is known

¹³¹⁹ As discussed above, social security numbers will not be made publicly available. This information is necessary in connection with the Commission's enforcement and examination functions pursuant to Section 15B(c) of the Exchange Act (15 U.S.C. 78o-4(c)). See Proposal, 76 FR at 840, note 171.

¹³²⁰ General Instruction 1 to Form MA-I in its adopted form has been expanded to provide more explanation for a firm that submits Form MA-I on behalf of natural persons associated with the firm and engaged in municipal advisory activities on the firm's behalf, but no new requirements have been added.

or has been known by, other than the individual's legal name, since the age of 18, which includes nicknames, aliases, and names used before and after marriage.

Specific Instruction 3 for Form MA-I is being adopted substantially as proposed, but expanded with more information. The instruction explains that, for purposes of Item 3, with respect to the individual's residential history for the past 5 years, post office boxes may not be used to complete the response and the firm may not leave any gaps in the individual's residential history greater than three months. As adopted, this instruction also includes the statement: "This information is needed for regulatory purposes. However, the version of completed Form MA-I that will be available for viewing by the public will not show the private residential addresses that you enter."

Specific Instruction 4 for Form MA-I is being adopted substantially as proposed, with an added clarification. The instruction provides that, with respect to Item 4 of Form MA-I, the individual's employment history for the past 10 years must be provided with no gaps greater than three months; that the history should account for full-time and part-time employment, self-employment, military service and homemaking; and that unemployment, full-time education, extended travel, and other similar statuses should be included. The added clarification explains that such statuses should be entered on the line provided for "Name of Municipal Advisor or Company."

Specific Instruction 5 for Form MA-I, regarding Item 5 of Form MA-I ("Other Business"), has been revised in its adopted version. Instead of restating, as proposed, some of the information requests specified in Item 5, the instruction explains that other businesses in which the individual "is engaged" is intended to capture such engagements as a proprietor, partner, officer, director, or employee (including independent contractor, trustee, agent or otherwise). As adopted, the instruction also informs firms that if the number of hours per week that individuals devote to the

other business varies, the firms should provide an average.

Specific Instruction 6 for Form MA-I, regarding Item 6 of Form MA-I, is being adopted as proposed. The instruction advises firms that affirmative responses to certain disclosure questions in the form could make an individual subject to a statutory disqualification.

Specific Instruction 7 for Form MA-I is being adopted as proposed, with an added reminder for non-residents. The instruction indicates that, as with Form MA, the form is to be signed (in Item 7 of Form MA-I) by typing a signature in the designated field and makes clear that, by typing a name, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature. The added reminder advises the firm that if the individual is a non-resident, the firm must attach a manually-signed Form MA-NR to the form.

The General Instructions contain a new section called "General Instructions to Form MA-NR" that consists of instructions and explanations specific to Form MA-NR. General Instruction 1 to Form MA-NR repeats the information in General Instruction 2, discussed above, regarding when Form MA-NR must be filed.

General Instruction 2 to Form MA-NR describes the circumstances in which more than one Form MA-NR must be filed by a municipal advisory firm. For example, the instruction states that a non-resident municipal advisory firm filing a Form MA for itself would also need to file Form MA-NR for each of its non-resident general partners and managing agents, even if a Form MA-NR had been previously filed by another municipal advisor for the general partner or managing agent. In addition, a firm filing Form MA-I must attach Form MA-NR for every non-resident natural person associated with the firm and engaged in municipal activities on the firm's behalf.

General Instruction 3 to Form MA-NR describes when a Form MA-NR must be filed at times other than when a municipal advisor submits its initial application for registration. The

instruction explains that a registered municipal advisory firm must file a Form MA-NR within 30 days of the firm becoming a non-resident. The same applies when a general partner or managing agent of the municipal advisory firm becomes a non-resident, or a non-resident becomes a general partner or managing agent of the firm after the firm's initial application for registration. In such cases, the municipal advisor must file an amendment to Form MA with the new Form MA-NR attached. The instruction explains that a municipal advisory firm must also file Form MA-NR with Form MA-I if, after the firm's initial registration, a non-resident natural person becomes associated with the firm and engages in municipal advisory activities on the firm's behalf. In addition, a firm must file Form MA-NR if a natural person associated with the firm and engaged in municipal advisory activities on behalf of the firm becomes a non-resident after the firm has filed Form MA-I relating to that individual. The firm must file Form MA-NR within 30 days of the individual becoming a non-resident.¹³²¹

General Instruction 4 to Form MA-NR describes when a new Form MA-NR must be filed. The instruction indicates that a new Form MA-NR must be filed promptly if a previously-filed Form MA-NR becomes invalid or inaccurate.¹³²² This includes any change to the name or address of the non-resident municipal advisory firm, general partner, managing agent, or natural person associated with the firm and engaged in municipal advisory activities on behalf of the firm, or any change to the name or address of the agent of service of process of such non-resident, to which the

¹³²¹ General Instruction 3 to Form MA-NR also contains a note reminding non-resident municipal advisory firms of two additional requirements for non-resident municipal advisory firms that are discussed in General Instruction 12 (to complete Form MA Execution Page for non-residents and the undertaking regarding books and records) and General Instruction 13 (to attach an opinion of counsel that the firm can provide the Commission with access to its books and records and can submit to inspection and examination by the Commission).

¹³²² A new Form MA-NR is filed by submitting an amendment to Form MA with a new Form MA-NR attached.

previously-filed Form MA-NR relates. The instruction explains that a non-resident must promptly appoint a successor agent for service of process and the municipal advisor must file a new Form MA-NR if the non-resident discharges its identified agent for service of process or if its agent for service of process becomes unwilling or unable to accept service on behalf of the non-resident.

In the Proposal, the term “non-resident” was defined as an individual, corporation, or partnership or other unincorporated organization or association that resides in or has his or its principal office and place of business in “any place not in the United States.” As adopted, the language in the term “non-resident” that determines whether an individual, corporation, or partnership or other unincorporated organization or association is a “non-resident” has been slightly modified to whether the person resides in or has his or its principal office and place of business in “any place not subject to the jurisdiction of the United States.” The language has been changed to clarify that persons that reside or have their principal office and place of business in United States territories do not fall within the definition of “non-resident.”

The Glossary of Terms is being adopted substantially as proposed. However, the Glossary, as adopted, contains some revisions that are being made for clarity. As adopted, the Glossary includes some revisions to terms that reflect changes to the definitions being adopted in Rule 15Ba1-1. For example, the definition of “Guaranteed Investment Contract” has been revised to clarify that the contract at issue must relate to investments of proceeds of municipal securities or municipal escrow investments. The definition of the term “municipal advisor,” as adopted, has been revised to make clear that the definition is subject to the exclusions that are being adopted under Rule 15Ba1-1(d)(2)¹³²³ and the exemptions under Rule 15Ba1-1(d)(3).¹³²⁴ Likewise, the definition of the term “obligated persons,” consistent with the definition in adopted Rule 15Ba1-1,

¹³²³ 17 CFR 240.15Ba1-1(d)(2).

¹³²⁴ 17 CFR 240.15Ba1-1(d)(3).

has been revised to state that the term does not include a person whose financial information or operating data is not material to a municipal securities offering or the federal government. The Glossary contains other revisions to terms that are consistent with revisions to the definitions in Rule 15Ba1-1, as adopted.

The Glossary includes some new definitions that were not in the Proposal. For example, the Glossary now defines the term “federal regulatory agency” to include any federal banking agency and the National Credit Union Administration. The Glossary also defines the term “state regulatory agency” to include any State securities commission (or any agency or officer performing like functions); State authority that supervises or examines banks, savings associations, or credit unions; or State insurance commission (or any agency or office performing like functions to the above).

The definitions of the terms “federal regulatory agency” and “state regulatory agency” are consistent with the language in Exchange Act Section 15(b)(4)(H).¹³²⁵ The Glossary has also been revised to include a new definition of the term “affiliate, affiliated, affiliation,” which is derived from the definition of “advisory affiliate” for Form ADV.

The term “natural person municipal advisor” has been removed from the Glossary, as adopted. In the Proposal, the term was defined to mean any natural person that is a municipal advisor, including sole proprietors. The term had been included in the Proposal to collectively describe natural persons who were required to file Form MA-I. Because municipal advisory firms, rather than natural persons (other than sole proprietors), are now responsible for filing Form MA-I, the term is no longer necessary, and is therefore being removed from the Glossary.

¹³²⁵ The statutory disqualification language of Section 15(b)(4)(H) is referenced in Exchange Act Section 15B(c)(2), which describes the Commission’s power to censure, place limitations on the activities, functions, or operations, or suspend, or revoke the registration of a municipal advisor.

9. Rule 15Bc4-1: Persons Associated with Municipal Advisors

As noted in the Proposal, Section 975(c)(5) of the Dodd-Frank Act provides the Commission with authority to censure or place limitations on the activities or functions of any person associated with a municipal advisor or to suspend or bar any such person from being associated with a municipal advisor. As discussed in the Proposal, however, it appears that a technical error was made in the final draft of this provision.¹³²⁶ Specifically, Section 975(c)(5) of the Dodd-Frank Act provides that Section 15B(c)(4) of the Exchange Act be amended “by inserting ‘or municipal advisor’ after ‘municipal securities dealer or obligated person’ each place that term appears.”¹³²⁷ At the time the Dodd-Frank Act was enacted, however, Section 15B(c)(4) of the Exchange Act included the term “municipal securities dealer,” but did not include the phrase “municipal securities dealer or obligated person” (emphasis added).

To address any ambiguity created by this error, the Commission stated in the Proposal its intent to recommend a technical amendment to Section 975(c)(5) of the Dodd-Frank Act.¹³²⁸ To date, however, the Exchange Act has not been amended to correct this technical error. Therefore, to clarify the Commission’s interpretation of Section 15B(c)(4) of the Exchange Act, the Commission is adopting new Rule 15Bc4-1 to make clear the Commission’s understanding of its authority with respect to associated persons of municipal advisors. Specifically, Rule 15Bc4-1 states that the Commission has the authority to, by order, censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a municipal advisor, or suspend for a period not exceeding 12 months or bar any such person from being associated with a broker, dealer,

¹³²⁶ See Proposal, 76 FR at 850, n.233.

¹³²⁷ See Section 975(c)(5) of the Dodd-Frank Act.

¹³²⁸ See Proposal, 76 FR at 850, n.233.

investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of Section 15(b) of the Exchange Act, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under section 15B(c)(4) of the Exchange Act, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of Section 15(b)(4). Rule 15Bc4-1 also states the Commission's interpretation that Section 15B(c)(4) of the Exchange Act makes it unlawful for any person, as to whom an order is entered pursuant to Section 15B(c)(4) or Section 15B(c)(5) of the Exchange Act suspending or barring him from being associated with a municipal advisor is in effect, willfully to become, or to be, associated with a municipal advisor without the consent of the Commission. Further, Rule 15Bc4-1 sets forth the Commission's understanding that it is unlawful for any municipal advisor to permit such a person to become, or remain, an associated person without the consent of the Commission, if such municipal advisor knew, or, in the exercise of reasonable care should have known, of such order. Not only does the Commission believe that such interpretation is the only one that is consistent with the Congressional intent underlying Section 975(c)(5) of the Dodd-Frank Act, and that any other reading would produce the absurd result that no amendment would be made to Section 15(c)(4) of the Exchange Act, but the Commission also believes that this interpretation and the adoption of Rule 15Bc4-1 are necessary and appropriate to ensure that the Commission may censure or place limitations on the activities or functions of any person associated with a municipal advisor or to suspend or bar any such person from being associated with a municipal advisor.

B. Approval or Denial of Registration

As discussed in the Proposal,¹³²⁹ Exchange Act Section 15B(a)(2) provides that within forty-five days of the filing of an application to register as a municipal advisor,¹³³⁰ the Commission must either: “(A) by order grant registration, or (B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for the conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.”¹³³¹

In accordance with Exchange Act Section 15B(a)(2), the Commission will grant the registration of a municipal advisor if the Commission finds that the requirements of Section 15B of the Exchange Act are satisfied. The Commission will deny the registration of a municipal advisor if the Commission does not make such a finding or if it finds that, if the applicant were registered, its registration would be subject to suspension or revocation under Section 15B(c) of the Exchange Act.¹³³²

As discussed in the Proposal, the information currently required by Form MA-T is not reviewed by the Commission prior to registration, although the Commission retains full authority to

¹³²⁹ See *id.*, at 860.

¹³³⁰ The statute allows for a longer period if the applicant consents. See 15 U.S.C. 78o-4(a)(2).

¹³³¹ See 15 U.S.C. 78o-4(a)(2).

¹³³² See 15 U.S.C. 78o-4(c).

review such information and examine any registered municipal advisor at any time.¹³³³ The Commission intends that the permanent registration process will entail a review of each filed Form MA.

In considering whether to grant an application for registration as a municipal advisor, the Commission will review the information provided on Form MA. For example, as discussed in the Proposal, the Commission may perform cross checks of applicants through the use of the applicant's other registration numbers, such as its CRD or other SEC registration numbers, to the extent available.¹³³⁴ Also, the Commission may review the disclosures required by Item 9 of Form MA, including the disciplinary history of an applicant.¹³³⁵ In addition, as discussed in the Proposal, the municipal advisor registration process will allow the Commission and staff to ask questions and, as needed, to request amendments before granting an application for registration.¹³³⁶

C. Rule 15Ba1-8: Books and Records to be Made and Maintained by Municipal Advisors

Section 17(a)(1) of the Exchange Act provides, in pertinent part, that all registered municipal advisors shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.¹³³⁷ With proposed Rule 15Ba1-7, the Commission proposed to specify the books and records requirements applicable to municipal advisors.¹³³⁸ The Commission

¹³³³ See Proposal, 76 FR at 860.

¹³³⁴ See *id.*

¹³³⁵ See *id.*

¹³³⁶ See *id.*

¹³³⁷ See 15 U.S.C. 78q(a)(1).

¹³³⁸ See Proposal, 76 FR at 860-862. In addition, Section 15B(b)(2)(G) of the Exchange Act

is adopting Rule 15Ba1-7 as proposed, but renumbered as Rule 15Ba1-8, with a few technical clarifications, the addition of general ledgers, and the addition of written consents to service of process from certain natural persons.

Record-keeping for Municipal Advisors

As discussed in the Proposal, the Commission based Rule 15Ba1-7(a) (as adopted, Rule 15Ba1-8(a)) generally on the books and records requirements for broker-dealers and investment advisers.¹³³⁹ Rule 15Ba1-8(a), among other things, requires a municipal advisory firm to make and keep true, accurate, and current certain books and records relating to its municipal advisory activities.¹³⁴⁰ Specifically, Rule 15Ba1-8(a) requires all municipal advisory firms to make and keep originals or copies of all written communications received, and originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of the communications.¹³⁴¹ Municipal advisory firms also must keep all check books, bank statements,

provides that the rules of the MSRB shall “prescribe records to be made and kept by . . . municipal advisors and the periods for which such records shall be preserved.” 15 U.S.C. 78o-4(b)(2)(G).

¹³³⁹ See Proposal, 76 FR at 861, note 274 and accompanying text.

¹³⁴⁰ Therefore, the books and records listed in Rule 15Ba1-8(a) are limited to those relating to a municipal advisor’s municipal advisory activities.

¹³⁴¹ As discussed in the Proposal, materials posted on a municipal advisor’s website relating to municipal advisory activities are written communications sent by the municipal advisor for purposes of this provision. See Proposal, 76 FR at 861, note 275. The Commission notes that written communications may be in electronic form, such as emails or instant messages. Further, as discussed above, in determining whether or not funds to be invested constitute proceeds of municipal securities for purposes of Rule 15Ba1-1(m), a person may rely on representations in writing made by a knowledgeable official of a municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person seeking to rely on such representations has a reasonable basis for such reliance. See Rule 15Ba1-1(m)(3). Similarly, in determining whether or not funds to be invested or reinvested constitute municipal escrow investments for purposes of Rule 15Ba1-1(h), a person may rely on representations in writing made by a knowledgeable official of a

general ledgers,¹³⁴² cancelled checks, and cash reconciliations; a copy of each version of the municipal advisor's policies and procedures, if any, that (i) are in effect or (ii) at any time within the last five years were in effect (not including those in effect prior to the effective date of Rule 15Ba1-8); and a copy of any document created by the municipal advisor that was material to making a recommendation to a municipal entity or obligated person that memorializes the basis for that recommendation. In addition, a municipal advisory firm must keep all written agreements (or copies thereof) entered into by the municipal advisor with any municipal entity, employee of a municipal entity, or an obligated person or otherwise relating to the business of the municipal advisor as such. Further, a municipal advisory firm is required to keep a record of the names of persons who are, or have been in the past five years, associated with the municipal advisor (not including persons associated with the municipal advisor prior to the effective date of Rule 15Ba1-8); names, titles, and business and residence addresses of all persons associated with the municipal advisor;¹³⁴³ all municipal entities or obligated persons with which the municipal advisor is engaging or has engaged in municipal advisory activities in the past five years (not including those prior to the effective date of Rule 15Ba1-8); the name and business address of each person to whom the municipal advisor provides or agrees to provide payment to solicit a municipal entity, an employee of a municipal entity, or an obligated person on its behalf; and the name and business address of

municipal entity or obligated person whose funds are to be invested or reinvested regarding the nature of such investments, provided that the person seeking to rely on such representations has a reasonable basis for such reliance. See Rule 15Ba1-1(h)(2). Such representations provided by the municipal entity or obligated person official constitute written communications received by a municipal advisor relating to municipal advisory activities.

¹³⁴² As discussed below in this section, the Commission is including "general ledgers" in the final books and records rule.

¹³⁴³ The Commission notes that this provision does not cover persons who were previously and are no longer associated with the municipal advisor.

each person that provides or agrees to provide payment to the municipal advisor to solicit a municipal entity, an employee of a municipal entity, or an obligated person on its behalf.¹³⁴⁴

Finally, a municipal advisory firm must keep written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such municipal advisor.¹³⁴⁵

Rule 15Ba1-8(b)(1) requires municipal advisory firms to maintain and preserve all books and records required to be made for a period of not less than five years, the first two years in an easily accessible place. Further, corporate governance documents, such as articles of incorporation and stock certificate books of the municipal advisor, and those of any predecessor, excluding those that were only in effect prior to the effective date of Rule 15Ba1-8, must be maintained in the principal office of the municipal advisor and preserved until at least three years after termination of the business or withdrawal from registration as a municipal advisor.

As discussed in the Proposal, Rule 15Ba1-7(d) (as adopted, Rule 15Ba1-8(d)) is modeled on Rule 204-2 under the Investment Advisers Act.¹³⁴⁶ Specifically, Rule 15Ba1-8(d) permits, and sets forth the requirements for, electronic storage of the records required to be maintained and preserved pursuant to Rule 15Ba1-8. The rule further sets forth requirements with respect to the prompt¹³⁴⁷

¹³⁴⁴ Proposed Rule 15Ba1-7 also required municipal advisory firms to make and keep a record of the initial or annual review, as applicable, conducted by the municipal advisory firm of its business in connection with its self-certification on Form MA. Because the Commission is not adopting a self-certification requirement, the Commission is also not adopting this corresponding books and records requirement.

¹³⁴⁵ As discussed below in this section, the Commission is including “written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such municipal advisor” in the final books and records rule.

¹³⁴⁶ See 17 CFR 275.204-2. See also Proposal, 76 FR at 861.

¹³⁴⁷ For purposes of Rule 15Ba1-8(d), the Commission interprets the term “prompt” to mean making reasonable efforts to produce records that are requested by the staff during an

provision of records upon request by the Commission or by its staff or other representatives. In addition, Rule 15Ba1-8(e) provides that any books or records made, kept, maintained, and preserved in compliance with Rules 17a-3 and 17a-4 under the Exchange Act, rules of the MSRB, or Rule 204-2 under the Investment Advisers Act, which are substantially the same as the books and records required to be made, kept, maintained, and preserved under Rule 15Ba1-8, will satisfy the record-keeping requirements under Rule 15Ba1-8.¹³⁴⁸ Subparagraph (e) of Rule 15Ba1-8 is designed to minimize the record-keeping burden for municipal advisory firms that are otherwise subject to similar record-keeping requirements.¹³⁴⁹

In the Proposal, the Commission requested comment on the proposed books and records requirements. Specifically, the Commission requested comment regarding, among other things, the types of documents and data that should be retained; whether it is appropriate for the books and records requirements to be based on the books and records requirements for broker-dealers and investment advisers; the length of the period for maintaining and preserving books and records; the format of the records retained; and whether the proposed requirements are overly burdensome.¹³⁵⁰

The Commission received several letters that specifically addressed the books and records requirements. One commenter generally supported the proposed record-keeping rule. This commenter stated it does not oppose establishing a five-year period for municipal advisor record retention and suggested that a record retention period of five years should be the same for broker-

examination without delay. The Commission believes that in many cases a municipal advisor could, and therefore will be required to, furnish records immediately or within a few hours of a request. The Commission expects that only in unusual circumstances would a municipal advisor be permitted to delay furnishing records for more than 24 hours.

¹³⁴⁸ See Rule 15Ba1-8(e).

¹³⁴⁹ See Proposal, 76 FR at 861.

¹³⁵⁰ See *id.*, at 862.

dealers, investment advisers, and municipal advisors.¹³⁵¹ However, other commenters criticized some of the requirements as being too burdensome, especially for small independent municipal advisors.¹³⁵² For example, one commenter noted that the expense required for firms to retain originals or copies of all written communications, internal or external, relating to their municipal advisory activities caused particular concern.¹³⁵³ This commenter recommended that this requirement be eliminated, while all other books and records requirements could remain.¹³⁵⁴ Alternatively, this commenter suggested that only certain communications with a client or generated

¹³⁵¹ See MSRB Letter I.

¹³⁵² See, e.g., letter from Gerald Gornish, Chief Counsel, Pennsylvania Public School Employees' Retirement System, Pennsylvania Municipal Retirement System, Jeffrey B. Clay, Executive Director, Pennsylvania Public School Employees' Retirement System, and James B. Allen, Secretary, Pennsylvania Municipal Retirement System, dated February 22, 2011 ("Pennsylvania Public School Employees' Retirement Board Letter") (noting that the Commission's estimate of 181 burden hours for books and records is not broken down further to an individual municipal advisor); letter from John B. Payne, Principal, B-Payne Group Financial Advisors, dated March 28, 2011 ("Bradley Payne Letter") ("I can manage and support fee and conflict disclosures and outgoing email and client file retention, but that is it."); letter from UFS Bancorp, dated February 22, 2011 ("UFS Bancorp Letter") ("[The 181-hour annual burden for books and records] is nearly ten percent of a full-time person's time."); letter from Adam W. Rygmyr, Associate General Counsel, TIAA-CREF, Individual & Institutional Services, LLC, dated February 22, 2011 (stating that the books and records requirement would largely duplicate existing record-keeping requirements for broker-dealers).

¹³⁵³ See Rule 15Ba1-8(a)(1) and NAIPFA Letter I ("The information technology and storage facilities required to keep all email or similar electronic communication and to segregate those that relate to municipal advisory business from other unrelated email is expensive. Firms would be required to either outsource this function or develop the capability in-house, which would necessitate hiring one or more IT professionals. Either way, the cost would be significant to firms with such limited revenue."). See also letter from Thomas DeMars, Managing Principal, Fieldman, Rolapp & Associates, dated February 22, 2011 ("Fieldman Rolapp Letter") (recommending that the Commission modify the record-keeping requirements to eliminate the need to retain all written communications, and clarify all other record-keeping requirements); and letter from Phillip C. Dotts, President, Public FA, Inc., dated February 22, 2011 ("Public FA Letter").

¹³⁵⁴ See NAIPFA Letter I.

internally be required to be kept.¹³⁵⁵ Another commenter stated that, because independent municipal advisors neither hold client accounts nor hold custody of monies from clients, audited financial statements should not be required, particularly as they are costly and burdensome for small firms.¹³⁵⁶ This commenter suggested that the Commission should narrow the record-keeping requirements to communication material specifically relevant to financing topics and financing recommendations or advice.¹³⁵⁷ One commenter also requested that the Commission clarify that every iteration of commonly used and routinely changing technical financial documents, typically referred to as “numbers runs,” need not be retained, and that only iterations either sent to a client or used internally to form the basis for a recommendation to a client must be retained.¹³⁵⁸

The Commission has carefully considered the issues raised by commenters and is adopting Rule 15Ba1-7 generally as proposed, but renumbered as Rule 15Ba1-8 and with modifications to include general ledgers, as well as written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such municipal advisor.

General ledgers would reflect asset, liability, reserve, capital, income and expense accounts.¹³⁵⁹ In the Proposal, the Commission inadvertently omitted general ledgers from proposed Rule 15Ba1-7. The Commission notes that ledgers are part of the books and records requirements for broker-dealers and investment advisers, and would already be made and kept by dually-

¹³⁵⁵ See id.

¹³⁵⁶ See Public FA Letter.

¹³⁵⁷ See id.

¹³⁵⁸ See NAIPFA Letter I.

¹³⁵⁹ See Rule 15Ba1-8(a)(2).

registered municipal advisors.¹³⁶⁰ The Commission believes that general ledgers will assist its staff in understanding a municipal advisor's business dealings and financial condition, identifying and tracking illicit expenses, identifying sources of revenue that were previously undisclosed or that pose a conflict of interest, identifying and tracing possible acts of fraud and violations of applicable laws and rules (e.g., MSRB Rule G-37 (Political Contributions and Prohibitions on Municipal Securities Business)), and conducting asset verification. In addition, the Commission notes that a municipal advisor's balance sheet and profit loss statement are derived from the general ledger.

The Commission believes it is also appropriate to include in the record-keeping requirement written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such municipal advisor. Under proposed Rule 15Ba1-2(b), each natural person who met the definition of municipal advisor would have been required to register as a municipal advisor by filing Form MA-I.¹³⁶¹ Proposed Form MA-I included consent to service of process that a natural person would have been required to execute. In contrast, adopted Rule 15Ba1-2(b) requires a person applying for registration or registered as a municipal advisor to complete Form MA-I with respect to each natural person who is a person associated with the municipal advisor and engaged in municipal advisory activities on its behalf.¹³⁶² As such, Form MA-I no longer includes consents to service of process executed by such natural persons. Because the Commission would no longer receive these consents to service of process as part of Form MA-I, the Commission believes it is appropriate to include in the record-keeping requirement written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities

¹³⁶⁰ See 17 CFR 240.17a-3(a)(2) and 17 CFR 275.204-2(a)(2).

¹³⁶¹ See proposed Rule 15Ba1-2(b).

¹³⁶² See Rule 15Ba1-2(b).

solely on behalf of such municipal advisor. Specifically, the Commission believes that this requirement will help ensure that such natural persons have indeed executed consents to service of process and will allow Commission staff to examine such consents to service of process.

With respect to concerns related to the burden of the books and records requirements, including the burden for retaining originals or copies of all written communications relating to municipal advisory activities,¹³⁶³ the Commission continues to believe that the final books and records requirements are appropriate for all municipal advisors because they will facilitate the Commission's inspections and examinations of municipal advisors and assist the Commission in evaluating a municipal advisor's compliance with Section 15B of the Exchange Act, the rules and regulations thereunder, and MSRB rules. Moreover, even though it recognizes that such requirements may impose burdens and costs upon municipal advisors, the Commission understands that many municipal advisors already make and keep certain types of the books and records required to be made and kept under Rule 15Ba1-8(a) under other regulatory requirements or general industry practices. Specifically, because the books and records required to be made and kept under Rule 15Ba1-8(a) are generally based on the existing books and records requirements for broker-dealers and investment advisers, the Commission believes that many municipal advisors would already be familiar and in compliance with such requirements because they are also registered as broker-dealers or investment advisers. Moreover, as noted above, to reduce the burden that would result from the books and records requirements, Rule 15Ba1-8(e)(1) provides that any books or other records made, kept, maintained, and preserved in compliance with Rules 17a-3 and 17a-4 under the Exchange Act, rules of the MSRB, or Rule 204-2 under the Investment Advisers Act, which are substantially the same as the books and records required to be made, kept, maintained,

¹³⁶³ See supra notes 1353-1355.

and preserved under Rule 15Ba1-8, will satisfy the requirements of Rule 15Ba1-8.

With respect to those municipal advisors that are not also registered with the Commission as broker-dealers or investment advisers, the Commission recognizes that Rule 15Ba1-8 establishes new record-keeping requirements for these entities and may impact these entities to a greater degree than entities that have previously registered as broker-dealers or investment advisers.¹³⁶⁴ However, the Commission believes that all municipal advisors should be subject to the same record-keeping requirements, regardless of whether they have previously registered with the Commission in another capacity. As noted above, the Commission believes that Rule 15Ba1-8 is appropriate for all municipal advisors because it will facilitate the Commission's inspections and examinations of municipal advisors¹³⁶⁵ and assist the Commission in evaluating a municipal advisor's compliance with Section 15B of the Exchange Act, the rules and regulations thereunder, and MSRB rules. The Commission also believes that regulation of municipal advisors is in the public interest and will improve the protection of municipal entities and investors.

Further, because the Commission is adopting certain additional exemptions from the definition of municipal advisor, including an exemption for persons providing advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments, the burden of the books and records requirements is similarly reduced (*i.e.*, fewer persons would be required to register as municipal advisors and the record-keeping requirements would not cover

¹³⁶⁴ See *infra* Sections VII.D.8.; VIII.D.3.a.; and X.D. (discussing the costs and burdens of Rule 15Ba1-8).

¹³⁶⁵ See 15 U.S.C. 78g-4(c)(7)(A). Based on the Commission's experience in conducting examinations of broker-dealers and investment advisers, which includes examinations of the types of books and records required by Rule 15Ba1-8(a), the Commission believes that the municipal advisor books and records requirements under Rule 15Ba1-8 will facilitate the Commission's inspections and examinations of municipal advisors.

activities that fall under an exemption or exclusion from the definition of municipal advisor). The Commission also notes that the burden of the books and records requirements for municipal advisors depends on the complexity of the business of a municipal advisor, which means smaller municipal advisors would be subject to proportionately lower burden in complying with such requirements.¹³⁶⁶ Further, as noted below, the Commission assumes that municipal advisors will use the most cost-effective method available, depending on their size and specific circumstances, to comply with Rule 15Ba1-8. The Commission understands that many municipal advisors generally make and keep the required records in electronic form, which will likely minimize the burdens and costs associated with record-keeping.¹³⁶⁷ Therefore, the Commission does not believe Rule 15Ba1-8 will be overly burdensome for municipal advisory firms, including small municipal advisory firms.¹³⁶⁸

Finally, in response to comments, the Commission confirms that only iterations of “numbers runs” sent to a client or that are used to form the basis for a recommendation to a client must be retained.¹³⁶⁹ With respect to a commenter’s suggestion that audited financial statements should not be required, the Commission notes that the requirements of Rule 15Ba1-8 do not apply to audited financial statements.¹³⁷⁰

Record-keeping After a Municipal Advisor Ceases to do Business

¹³⁶⁶ See also infra notes 1594 and accompanying text (discussing PRA burdens of Rule 15Ba1-8) and 1867 and accompanying text (discussing the technological costs of Rule 15Ba1-8).

¹³⁶⁷ See infra note 1601 and accompanying text (discussing PRA burdens in connection with electronic storage of books and records).

¹³⁶⁸ Concerns expressed with respect to the impact of the rule on small municipal advisors are further discussed in Section IX below.

¹³⁶⁹ See supra note 1358 and accompanying text.

¹³⁷⁰ See supra note 1356 and accompanying text.

As proposed, Rule 15Ba1-8(c)¹³⁷¹ requires a municipal advisory firm, before ceasing to conduct or discontinuing business as a municipal advisor, to arrange and be responsible for the continued preservation of the books and records for the remainder of the period required by Rule 15Ba1-8. It also requires the municipal advisory firm to notify the Commission in writing of the exact address where such books and records will be maintained during such period. The Commission did not receive any comments on this aspect of the proposal and is adopting Rule 15Ba1-8(c) without modification.

Requirements for Non-Residents

As proposed, Rule 15Ba1-8(f), which is modeled on Rule 204-2(j) under the Investment Advisers Act,¹³⁷² sets forth the books and records requirements for non-resident municipal advisory firms, including requirements for keeping, maintaining, and preserving copies of the books and records that these municipal advisors are required to make, keep, maintain, and preserve under any rule or regulation adopted under the Exchange Act, as well as requirements for providing written notice to the Commission of the location of such books and records.¹³⁷³ Specifically, Rule 15Ba1-8(f) requires non-resident municipal advisory firms to keep, maintain, and preserve all such books and records in the United States¹³⁷⁴ and provide notice to the Commission of the address of such location within 30 calendar days¹³⁷⁵ after Rule 15Ba1-8 becomes effective (in the case of municipal advisory firms that are already registered or in the process of applying for registration when the rule becomes effective) or when filing an application for registration (in the case of municipal advisory

¹³⁷¹ In the Proposal, this provision was numbered Rule 15Ba1-7(c).

¹³⁷² 17 CFR 275.204-2(j).

¹³⁷³ In the Proposal, this provision was numbered Rule 15Ba1-7(f).

¹³⁷⁴ See Rule 15Ba1-8(f)(1).

¹³⁷⁵ The Commission is clarifying that the 30-day period refers to 30 calendar days.

firms that file applications for registration after the rule becomes effective).¹³⁷⁶ A non-resident municipal advisory firm is not required to keep, maintain, and preserve such books and records in the United States if the municipal advisor timely files with the Commission a written undertaking (in a form acceptable to the Commission and signed by a duly authorized person) to furnish the Commission, upon demand, copies of any or all of such books and records at the municipal advisor's expense at the Commission's principal or regional office (as specified by the Commission).¹³⁷⁷ Specifically, a non-resident municipal advisory firm must furnish the requested books and records within 14 calendar days¹³⁷⁸ of the Commission's written demand to the offices of the Commission as specified in the written demand.¹³⁷⁹

The Commission did not receive any comments on its proposed record-keeping requirements for non-resident municipal advisory firms and is adopting Rule 15Ba1-8(f) without substantive modification.¹³⁸⁰ The Commission believes the requirements for non-resident municipal advisory firms will help ensure the Commission's effective regulation of municipal advisors. Further, as discussed in the Proposal, such requirements are designed to ensure that the Commission has access to the books and records of municipal advisors located outside of the United States to enable it to perform effective examinations and inspections. The requirements will also serve to mitigate the time and cost burdens the Commission may otherwise face in attempting to gain access to books and records located outside of the United States, such as in the case of any jurisdictional

¹³⁷⁶ See Rule 15Ba1-8(f)(2).

¹³⁷⁷ See Rule 15Ba1-8(f)(3)(i). Rule 15Ba1-8(f)(3)(i) sets forth the form of the undertaking.

¹³⁷⁸ The Commission is clarifying that the 14-day period refers to 14 calendar days.

¹³⁷⁹ See Rule 15Ba1-8(f)(3)(ii). The rule requires that any written demand be forwarded by the Commission to the municipal advisor by registered mail at the municipal advisor's last address of record filed with the Commission. See *id.*

¹³⁸⁰ See *supra* notes 1375 and 1378.

dispute relating to such access.¹³⁸¹

IV. DESIGNATION OF FINRA TO EXAMINE FINRA MEMBER MUNICIPAL ADVISORS

The Dodd-Frank Act amended the Exchange Act to, among other things, require new entities and individuals to register with the Commission and authorize the Commission to examine such registrants, including municipal advisors. Some entities that are currently registered, or will be registered, with the Commission as municipal advisors are also registered with the Commission as broker-dealers and are members of FINRA. The Commission anticipates that FINRA will conduct examinations of Commission-registered municipal advisors that are also FINRA members, subject to the Commission's oversight. The Commission will be responsible for examining registered municipal advisors that are not FINRA members, which comprise the vast majority of the anticipated registrants.¹³⁸²

The Commission believes that Section 15A of the Exchange Act provides authority to FINRA to examine its members' municipal advisory activities. Section 15A provides, in relevant part, that an association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that: (1) the association has the capacity to be able to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules and regulations thereunder, the rules of the MSRB, and the rules of the association;¹³⁸³ and (2) the rules of the association provide that the association shall provide information to the MSRB about the examinations of the association so that the MSRB may assist in

¹³⁸¹ See Proposal, 76 FR at 862.

¹³⁸² As of December 31, 2012, approximately twenty-five percent of the 1,110 MA-T registrants were also registered with FINRA as broker-dealers. Accordingly, under the permanent registration regime, the Commission believes that FINRA will examine but a small percentage of registered municipal advisors.

¹³⁸³ See 15 U.S.C. 78o-3(b)(2).

such examinations.¹³⁸⁴ In accordance with these provisions, FINRA, as a registered national securities association, has traditionally conducted examinations of its members' activities in connection with municipal securities for compliance with the Exchange Act, rules and regulations thereunder, and MSRB rules.

Registered municipal advisors are subject to the Exchange Act, rules and regulations thereunder, and MSRB rules. As such, Section 15A provides FINRA with authority to conduct examinations of its members' activities as registered municipal advisors in order to evaluate their compliance with the applicable laws and rules.¹³⁸⁵ In addition, the Dodd-Frank Act amended Section 15B of the Exchange Act to expressly provide that "the Commission, or its designee, in the case of municipal advisors," conduct periodic examinations.¹³⁸⁶ Accordingly, the Commission designates FINRA as a designee to examine its members' activities as registered municipal advisors and evaluate compliance by such members with federal securities laws, Commission rules and regulations, and MSRB rules applicable to municipal advisors.

V. IMPLEMENTATION AND COMPLIANCE DATES

As discussed above, Section 15B of the Exchange Act, as amended by the Dodd-Frank Act, makes it unlawful for a municipal advisor to provide advice to or on behalf of a municipal entity or

¹³⁸⁴ See 15 U.S.C. 78o-3(b)(15).

¹³⁸⁵ Moreover, as noted above, Section 15A(b)(15) of the Exchange Act requires FINRA rules to specify that it shall provide information to the MSRB about its examinations so that the MSRB may "assist in such . . . examinations." 15 U.S.C. 78o-3(b)(15). This statutory provision implies that FINRA has the requisite authority to examine municipal advisors.

¹³⁸⁶ 15 U.S.C. 78o-4(c)(7)(A)(iii). Specifically, Section 15B(c)(7) provides that "periodic examinations . . . shall be conducted by — (i) a registered securities association, in the case of municipal securities brokers and municipal securities dealers who are members of such association; (ii) the appropriate regulatory agency for any municipal securities broker or municipal securities dealer, in the case of all other municipal securities brokers and municipal securities dealers; and (iii) the Commission, or its designee, in the case of municipal advisors."

obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered with the Commission.¹³⁸⁷ Section 15B of the Exchange Act also provides that a municipal advisor may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning the municipal advisor and any person associated with the municipal advisor as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹³⁸⁸ The temporary municipal advisor registration regime, also as discussed above, is set to expire on December 31, 2014.¹³⁸⁹ Rules 15Ba1-1 through 15Ba1-8, Rule 15Bc4-1, and Forms MA, MA-I, MA-W, and MA-NR will become effective 60 days after publication of the rules in the Federal Register, and municipal advisors must comply with the new rules within the applicable compliance filing periods described below.

The permanent municipal advisor registration system on EDGAR will be available to accept registration applications for municipal advisory firms, including sole proprietors, beginning July 1, 2014. As discussed below, however, the Commission is providing specific compliance filing periods for filing applications for registration under the permanent registration regime. To continue doing business as a municipal advisory firm, any firm that is registered as a municipal advisor under Rule 15Ba2-6T and Form MA-T as of the Effective Date must file a complete application for registration as a municipal advisor within the applicable filing period, as set forth below. In accordance with Section 15B(a)(2) of the Exchange Act, within forty-five days of the date such

¹³⁸⁷ See 15 U.S.C. 78o-4(a)(1)(B).

¹³⁸⁸ See 15 U.S.C. 78o-4(a)(2).

¹³⁸⁹ See supra Section II.C. See also Rule 15Ba2-6T and Form MA-T Extension Release, supra note 7.

complete application is considered filed (or within such longer period as to which the applicant consents), the Commission shall grant registration or institute proceedings to determine whether registration should be denied.¹³⁹⁰ Before filing applications for registration as municipal advisors, municipal advisory firms will need to file a Form ID requesting an EDGAR access code as soon as possible, and should do so by no later than 30 days after the Effective Date to minimize processing delays.¹³⁹¹

To help ensure an orderly transition from the temporary registration regime to the permanent registration regime and the submission of applications through EDGAR, the Commission is providing the following compliance dates for municipal advisory firms to complete their applications for registration under the permanent registration regime. These compliance dates are based on the registration number a municipal advisor received (or will receive) when it registered (or will register) as a municipal advisor under Rule 15Ba2-6T and on Form MA-T (“temporary registration number”). A municipal advisory firm that has a temporary registration number falling within the range that begins on 866-00001-00 and ends on 866-00400-00 must file a complete application for registration under the permanent registration regime on or after July 1, 2014, but no later than July 31, 2014. A municipal advisory firm that has a temporary registration number falling within the range that begins on 866-00401-00 and ends on 866-00800-00 must file a complete application for registration under the permanent registration regime on or after August 1, 2014, but no later than August 31, 2014. A municipal advisory firm that has a temporary registration number

¹³⁹⁰ See 15 U.S.C. 78o-4(a)(2).

¹³⁹¹ As discussed in the Instructions, before a municipal advisory firm can electronically file the application with the Commission on EDGAR, such person must become an EDGAR filer with authorized access codes through the “Form ID” authorization process. Form ID is available on the Commission’s website at <http://www.sec.gov/about/forms/secforms.htm#EDGAR>. For staff guidance regarding Form ID, Electronic Form ID Frequently Asked Questions are available on the Commission’s website at <http://www.sec.gov/info/edgar/feifaq052306.htm>.

falling within the range that begins on 866-00801-00 and ends on 866-01200-00 must file a complete application for registration under the permanent registration regime on or after September 1, 2014, but no later than September 30, 2014. A municipal advisory firm that has a temporary registration number that falls after 866-01200-00 must file a complete application for registration under the permanent registration regime on or after October 1, 2014, but no later than October 31, 2014.

A municipal advisory firm that enters into the municipal advisory business on or after October 1, 2014 and does not have a temporary registration number as of October 1, 2014, must file a complete application for registration under the permanent registration regime on or after October 1, 2014 and be registered with the Commission before engaging in municipal advisory activities. The Commission believes that this staggered compliance approach will help to facilitate an orderly transition from the temporary registration regime to the permanent registration regime.

For a municipal advisory firm that files a complete application during the applicable filing period, its temporary municipal advisor registration will continue in effect until the Commission grants or denies the application for registration, unless the temporary registration is rescinded by the Commission or withdrawn by the municipal advisory firm. Any complete application for registration received prior to the start of the applicable filing period for a municipal advisory firm will be considered filed¹³⁹² on the first day of the applicable filing period.¹³⁹³ For a municipal advisory firm that engages in municipal advisory activities before and during the applicable filing

¹³⁹² See Rule 15Ba1-2(c). See also *supra* note 971 and accompanying text (discussing that a Form MA is considered filed upon submission of a completed Form MA, together with all additional required documents, and clarifying that, if a Form MA is not considered complete, the Commission's statutory forty-five day review period will not commence).

¹³⁹³ For example, if a municipal advisory firm with a temporary registration number that falls between 866-00401-00 and 866-00800-00 files a complete application for registration on July 15, 2014, its application will be considered filed on August 1, 2014.

period but that fails to file a complete application within the applicable filing period, the firm's temporary registration will expire forty-five days after the end of the applicable filing period. Therefore, a firm that continues to engage in municipal advisory activities after the expiration of its temporary registration would be in violation of Section 15B of the Exchange Act until it submits a complete application and the Commission grants its application for registration under the permanent registration regime.

A municipal advisory firm that is required to register as a municipal advisor with the Commission on or after the Effective Date but before the applicable filing period must register under the temporary registration regime as a municipal advisor and must file an application for registration under the permanent registration regime during the applicable filing period. Such municipal advisory firm's temporary registration will continue to be in effect until the date that its registration is granted or denied by the Commission under the permanent registration regime, unless the municipal advisory firm's temporary registration is rescinded by the Commission or withdrawn by the municipal advisory firm. A municipal advisory firm that is required to register as a municipal advisor with the Commission after the commencement of the applicable filing period must file an application with the Commission under the permanent registration regime.

VI. DELEGATION OF AUTHORITY¹³⁹⁴

¹³⁹⁴ The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the Federal Register. See 5 U.S.C. 553(b). This requirement does not apply, however, to rules of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(3)(A). Because the amendments described in this Section VI are limited to the Commission's Rules of Organization and Program Management, they are not subject to the provisions of the APA requiring notice and opportunity for comment. Because the Commission is not publishing these rule amendments in a notice of proposed rulemaking, the provisions of the Regulatory Flexibility Act are not applicable. See 5 U.S.C. 603. For the same reason, and because these amendments do not substantially affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act are also not applicable. See 5 U.S.C. 804(3)(C). Additionally, the Commission does not believe the amendments will have any anti-competitive effects for

A. Delegation to the Director of the Office of Municipal Securities

Rule 30-3a of the Commission's Rules of Organization and Program Management

The Commission is amending its existing delegations of authority by adding Rule 30-3a to its Rules of Organization and Program Management, which governs the delegations of authority to the Director of the Office of Municipal Securities ("Director").¹³⁹⁵ Section 15B(a)(2) of the Exchange Act, as amended by the Dodd-Frank Act, provides that "[w]ithin forty-five days of the date of the filing of [a municipal advisor registration] application (or within such longer period as to which the applicant consents), the Commission shall... by order grant registration, or... institute proceedings to determine whether registration should be denied."¹³⁹⁶ New Rule 30-3a delegates to the Director the authority to issue orders granting registration of municipal advisors within forty-five days of the filing of an application for registration as a municipal advisor (or within such longer period as to which the applicant consents).¹³⁹⁷

Section 15B(c)(3) of the Exchange Act, as amended by the Dodd-Frank Act, provides the Commission with the authority to cancel the registration of a municipal advisor if it finds that such municipal advisor is no longer in existence or has ceased to do business as a municipal advisor.¹³⁹⁸ Rule 30-3a delegates to the Director the authority to issue orders canceling the registration of a municipal advisor, if such municipal advisor is no longer in existence or has ceased to do business

purposes of Section 23(a)(2) of the Exchange Act because they will not impose any new burden on municipal advisors or other market participants. See 15 U.S.C. 78w(a)(2). Finally, this amendment does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1980, as amended. See 44 U.S.C. 3501 et seq.

¹³⁹⁵ 17 CFR 200.30-3a.

¹³⁹⁶ 15 U.S.C. 78o-4(a)(2).

¹³⁹⁷ See 17 CFR 200.30-3a(a)(1)(i).

¹³⁹⁸ See 15 U.S.C. 78o-4(c)(3).

as a municipal advisor.¹³⁹⁹

The delegations of authority to the Director in Rule 30-3a will allow the staff, on behalf of the Commission, pursuant to Section 15B of the Exchange Act,¹⁴⁰⁰ to review and act upon applications for registration, and to issue orders canceling municipal advisor registrations. The Commission believes that these delegations of authority will facilitate efficient registration and regulation of municipal advisors. Also, pursuant to Rule 30-3a, the Director may submit matters to the Commission for consideration as it deems appropriate.¹⁴⁰¹

Rule 19d of the Commission's Rules of Organization and Program Management

The Commission is also amending its existing Rules of Organization and Program Management by adding Rule 19d, which sets forth the responsibilities of the Director.¹⁴⁰² In light of the changes made by the Dodd-Frank Act to Section 15B of the Exchange Act regarding the registration and regulation of municipal advisors, the Commission is adding Rule 19d, which states that the Director is responsible to the Commission for the administration and execution of the Commission's programs under the Exchange Act relating to the registration and regulation of municipal advisors. Rule 19d also states that the functions involved in the regulation of municipal advisors include recommending the adoption and amendment of Commission rules, and responding to interpretive and no-action requests. Therefore, Rule 19d specifies the role of staff in the registration and regulation of municipal advisors.

B. Delegation to the Director of the Office of Compliance Inspections and Examinations

Rule 30-18 of the Commission's Rules of Organization and Program Management

¹³⁹⁹ See 17 CFR 200.30-3a(a)(1)(ii).

¹⁴⁰⁰ 15 U.S.C. 78o-4.

¹⁴⁰¹ See 17 CFR 200.30-3a(b).

¹⁴⁰² 17 CFR 200.19d.

The Commission is amending its existing delegations of authority by amending Rule 30-18 of its Rules of Organization and Program Management governing the delegations of authority to the Director of the Office of Compliance Inspections and Examinations (“OCIE Director”).¹⁴⁰³ As noted above, Section 15B(a)(2) of the Exchange Act, as amended by the Dodd-Frank Act, provides that “[w]ithin forty-five days of the date of the filing of [a municipal advisor registration] application (or within such longer period as to which the applicant consents), the Commission shall... by order grant registration, or... institute proceedings to determine whether registration should be denied.”¹⁴⁰⁴ The Commission delegates to the OCIE Director the authority to issue orders granting registration of municipal advisors within 45 days of the filing of an application for registration as a municipal advisor (or within such longer period as to which the applicant consents), and to grant registration of municipal advisors sooner than 45 days after the filing of an application for registration.¹⁴⁰⁵

Section 15B(c)(3) of the Exchange Act, as amended by the Dodd-Frank Act, provides the Commission with the authority to cancel the registration of a municipal advisor if the Commission finds that such municipal advisor is no longer in existence or has ceased to do business as a municipal advisor.¹⁴⁰⁶ The amendment to Rule 30-18 delegates to the OCIE Director the authority to issue orders to cancel the registration of a municipal advisor, if such municipal advisor is no longer in existence or has ceased to do business as a municipal advisor.¹⁴⁰⁷

¹⁴⁰³ 17 CFR 200.30-18.

¹⁴⁰⁴ 15 U.S.C. 78o-4(a)(2).

¹⁴⁰⁵ See 17 CFR 200.30-18(j)(7).

¹⁴⁰⁶ See 15 U.S.C. 78o-4(c)(3).

¹⁴⁰⁷ See 17 CFR 200.30-18(j)(8)(i).

Section 15B(c)(3) of the Exchange Act, as amended by the Dodd-Frank Act, also provides for the withdrawal of municipal advisors from registration under such terms and conditions that the Commission deems necessary in the public interest or for the protection of investors or municipal entities or obligated persons.¹⁴⁰⁸ The amendment to Rule 30-18 delegates to the OCIE Director the authority to determine whether notices of withdrawal from registration on Form MA-W may become effective sooner than the 60-day waiting period.¹⁴⁰⁹

These delegations of authority to the OCIE Director will allow the staff, on behalf of the Commission, pursuant to Section 15B of the Exchange Act,¹⁴¹⁰ to review and act upon applications for registration and withdrawals from registration, and to make determinations with regard to the cancellation of municipal advisor registrations. These delegations of authority will facilitate efficient registration and regulation of municipal advisors. Also, the OCIE Director may submit matters to the Commission for consideration as it deems appropriate.¹⁴¹¹

Rule 19c of the Commission's Rules of Organization and Program Management

The Commission is also amending its existing Rules of Organization and Program Management by amending Rule 19c, which sets forth the responsibilities of the OCIE Director.¹⁴¹² Currently, Rule 19c provides that the OCIE Director is responsible for the compliance inspections and examinations relating to the regulation of exchanges, national securities associations, clearing agencies, securities information processors, the MSRB, brokers and dealers, municipal securities dealers, transfer agents, investment companies, and investment advisers. Under Sections 15B and

¹⁴⁰⁸ See 15 U.S.C. 78o-4(c)(3).

¹⁴⁰⁹ See 17 CFR 200.30-18(j)(8)(ii).

¹⁴¹⁰ 15 U.S.C. 78o-4.

¹⁴¹¹ See 17 CFR 200.30-18(m).

¹⁴¹² 17 CFR 200.19c.

17(a) of the Exchange Act, as amended by the Dodd-Frank Act, municipal advisors are now required to be registered with the Commission and are subject to record-keeping requirements promulgated by the Commission.¹⁴¹³ Further, Section 17(b) of the Exchange Act provides that all records of persons described in Section 17(a) are subject “to such reasonable periodic, special, or other examinations by representatives of the Commission... as the Commission... deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title.”¹⁴¹⁴ In light of the changes made by the Dodd-Frank Act, the Commission is amending Rule 19c to reflect the responsibilities of the OCIE Director with respect to all persons subject to compliance inspections and examinations, including municipal advisors. These amendments specify the role of OCIE staff in the inspection and examination of records kept by municipal advisors.

VII. PAPERWORK REDUCTION ACT

Certain rules that the Commission is adopting impose new “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).¹⁴¹⁵ 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. In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted these collections of information to the Office of Management and Budget (“OMB”) for review. The title for the collection of information requirement is “Rules 15Ba1-1 to 15Ba1-8 – Registration of Municipal Advisors.” The collection of information was assigned OMB Control No. 3235-0681.

In the Proposal, the Commission solicited comments on the collection of information

¹⁴¹³ 15 U.S.C. 78o-4 and 78q(a).

¹⁴¹⁴ 15 U.S.C. 78q(b).

¹⁴¹⁵ 44 U.S.C. 3501 *et seq.*

requirements. In particular, the Commission solicited comments on whether the calculations of either the burden hours or associated costs were too high or too low.¹⁴¹⁶ Some commenters addressed the collection of information aspects of the Proposal.

Many commenters opined generally that municipal advisor registration under the proposed rules would be overly burdensome and would impose significant costs that would prove detrimental, especially to smaller “community banks” and local and state municipalities.¹⁴¹⁷ Although most of these letters neither provided specific suggestions to revise the Commission’s estimates, nor provided specific alternative figures or calculations for actual burden hour figures, the Commission addresses the comments below.

A. Summary of Collection of Information

Section 15B(a)(2) of the Exchange Act, as amended by the Dodd-Frank Act, provides that a municipal advisor may be registered by filing with the Commission an application for registration in such form, and containing such information and documents concerning the municipal advisor and any persons associated with the municipal advisor, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹⁴¹⁸

Under the final rules and forms, the permanent registration regime for municipal advisors will be more comprehensive than the temporary one and will require more detailed disclosures. Under Rule 15Ba1-2(a), each firm applying for registration with the Commission as a municipal advisor is required to complete and file electronically with the Commission Form MA. In addition, each person applying for registration, or registered with, the Commission as a municipal advisor must complete and file electronically with the Commission Form MA-I with respect to each natural

¹⁴¹⁶ See Proposal, 76 FR at 872, 878.

¹⁴¹⁷ See, e.g., Form Letter A.

¹⁴¹⁸ See 15 U.S.C. 78o-4(a)(2).

person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf.¹⁴¹⁹ Each Form MA shall be considered filed with the Commission upon acceptance of Form MA, together with all additional required documents, including all required Form MA-Is, by the Commission's EDGAR system.¹⁴²⁰ A sole proprietor will have to complete both Form MA and Form MA-I.¹⁴²¹

Under the permanent registration regime, municipal advisors will include sole proprietorships and firms of varying sizes. In addition, municipal advisors will include firms that engage in municipal advisory activities as part of a broader array of financial services, serving many types of clients, and that have many associated persons. Thus, the paperwork burden will reflect these differences in size and types of other financial services in which the municipal advisors engage.

Pursuant to Rule 15Ba1-5(a), a municipal advisory firm that registers on Form MA must amend its Form MA at least annually, within 90 days of the end of the municipal advisor's fiscal year in the case of firms or within 90 days of the end of the calendar year for sole proprietors, and more frequently as required by the General Instructions. In addition, a registered municipal advisor must promptly amend Form MA-I whenever any information previously provided therein becomes inaccurate.¹⁴²² Municipal advisory firms must also amend Form MA-I to indicate that an individual is no longer an associated person of the municipal advisory firm filing the form or no longer engaged in municipal advisory activities on its behalf. Finally, registered municipal advisors must

¹⁴¹⁹ See Rule 15Ba1-2(b)(1).

¹⁴²⁰ See Rule 15Ba1-2(c).

¹⁴²¹ See Rule 15Ba1-2(b)(2). The Commission has developed an online filing system to permit municipal advisors to file a completed Form MA and Form MA-I through the EDGAR system.

¹⁴²² See Rule 15Ba1-5(b).

report successions of registration on Form MA.¹⁴²³

Pursuant to Rule 15Ba1-4, all registered municipal advisors are required to file Form MA-W to withdraw from registration with the Commission as a municipal advisor. As will be the case with both Forms MA and MA-I, Form MA-W will be required to be filed electronically with the Commission.

Rule 15Ba1-6 sets forth the general procedures for serving non-residents. Pursuant to Rule 15Ba1-6 and the instructions to Form MA-NR, each non-resident municipal advisor applying for registration, at the time of filing of the municipal advisor's application on Form MA, must file with the Commission a written irrevocable consent and power of attorney on Form MA-NR to appoint an agent in the United States upon whom may be served any process, pleadings, or other papers in any action brought against the non-resident municipal advisor. In addition, each municipal advisor applying for registration pursuant to, or registered under, Section 15B of the Exchange Act must file Form MA-NR with the Commission for each non-resident general partner, non-resident managing agent, and non-resident natural person associated with the municipal advisor who engages in municipal advisory activities on behalf of the municipal advisor.¹⁴²⁴ Rule 15Ba1-6(d) requires each non-resident municipal advisor to provide an opinion of counsel that the municipal advisor can, as a matter of law, provide the Commission with access to its books and records and submit to inspection and examination by the Commission.

Rule 15Ba1-8 requires all registered municipal advisors to maintain true, accurate, and current books and records relating to their municipal advisory activities. Generally, Rule 15Ba1-8 requires such books and records to be maintained and preserved for a period of not less than five years, the first two years in an easily accessible place.

¹⁴²³ See Rule 15Ba1-7.

¹⁴²⁴ See Rule 15Ba1-6(a)(2).

Rule 15Ba1-1(d)(3)(vi) exempts from the definition of “municipal advisor” any person engaging in municipal advisory activities in a circumstance in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities, provided that certain requirements are met. First, an independent registered municipal advisor must be providing advice with respect to the same aspects of the municipal financial product or issuance of municipal securities.¹⁴²⁵ Second, the person seeking to rely on Rule 15Ba1-1(d)(3)(vi) must receive from the municipal entity or obligated person a representation in writing that the municipal entity or obligated person is represented by, and will rely on the advice of, an independent registered municipal advisor.¹⁴²⁶ Third, the person must make certain disclosures to the municipal entity or obligated person and provide a copy of such disclosures to the municipal entity’s or obligated person’s independent registered municipal advisor.¹⁴²⁷ With respect to a municipal entity, the person seeking to rely on the exemption must disclose in writing that, by obtaining the representation discussed above from the municipal entity, such person is not a municipal advisor and is not subject to the fiduciary duty set forth in Section 15B(c)(1) of the Exchange Act¹⁴²⁸ with

¹⁴²⁵ See Rule 15Ba1-1(d)(3)(vi)(A). For purposes of this exemption, the term “independent registered municipal advisor” means a municipal advisor registered pursuant to Section 15B of the Exchange Act (15 U.S.C. 78o-4) and the rules and regulations thereunder and that is not, and within at least the past two years was not, associated with the person seeking to rely on Rule 15Ba1-1(d)(3)(vi).

¹⁴²⁶ See Rule 15Ba1-1(d)(3)(vi)(B). The person receiving the written representation may rely on the representation, provided that the person receiving such representation has a reasonable basis for relying on the representation.

¹⁴²⁷ Each such disclosure must be made at a time and in a manner reasonably designed to allow the municipal entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities. See Rule 15Ba1-1(d)(3)(vi)(C)(3).

¹⁴²⁸ 15 U.S.C. 78o-4(c)(1).

respect to the municipal financial product or the issuance of municipal securities.¹⁴²⁹ With respect to an obligated person, the person seeking to rely on the exemption must disclose in writing that, by obtaining the representation discussed above from the obligated person, such person is not a municipal advisor with respect to the municipal financial product or issuance of municipal securities.¹⁴³⁰

Rule 15Ba1-1(h) defines “municipal escrow investments” to mean proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium, if any, and interest on one or more issues of municipal securities. In determining whether or not funds to be invested or reinvested constitute municipal escrow investments, a person may rely on representations in writing made by a knowledgeable official of a municipal entity or obligated person whose funds are to be invested or reinvested regarding the nature of such investments, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.¹⁴³¹

Similarly, the Commission is adopting a qualification to the definition of “proceeds of municipal securities” that provides that in determining whether or not funds to be invested constitute proceeds of municipal securities, a person may rely on representations in writing made by a knowledgeable official of a municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.¹⁴³²

¹⁴²⁹ See Rule 15Ba1-1(d)(3)(vi)(C)(1).

¹⁴³⁰ See Rule 15Ba1-1(d)(3)(vi)(C)(2).

¹⁴³¹ See Rule 15Ba1-1(h)(2).

¹⁴³² See Rule 15Ba1-1(m)(3).

B. Use of Information

The Commission believes Form MA and Form MA-I will help to ensure that the Commission can make information about municipal advisors transparent and easily accessible to the investing public, including municipal entities and obligated persons who engage municipal advisors; investors who may purchase securities from offerings in which municipal advisors participated; and other regulators. Further, the information provided on Form MA and Form MA-I will expand the amount of publicly available information about municipal advisors, including conflicts of interest and disciplinary history. Although much of the information required by Form MA is already publicly available with respect to municipal advisors that are already registered with the Commission as investment advisers or broker-dealers, many municipal advisors that are not currently registered with the Commission in another capacity will make this information available for the first time. In addition, while municipal advisors are currently required to disclose disciplinary history for some of their associated persons on Form MA-T, municipal advisors will be required to disclose on Form MA disciplinary history for all associated persons. Consequently, the final rules and forms will allow municipal entities and obligated persons, as well as others, to become more fully informed about municipal advisors in a more efficient manner.

In addition, the requirement that each municipal advisory firm register with the Commission on Form MA and complete Form MA-I with respect to each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf will help ensure that the Commission has information to oversee respondents and their activities in the municipal securities market effectively. In particular, the information provided in Form MA will be used to determine whether to grant a municipal advisor's application for registration or to institute proceedings to determine whether registration should be denied. The information will also be used to focus examinations and aid in risk-based examination. Moreover, Form MA and Form MA-I will

enable the Commission to obtain an accurate estimate of the number of municipal advisors, by size and by municipal advisory activity; analyze data regarding the various types of municipal advisory activities in which municipal advisors engage; and evaluate the disciplinary history of all municipal advisors and associated persons, including all regulatory, civil, and criminal proceedings.

The requirement that a municipal advisor make and keep books and records, including written communications and records of associated persons, will help to ensure that records of the respondent's primary municipal advisory activities, as well as the activities of its associated persons, exist. The Commission and other regulators could potentially request books and records during an examination to evaluate the municipal advisor's compliance with the Exchange Act, the rules thereunder, and MSRB rules, as well as for other regulatory purposes.

The requirement that a non-resident municipal advisor complete Form MA-NR, and furnish Form MA-NR for its non-resident general partners, non-resident managing agents, and associated persons engaged in municipal advisory activities, will help minimize legal or logistical obstacles that the Commission may encounter when attempting to effect service, conserve Commission resources, and avoid potential conflicts of law. The requirement that a non-resident municipal advisor provide an opinion of counsel on Form MA will help ensure that such non-resident municipal advisor can provide access to its books and records and submit to inspection and examination by the Commission.

The requirement that certain written representations and disclosures be made in order for a person to be exempt from the definition of municipal advisor where a municipal entity or obligated person is represented by an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities will allow the Commission staff to determine whether a person engaging in municipal advisory activities has

failed to register with the Commission. Further, the information will allow municipal entities and obligated persons to understand whether a person is acting as a municipal advisor. Similarly, the exceptions from the definitions of municipal escrow investments and proceeds of municipal securities for reasonable inquiries will allow the Commission staff to determine whether a person engaging in municipal advisory activities has failed to register with the Commission.

C. Respondents

In the Proposal, the Commission estimated that the proposed “collections of information” would initially apply to approximately 1,000 municipal advisory firms, including sole proprietors.¹⁴³³ This estimate was based partly on the number of municipal advisors that had registered with the Commission under Rule 15Ba2-6T. As of October 2010, there were approximately 800 total unique electronic temporary registrations for municipal advisors where Form MA-T was completed and not withdrawn.¹⁴³⁴ In the Proposal, the Commission stated its belief that the number of Form MA-T registrants would likely increase beyond 800 because numerous applicants that would have been required to register might have missed the October 1, 2010, deadline for a variety of reasons, such as concluding, based on their interpretation of the Dodd-Frank Act, that they were not required to register as municipal advisors.¹⁴³⁵ For the PRA analysis of Rule 15Ba2-6T, the Commission estimated that approximately 1,000 applicants would be required to complete Form MA-T.¹⁴³⁶ The Commission therefore believed that 1,000 applicants would remain an appropriate estimate for the total number of municipal advisory firms that would be required to register on Form MA under the proposed permanent registration regime. The

¹⁴³³ See Proposal, 76 FR at 865.

¹⁴³⁴ See *id.*

¹⁴³⁵ See *id.*

¹⁴³⁶ See Temporary Registration Rule Release, 75 FR at 54473.

Commission also estimated that the average number of new Form MA applicants per year would be 100.¹⁴³⁷

In the Proposal, the Commission also estimated that approximately 21,800 individuals would be required to register as natural person municipal advisors on Form MA-I,¹⁴³⁸ while the average number of new Form MA-I applicants per year would be 1,800.¹⁴³⁹ These estimates were based on trends observed in registrations of investment advisers and Form U4 applications submitted to FINRA.

In the Proposal, the Commission solicited comments on how many municipal advisors would incur collection of information burdens if the proposed rules and forms were adopted by the Commission.¹⁴⁴⁰ The Commission received no comments regarding the estimated number of municipal advisory firms that would be required to register initially on Form MA¹⁴⁴¹ and no comments regarding estimates for the average annual number of new Form MA and Form MA-I applicants. Nevertheless, the Commission is revising its initial estimates of the numbers of applicants required to complete Form MA. The Commission's decision to revise its estimates is based, in part, on a comparison between the current number of Form MA-T registrants and the number of municipal advisors that are registered with the MSRB.

In October 2010, there were approximately 800 Form MA-T registrants. According to Form MA-T data, as of December 31, 2012, there were approximately 1,110 Form MA-T registrants. Of these Form MA-T registrants, as of December 31, 2012, approximately 901 were also registered as

¹⁴³⁷ See Proposal, 76 FR at 866.

¹⁴³⁸ See *id.* at 865.

¹⁴³⁹ See *id.*

¹⁴⁴⁰ See *id.* at 872.

¹⁴⁴¹ For a discussion of comments regarding the number of natural persons who will need to initially register on Form MA-I, see *infra* note 1447–1467 and accompanying text.

municipal advisors with the MSRB, as they are required to do prior to engaging in municipal advisory activities.¹⁴⁴² For the reasons discussed below, the Commission believes that the number of Form MA-T registrants may not be an accurate representation of the number of municipal advisors and that MSRB data represents a better basis on which to estimate the number of municipal advisors active in the market.

The Commission believes that a number of persons, recognizing that the Commission does not impose any fees for registration, may have registered with the Commission as municipal advisors out of an initial overabundance of caution. Although some current Form MA-T registrants may not have registered with the MSRB because of uncertainty regarding the scope of the temporary registration regime, others may have determined in the intervening time after October 1, 2010, that registration with the MSRB was not required because they were not engaging in municipal advisory activities. The Commission staff understands based on discussions with market participants that these Form MA-T registrants may have retained Commission registration because there are no associated fees to maintain such registration.¹⁴⁴³ In addition, the Commission anticipates that the exemption for persons providing advice with respect to investment strategies that are not plans or programs for the investment of proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments¹⁴⁴⁴ will reduce the estimated number of initial Form MA applicants. Likewise, the Commission anticipates the additional

¹⁴⁴² The Commission staff obtained this estimate by comparing the list of MSRB registrants to the Commission's list of Form MA-T registrants as of December 31, 2012.

¹⁴⁴³ The Commission staff also understands based on discussions with market participants that some municipal advisors may have maintained Form MA-T registration instead of withdrawing from registration to wait and see whether registration would be required under the permanent registration regime, while others may not have realized they could withdraw from registration or may have determined not to withdraw for other reasons.

¹⁴⁴⁴ See Rule 15Ba1-1(d)(3)(vii).

exemptions adopted today will also reduce the estimated number of initial Form MA applicants.¹⁴⁴⁵

For these reasons, the Commission now estimates that the “collections of information” will initially apply to approximately 910 municipal advisory firms, including sole proprietors.¹⁴⁴⁶

In addition, the Commission is revising its estimate of the number of Form MA-I submissions the Commission expects municipal advisory firms will be required to file.¹⁴⁴⁷ For reasons discussed below, the Commission is revising its estimate of approximately 21,800 Form MA-I submissions downward and currently estimates that, during the first year, municipal advisors will need to complete a Form MA-I for approximately 11,250 individuals.¹⁴⁴⁸

In the Proposal, the Commission divided the number of Form MA-I applicants into three main categories: (1) individuals who are currently also registered as investment adviser representatives, registered representatives of broker-dealers, or both, and who are employed at investment advisory firms, broker-dealer firms, or banks; (2) individuals who are employed at financial advisor firms that are not registered as broker-dealers or investment advisers; and (3)

¹⁴⁴⁵ See supra Section III.A.1.c.

¹⁴⁴⁶ This estimate rounds to the nearest higher multiple of ten the number of municipal advisors that are registered with the MSRB to engage in municipal advisory activities. The Commission uses a similar rounding convention in estimating the number of municipal advisors that will newly register with the Commission in subsequent years, amend prior filings, and withdraw from registration.

¹⁴⁴⁷ As discussed above, natural person municipal advisors who are not sole proprietors no longer need to register with the Commission. However, the Commission is retaining Form MA-I to obtain information about individuals associated with municipal advisory firms engaged in municipal advisory activities on behalf of such firms. The Commission notes, moreover, that it is the municipal advisory firms, not the individuals, that will be required to file Form MA-I with the Commission.

¹⁴⁴⁸ 5,602 (estimated number of individuals who are registered as investment adviser representatives, registered representatives of broker-dealers, or both, for whom a municipal advisor will be required to file Form MA-I) + 4,910 (estimated number of individuals employed by a municipal advisor not otherwise registered with the Commission for whom a municipal advisor will be required to file Form MA-I) + 730 (estimated number of individuals who are employed at solicitors) = 11,242 Form MA-I applicants.

individual solicitors who are employed at third-party marketing and solicitor firms.¹⁴⁴⁹ First, the Commission estimated the number of individuals who are currently registered as investment adviser representatives, registered representatives of broker-dealers, or both, and would register on Form MA-I. To calculate this estimate in the Proposal, the Commission compared the proportion of FINRA Form U4 filers (i.e., individuals who are investment adviser representatives and/or registered representatives of broker-dealers) to the sum of all investment advisers registered on Form ADV and all broker-dealers registered on Form BD. FINRA estimated that, as of October 2010, 637,000 individuals had registered as investment adviser representatives and/or registered representatives of broker-dealers on Form U4.¹⁴⁵⁰ The Commission estimated that as of October 2010, 11,888 investment advisers had registered on Form ADV, while as of March 2010, 5,163 broker-dealers had registered on Form BD. The proportion of Form U4 registrants to the sum of Form ADV and Form BD registrants was approximately 37.36 to 1.¹⁴⁵¹ According to Form MA-T data that had been collected as of October 2010, the Commission estimated that approximately 450 of 1,000 Form MA-T registrants would be investment adviser and/or broker-dealer firms. Thus, in the Proposal, the Commission estimated that approximately 16,800 individuals who are registered as investment adviser representatives, registered representatives of broker-dealers, or both, would be required to register on Form MA-I.¹⁴⁵²

Based on data collected as of December 31, 2012, the Commission is revising its estimate of

¹⁴⁴⁹ See Proposal, 76 FR at 865.

¹⁴⁵⁰ See October 2010 "Registered Reps" in "FINRA Statistics," available at <http://www.finra.org/Newsroom/Statistics>. See also Proposal, 76 FR at 865.

¹⁴⁵¹ $637,000$ (estimated number of Form U4 registrants) \div ($11,888$ (estimated number of Form ADV registrants) + $5,163$ (estimated number of Form BD registrants)) = 37.36 . See Proposal, 76 FR at 865.

¹⁴⁵² 450 (total number of investment adviser and broker-dealer firms registered as municipal advisors) \times 37.36 (proportion of Form U4 registrants to all Form ADV and Form BD registrants) = $16,812$. See *id.*

the number of individuals who are employed at municipal advisors registered with the Commission as investment advisers and/or broker-dealers and for whom a municipal advisor will be required to file Form MA-I. FINRA estimates that, as of December 31, 2012, 670,016 individuals had registered as investment adviser representatives and/or registered representatives of broker-dealers on Form U4.¹⁴⁵³ The Commission estimates that, as of December 31, 2012, there were 32,645 broker-dealer and investment advisory firms.¹⁴⁵⁴ Thus, the revised estimate of the average number of individuals who are employed at municipal advisors registered with the Commission as investment advisers and/or broker-dealers and for whom a municipal advisor will be required to file Form MA-I is approximately 20.52.¹⁴⁵⁵ The Commission estimates that approximately 273 of the 910 Form MA registrants will be municipal advisors registered with the Commission as investment advisers and/or broker-dealers.¹⁴⁵⁶ Accordingly, the Commission currently estimates there to be

¹⁴⁵³ 630,391 (number of registered representatives of broker-dealers) + 39,625 (number of investment adviser representatives who are not also registered representatives of a broker-dealer) = 670,016. See 2012 “Registered Reps” in “FINRA Statistics,” available at <http://www.finra.org/Newsroom/Statistics>. The Proposal did not include the number of investment adviser representatives who are not also registered representatives of a broker-dealer when determining the proportion of Form U4 registrants to the sum of Form ADV and Form BD registrants.

¹⁴⁵⁴ 4,632 (broker-dealers) + 10,754 (Commission-registered investment advisers) + 17,259 (state-registered investment advisers) = 32,645. The Proposal did not include the number of state-registered investment advisers when determining the proportion of Form U4 registrants to the sum of Form ADV and Form BD registrants.

¹⁴⁵⁵ 670,016 (estimated number of Form U4 registrants) ÷ 32,645 (number of broker-dealers, SEC-registered investment advisers, and state-registered investment advisers) = 20.52.

¹⁴⁵⁶ The Commission staff has examined Form MA-T data as of December 31, 2012, and estimates that approximately 30% of Form MA-T registrants are municipal advisors registered with the Commission as investment advisers and/or broker-dealers (330 municipal advisors registered with the Commission as investment advisers and/or broker-dealers registered on Form MA-T ÷ 1,110 municipal advisors registered on Form MA-T = 29.73%). The Commission assumes that the same percentage of municipal advisors registered with the Commission as investment advisers and/or broker-dealers will register with the Commission on Form MA. 910 (estimated number of municipal advisors registered on Form MA) × 30% = 273.

approximately 5,602 individuals who are employed at municipal advisors registered with the Commission as investment advisers and/or broker-dealers for whom a Form MA-I will need to be filed.¹⁴⁵⁷

Second, in the Proposal, the Commission estimated the number of individuals who are employed at municipal financial advisors and who would register on Form MA-I. The Commission staff learned from discussions with industry and market participants that it was reasonable to estimate that there is an average of approximately 10 professional employees per financial advisor. According to Form MA-T data that had been collected as of October 2010, the Commission estimated that approximately 450 of 1,000 MA-T registrants would be financial advisors. Thus, in the Proposal, the Commission estimated that approximately 4,500 individuals who are employed at financial advisors would be required to register on Form MA-I.¹⁴⁵⁸

The Commission now estimates that approximately 491 of the 910 Form MA registrants will be municipal advisors not otherwise registered with the Commission.¹⁴⁵⁹ Accordingly, the Commission currently estimates there to be approximately 4,910 individuals employed by a municipal advisor not otherwise registered with the Commission for whom a Form MA-I will need

¹⁴⁵⁷ 273 (estimated number of municipal advisors registered with the Commission as investment advisers and/or broker-dealers) \times 20.52 (estimated average number of employees per municipal advisor registered with the Commission as an investment adviser and/or broker-dealer) = 5,601.96.

¹⁴⁵⁸ 450 (total number of independent financial advisor firms registered as municipal advisors) \times 10 (estimated average number of professional employees per independent financial advisor firm) = 4,500. See Proposal, 76 FR at 865.

¹⁴⁵⁹ The Commission staff has examined Form MA-T data as of December 31, 2012, and estimates that approximately 54% of Form MA-T registrants are municipal advisors not otherwise registered with the Commission (603 municipal advisors not otherwise registered with the Commission registered on Form MA-T \div 1,110 municipal advisors registered on Form MA-T = 54.32%). The Commission assumes that the same percentage of municipal advisors not otherwise registered with the Commission will register with the Commission on Form MA. 910 (estimated number of municipal advisors registered on Form MA) \times 54% = 491.4.

to be filed.¹⁴⁶⁰

Third, in the Proposal, the Commission estimated the number of individual solicitors who would register on Form MA-I. The Commission examined the data of all Form MA-T registrants as of October 2010, and estimated that approximately 100 out of 1,000 registrants were solicitors. For purposes of the Proposal's PRA, the Commission assumed that there were five individual solicitors who would register on Form MA-I for every solicitor firm that would register on Form MA.¹⁴⁶¹ Thus, in the Proposal, the Commission estimated that approximately 500 individual solicitors would be required to register on Form MA-I.¹⁴⁶²

The Commission now estimates that approximately 146 of the 910 Form MA registrants will be solicitors.¹⁴⁶³ Accordingly, the Commission currently estimates there to be approximately 730 individuals employed by solicitors for whom a Form MA-I will need to be filed.¹⁴⁶⁴

One commenter noted that, for the Proposal's estimate of 21,800 natural persons who will be required to register initially on Form MA-I, the Commission "completely disregards" governing

¹⁴⁶⁰ 491 (estimated number of municipal advisors not otherwise registered with the Commission registered as municipal advisors) \times 10 (estimated average number of professional employees per municipal advisors not otherwise registered with the Commission) = 4,910.

¹⁴⁶¹ See letter from Donna DiMaria, President, Third Party Marketers Association, dated August 27, 2009, available at <http://www.sec.gov/comments/s7-18-09/s71809-36.pdf> (commenting on the Commission's proposal to adopt a rule addressing "pay-to-play" practices by investment advisers and estimating that the typical solicitor firm consists of 2 to 5 professionals). See Proposal, 76 FR at 865.

¹⁴⁶² 100 (estimated number of solicitors) \times 5 (estimated number of Form MA-I applicants per solicitor) = 500. See Proposal, 76 FR at 865.

¹⁴⁶³ The Commission staff has examined Form MA-T data as of December 31, 2012, and estimates that approximately 16% of Form MA-T registrants are solicitors (177 Form MA-T registrants that are solicitors \div 1,110 municipal advisors registered on Form MA-T = 15.95%). The Commission assumes that the same percentage of solicitors will register with the Commission on Form MA. 910 (estimated number of municipal advisors registered on Form MA) \times 16% = 145.6.

¹⁴⁶⁴ 146 (estimated number of solicitors that are registered as municipal advisors) \times 5 (estimated average number of professional employees per solicitor) = 730.

body appointees “who may number in the tens of thousands and will likely require significantly more time and expense per person to ensure compliance than the population of financial professionals assumed in the Proposed Rule.”¹⁴⁶⁵ In the Proposal, the Commission stated that it did not believe that appointed members of a governing body of a municipal entity that are not elected ex officio members should be excluded from the definition of “municipal advisor.”¹⁴⁶⁶ As discussed above, however, Rule 15Ba1-1(d)(3)(ii) now provides an exemption from the definition of municipal advisor for any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person to the extent that such person is acting within the scope of such person’s official capacity, regardless of whether such person is an employee of the municipal entity or obligated person.¹⁴⁶⁷ Therefore, the Commission does not believe that it should increase the current estimated number of Form MA-I to account for appointed board members of governing bodies.

The Commission is not revising its initial estimate of the average number of firms that will newly register as a municipal advisor each year. In the Proposal, the Commission estimated that the average number of new Form MA applicants per year would be approximately 100.¹⁴⁶⁸ The Commission staff has reviewed Form MA-T data as of December 31, 2012, and estimates that approximately 205 municipal advisors filed an initial Form MA-T in 2011 and approximately 115

¹⁴⁶⁵ See Wayne County Airport Authority Letter.

¹⁴⁶⁶ See Proposal, 76 FR at 834. As proposed, to trigger the municipal advisor registration requirement, an appointed member of a governing body would have needed to be engaged in municipal advisory activities, and most appointed members do not engage in such activities.

¹⁴⁶⁷ See supra Section III.A.1.c.i.

¹⁴⁶⁸ For its estimate of the average annual number of new Form MA applicants, the Commission relied on investment adviser registration data, which indicated that new investment adviser applicants comprise, on average, approximately 10.4% of the total number of registered investment advisers. See Proposal, 76 FR at 866. $1,000$ (all Form MA applicants) \times 10.4% = 104 new Form MA applicants per year. See id.

filed an initial Form MA-T in 2012. In the Proposal, the Commission stated that it believed that the number of Form MA-T registrants would likely increase beyond 800 because numerous applicants that would have been required to register might have missed the October 30, 2010, deadline for a variety of reasons, such as concluding, based on their interpretation of the Dodd-Frank Act, that they were not required to register as municipal advisors.¹⁴⁶⁹ The Commission believes this could explain the higher number of municipal advisors that filed an initial Form MA-T in 2011 than in 2012. Thus, the Commission believes that, going forward, it is appropriate to estimate approximately 115 new Form MA-T registrations per year (assuming the temporary regime were to continue). Based on the estimate of the number of new Form MA-T registrations per year, the Commission continues to estimate that approximately 100 new municipal advisory firms will register on Form MA each year.¹⁴⁷⁰

The Commission, however, is revising its estimate of the average number of individuals for whom municipal advisory firms will need to submit a new Form MA-I. In the Proposal, the Commission estimated that the average number of new Form MA-I applicants per year would be 1,800.¹⁴⁷¹ The Commission now estimates that municipal advisors will need to submit a new Form

¹⁴⁶⁹ See id. at 865.

¹⁴⁷⁰ The Commission estimates that the percentage of Form MA-T registrants that will also be Form MA registrants is 82%, or 910 (estimated number of Form MA registrants) ÷ 1,110 (current Form MA-T registrants). The Commission assumes that this percentage adjustment also applies in connection with its estimate of the number of new municipal advisory firms that will register on Form MA each year. 115 (estimated number of new Form MA-T registrants per year) × 82% = 94.3 new Form MA registrants per year.

¹⁴⁷¹ To estimate the average annual number of new Form MA-I applicants, the Commission relied on FINRA registration data, which indicated that new Form U4 applicants that are new to the industry comprise, on average, approximately 8.39% of the total number of Form U4 applicants. See Proposal, 76 FR at 866. 21,800 (all Form MA-I applicants) × 8.39% = 1,829 new Form MA-I applicants per year. See id.

MA-I for approximately 950 individuals annually.¹⁴⁷²

D. Total Initial and Annual Reporting and Recordkeeping Burdens

1. Initial Registration Burden

a. Form MA

In the Proposal, the Commission estimated that it would take a municipal advisory firm an average of 3.5 hours to complete Form MA.¹⁴⁷³ This estimate was based on the estimated average amount of time for a municipal advisory firm to complete Form MA-T and the estimated average amount of time for an investment adviser to complete Part 1A of Form ADV. The Commission stated in the Proposal that this estimate would apply to all municipal advisory firms because even those that had already completed Form MA-T under the temporary registration regime would be required to register anew under the permanent registration regime.¹⁴⁷⁴

Additionally, the Commission stated in the Proposal that, at the time it initially files Form MA, a municipal advisory firm would be required to conduct an initial review of its business and certify that, among other things, it and every natural person associated with the municipal advisory firm would meet standards required by the Commission, the MSRB, or any other relevant SRO to engage in municipal advisory activities. The Commission estimated that the initial burden to comply with the Form MA self-certification requirement would be, on average, approximately 3.0 hours per applicant.¹⁴⁷⁵ The Commission based this estimate on burden estimates for Form N-CSR (“Certified Shareholder Report of Registered Management Investment Companies”) and Form N-Q

¹⁴⁷² 11,250 (initial number of individuals for whom municipal advisory firms will need to submit a Form MA-I) \times 8.39% = 943.88 individuals for whom municipal advisory firms will need to submit a new Form MA-I.

¹⁴⁷³ See Proposal, 76 FR at 866.

¹⁴⁷⁴ See *id.*

¹⁴⁷⁵ See *id.* at 866–67.

("Quarterly Schedule of Portfolio Holdings of Registered Management Investment Company"), which include similar self-certification requirements.¹⁴⁷⁶ Thus, the Commission estimated that the total average initial burden for Form MA would be 6.5 hours per applicant.¹⁴⁷⁷

As noted above, the Commission is making some revisions to clarify the questions asked in the forms and to elicit additional information. The Commission recognizes that some revisions will increase the burden for municipal advisors to complete the relevant forms, while others will decrease the burden. For example, to reduce the burden for municipal advisory firms with many offices, Form MA will require information pertaining only to the five largest offices. On the other hand, Form MA now requires certain additional information that will result in additional burdens, including additional identifying information and information regarding disciplinary history.

Because of these reasons and because most of the changes to Form MA are clarifications not requiring additional information,¹⁴⁷⁸ on balance, the Commission does not believe the additional information requirements will impose additional burdens on municipal advisors in the aggregate. As noted in the Proposal, the average time necessary to complete Form MA-T is 2.5 hours, while the average time necessary to complete Part 1A of Form ADV, a lengthier registration form, is 4.32 hours.¹⁴⁷⁹ Based on the comparative estimated burdens to complete Form MA-T and Part 1A of Form ADV, the Commission continues to believe that its burden estimate for the completion of Form MA is reasonable. As discussed above, however, the Commission is not adopting a self-

¹⁴⁷⁶ See Securities Exchange Act Release No. 47262 (January 27, 2003), 68 FR 5348 (February 3, 2003); Securities Exchange Act Release No. 49333 (February 27, 2004), 69 FR 11244 (March 9, 2004). See also Proposal, 76 FR at 866.

¹⁴⁷⁷ See Proposal, 76 FR at 867.

¹⁴⁷⁸ See *supra* Section III.A.2.

¹⁴⁷⁹ See Proposal, 76 FR at 866.

certification requirement.¹⁴⁸⁰ Therefore, the Commission estimates that the total average initial burden for Form MA will be 3.5 hours per applicant.

In the Proposal, the Commission estimated that the total initial paperwork burden for completion and submission of Form MA during the first year would be 6,500 hours.¹⁴⁸¹ Given its revised estimates for Form MA applicants, as described above, and its decision not to adopt a self-certification requirement, the Commission now estimates that the total initial paperwork burden for completion and submission of Form MA during the first year will be 3,185 hours.¹⁴⁸²

In the Proposal, the Commission solicited comments on the collection of information burdens associated with the proposed rules and forms.¹⁴⁸³ The Commission received two comment letters that addressed the Commission's burden estimates for Form MA. Both commenters argued that completing Form MA would require significantly more than the estimated 6.5 hours.¹⁴⁸⁴ One commenter, in particular, asserted that:

[T]he cost estimates included in the Proposal are grossly underestimated. Rather than the 6.5 hours estimated by the Commission, our members estimate that the initial preparation of Form MA would require significantly greater hours and much higher costs. Annual updates are estimated to require exponentially higher hours to update and maintain the filing. In this regard, some of our members have observed that the time required to prepare the Form MA-T to register under the Commission's temporary rules required well in excess of 6.5 hours.¹⁴⁸⁵

However, this commenter did not provide specific figures by which to recalculate the Commission's estimates, making it difficult to evaluate these assertions.

¹⁴⁸⁰ See supra Section III.A.2.b.

¹⁴⁸¹ $1,000$ (persons required to submit Form MA) \times 6.5 hours (average estimated time required to complete Form MA and initial self-certification) = 6,500 hours. Id.

¹⁴⁸² 910 (persons required to submit Form MA) \times 3.5 hours (average estimated time required to complete Form MA) = 3,185 hours.

¹⁴⁸³ See Proposal, 76 FR at 872.

¹⁴⁸⁴ See, e.g., Union Bank Letter; Financial Services Roundtable Letter.

¹⁴⁸⁵ See Financial Services Roundtable Letter.

While the Commission recognizes that some applicants will require well in excess of 3.5 hours to complete Form MA, the Commission reiterates that the hourly estimate is meant to reflect an average and emphasizes that, as noted in the Proposal, depending on the specific circumstances of the municipal advisory firm, the initial burden to complete Form MA will vary greatly from respondent to respondent.¹⁴⁸⁶ Factors that will affect the initial burden include the size of the municipal advisory firm, the complexity of its business activities, and the amount and type of information to be included on Form MA. Moreover, as noted above, Form MA generally allows applicants for municipal advisor registration to incorporate by reference information that already has been submitted on other forms under other Commission regulatory requirements.¹⁴⁸⁷ The Commission believes that the ability of registrants to incorporate by reference will lower the hourly average burden for many applicants. The Commission anticipates that, generally, many smaller municipal advisory firms will require less time than the 3.5 hour average burden estimate, while larger municipal advisory firms that offer a variety of services to municipal entities will require considerably more time since they will have more information to disclose in Form MA.

The collection of information made pursuant to Form MA is mandatory and generally will not be confidential and will be made publicly available. Some information, such as social security numbers, will be kept confidential subject to applicable law.

b. Form MA-I

In the Proposal, the Commission estimated that the average amount of time for a natural person municipal advisor to complete Form MA-I would be 3.0 hours.¹⁴⁸⁸ The Commission determined this figure by estimating the paperwork burden for Form MA-I compared to that of

¹⁴⁸⁶ See Proposal, 76 FR at 867.

¹⁴⁸⁷ See supra Section III.A.2.

¹⁴⁸⁸ See Proposal, 76 FR at 867.

Form MA-T, which is estimated to be 2.5 hours per applicant.¹⁴⁸⁹ The Commission believed that the paperwork burden of completing Form MA-I would not be significantly greater than the amount of time required to complete Form MA-T because some of the information required for Form MA-I would have already been gathered to complete Form MA-T.¹⁴⁹⁰ In the Proposal, the Commission stated that the estimate of 3.0 hours to complete Form MA-I would apply to all natural person municipal advisors because even those that had already completed Form MA-T under the temporary registration regime would be required to register anew under the permanent registration regime.¹⁴⁹¹

As noted above, a natural person municipal advisor who is not a sole proprietor is no longer required to register as a municipal advisor by completing Form MA-I. However, the Commission has determined that a municipal advisory firm must submit Form MA-I to provide information pertaining to each associated person who engages in municipal advisory activities on the firm's behalf. Although the person responsible for submitting Form MA-I has changed since the Proposal, the Commission does not believe that its estimate regarding the number of hours required to complete Form MA-I would materially change. Rather, the Commission believes that it would take an individual and a municipal advisory firm substantially the same number of hours to complete Form MA-I. Similarly, although municipal advisory firms may, over time, become more efficient in completing Form MA-I, the Commission does not believe the time savings would be substantial enough to cause the Commission to revise its estimate.

As discussed above, the Commission is also making some revisions to clarify the questions asked in Form MA-I and to elicit additional information. The Commission recognizes that some

¹⁴⁸⁹ See Temporary Registration Rule Release, 75 FR at 54473. See also Proposal, 76 FR at 867.

¹⁴⁹⁰ See Proposal, 76 FR at 867.

¹⁴⁹¹ See id.

revisions will change the estimated burden provided in the Proposal to complete Form MA-I, while others will decrease the burden. For example, to reduce the paperwork burden, an individual's disciplinary history reported on Form MA can be incorporated by reference in Form MA-I. On the other hand, Form MA-I now requires certain additional information that would result in additional burden, including additional identifying information and information regarding disciplinary history.

As with Form MA, because most of the changes to Form MA-I are clarifications not requiring additional information, on balance, the Commission does not believe the additional information requirements will impose additional burdens on municipal advisors in the aggregate.¹⁴⁹² Moreover, as noted above, Form MA-I generally allows information that already has been submitted on other forms to be incorporated by reference.¹⁴⁹³ Based on the comparative estimated burden to complete Form MA-T and the ability to incorporate by reference, the Commission continues to believe that its hourly burden estimate for the completion of Form MA-I is reasonable and is retaining the estimate as originally proposed. Therefore, the Commission estimates that the average amount of time for a municipal advisory firm to complete Form MA-I with respect to each natural person who is a person associated with the municipal advisor and who engages in municipal advisory activities on its behalf will be 3.0 hours.

In the Proposal, the Commission estimated that, during the first year, the total paperwork burden for completion and submission of Form MA-I would be 65,400 hours.¹⁴⁹⁴ Given its revised estimate of the number of individuals for whom municipal advisory firms will need to complete a Form MA-I, as described above, the Commission now estimates that the total initial paperwork

¹⁴⁹² See supra Section III.A.2.

¹⁴⁹³ See supra Section III.A.2.

¹⁴⁹⁴ 21,800 (individuals required to submit Form MA-I) × 3.0 hours (average estimated time required to complete Form MA-I and initial self-certification) = 65,400 hours. See Proposal, 76 FR at 867.

burden for completion and submission of Form MA-I during the first year will be 33,750 hours.¹⁴⁹⁵

The Commission received two comment letters addressing the estimated burden to complete Form MA-I. One commenter contended that Form MA-I, as proposed, contained many questions that are irrelevant to board trustees who are not involved in investment transactions.¹⁴⁹⁶ According to the commenter, completion of the form would likely take longer than three hours, would not benefit the Commission, and would impose unnecessary burdens and costs.¹⁴⁹⁷ Another commenter argued that the registration process would create burdens that would significantly outweigh any benefits created for a citizen to volunteer its services and that the registration requirements, such as paying fees, meeting multiple disclosure requirements, and facing ongoing potential liabilities, could act as a deterrent for volunteers.¹⁴⁹⁸

The Commission stated in the Proposal that it did not believe that appointed members of a governing body of a municipal entity that are not elected ex officio members, such as citizen volunteers, should be excluded from the definition of “municipal advisor.”¹⁴⁹⁹ As discussed above, however, Rule 15Ba1-1(d)(3)(ii) now provides an exemption from the definition of municipal advisor for any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person to the extent that such person is acting within the scope of such person’s official capacity, regardless of whether such person is an employee of the municipal entity or obligated

¹⁴⁹⁵ 11,250 (individuals for whom municipal advisors will be required to submit Form MA-I) × 3.0 hours (average estimated time required to complete Form MA-I) = 33,750 hours.

¹⁴⁹⁶ See Pennsylvania Public School Employees’ Retirement Board Letter.

¹⁴⁹⁷ See id.

¹⁴⁹⁸ See National Association of Counties Letter.

¹⁴⁹⁹ See Proposal, 76 FR at 834.

person.¹⁵⁰⁰ Accordingly, under the rules that the Commission is adopting today, board trustees are not required to complete Form MA-I. The Commission, therefore, has not included citizen volunteers for purposes of the current PRA hourly burden estimate or the economic analysis cost estimates.

The collection of information made pursuant to Form MA-I is mandatory and generally will not be confidential and will be made publicly available. Some information, such as social security numbers, will be kept confidential subject to applicable law.

c. Total Initial Registration Burden Calculation

The Commission now estimates that the total initial one-time burden for municipal advisors to register with the Commission will be approximately 36,935 hours.¹⁵⁰¹

2. Annual Burden for Newly Registered Municipal Advisors

In the Proposal, the Commission estimated that the annual paperwork burden for firms to newly register as municipal advisors after the first year would be 650 hours for Form MA¹⁵⁰² and 5,400 hours for Form MA-I.¹⁵⁰³ In light of its decision not to adopt a self-certification requirement, the Commission now estimates that the total ongoing annual burden for firms that will newly register as municipal advisors each year to complete Form MA will be approximately 350 hours.¹⁵⁰⁴ In addition, given the revised estimate of the average number of individuals for whom municipal

¹⁵⁰⁰ See supra Section III.A.1.c.i.

¹⁵⁰¹ 3,185 (estimated initial burden for completion and submission of Form MA during the first year) + 33,750 (estimated initial burden for completion and submission of Form MA-I during the first year) = 36,935 hours.

¹⁵⁰² 100 (new Form MA applicants per year) × 6.5 hours (average estimated time required to complete Form MA and initial self-certification) = 650 hours. See Proposal, 76 FR at 868.

¹⁵⁰³ 1,800 (new Form MA-I registrants per year) × 3.0 hours (average estimated time required to complete Form MA-I and initial self-certification) = 5,400 hours. See id.

¹⁵⁰⁴ 100 (new Form MA applicants per year) × 3.5 hours (average estimated time required to complete Form MA) = 350 hours.

advisory firms will need to submit a new Form MA-I, the Commission now estimates that the total annual burden to submit a new Form MA-I will be approximately 2,850 hours.¹⁵⁰⁵ Thus, the Commission estimates that the annual ongoing registration burden for new municipal advisors after the first year will be approximately 3,500 hours.¹⁵⁰⁶

3. Annual Burden for Amendments to Form MA and Form MA-I

In the Proposal, the Commission estimated that the average time necessary to prepare an annual amendment to Form MA would be approximately 1.5 hours because only certain parts of Form MA would need to be amended.¹⁵⁰⁷ The Commission recognized that, depending on the extent of the amendments, the burden to complete an annual amendment to Form MA may vary greatly from respondent to respondent, and that some municipal advisors would require significantly more time than 1.5 hours, while others would require significantly less time than 1.5 hours.¹⁵⁰⁸ In addition, the Commission estimated that the annual burden to comply with the Form MA self-certification requirement would be, on average, approximately one hour per respondent. This estimate was based on burden estimates for Form N-CSR and Form N-Q.¹⁵⁰⁹

In the Proposal, the Commission estimated that the average amount of time necessary to prepare an interim updating amendment to Form MA (i.e., any additional amendment other than the required annual amendment) would be 0.5 hours.¹⁵¹⁰ The Commission based this figure on its estimate for the amount of time required to prepare an interim updating amendment to Form

¹⁵⁰⁵ 950 (new Form MA-I filings per year) × 3.0 hours (average estimated time required to complete Form MA-I) = 2,850 hours.

¹⁵⁰⁶ 350 (estimated annual ongoing burden to complete Form MA) + 2,850 (estimated annual ongoing burden to complete Form MA-I) = 3,200 hours.

¹⁵⁰⁷ See Proposal, 76 FR at 868.

¹⁵⁰⁸ See id.

¹⁵⁰⁹ See id.

¹⁵¹⁰ See id.

ADV.¹⁵¹¹ The Commission estimated that each municipal advisor would likely amend Form MA two times during the year – one annual amendment and one interim updating amendment – although the Commission recognized that the actual number of amendments per municipal advisor might be higher or lower depending on the circumstances.¹⁵¹² Accordingly, the Commission estimated that the total burden to amend Form MA per year, including compliance with the annual self-certification requirement, would be 3,000 hours.¹⁵¹³

Given the revised estimate of the number of municipal advisors that will register with the Commission on Form MA initially, as described above, and its decision not to adopt a self-certification requirement, the Commission now estimates that the total annual burden for municipal advisors to amend Form MA will be 1,820 hours.¹⁵¹⁴

In the Proposal, the Commission estimated that the average amount of time to complete an updating amendment to Form MA-I would be 0.5 hours.¹⁵¹⁵ The Commission based this figure on its estimate of the amount of time required to prepare an interim updating amendment to Form ADV.¹⁵¹⁶ The Commission further estimated that the time required to complete the Form MA-I

¹⁵¹¹ See id.

¹⁵¹² See id.

¹⁵¹³ $(1,000 \text{ (persons required to amend Form MA)} \times 2.5 \text{ hours (average estimated time to amend Form MA and complete self-certification annually)} \times 1.0 \text{ (number of annual amendments per year)}) + (1,000 \text{ (persons required to amend Form MA)} \times 0.5 \text{ hours (average estimated time to prepare an interim updating amendment for Form MA)} \times 1.0 \text{ (number of interim updating amendments per year)}) = 3,000 \text{ hours per year. } \underline{\text{See id.}}$

¹⁵¹⁴ $(910 \text{ (number of municipal advisors required to submit an annual amendment to Form MA)} \times 1.5 \text{ hours (average estimated time to prepare an annual amendment to Form MA)} \times 1.0 \text{ (number of annual amendments per year)}) + (910 \text{ (number of municipal advisors required to submit an interim updating amendment to Form MA)} \times 0.5 \text{ hours (average estimated time to prepare an interim updating amendment to Form MA)} \times 1.0 \text{ (number of interim updating amendments per year)}) = 1,820 \text{ hours per year.}$

¹⁵¹⁵ See Proposal, 76 FR at 868.

¹⁵¹⁶ See id.

annual self-certification requirement would be approximately five minutes, or 0.1 hours.¹⁵¹⁷ The Commission, relying on FINRA U4 registration data, estimated that a Form MA-I respondent would submit an average of 1.7 updating amendments per year. Therefore, the Commission estimated the total burden to prepare updating amendments to Form MA-I and to complete the annual self-certification would be approximately 20,700 hours.¹⁵¹⁸

In addition, under the proposed rules and forms, the Commission would have required individuals who register as municipal advisors by completing Form MA-I to file Form MA-W to withdraw from registration. Accordingly, in the proposal, the Commission estimated that the total annual burden to withdraw from MA-I registration would be approximately 1,350 hours.¹⁵¹⁹

As noted above, a natural person municipal advisor who is not a sole proprietor is no longer required to register as a municipal advisor by completing Form MA-I. However, the Commission has determined that municipal advisory firms must submit Form MA-I to provide information pertaining to each associated person who engages in municipal advisory activities on the firm's behalf. In addition, the final rules and forms require municipal advisory firms to amend Form MA-I to indicate that an individual is no longer an associated person of the municipal advisory firm filing

¹⁵¹⁷ See *id.* The Commission stated its belief that this estimate was appropriate given the short time required to read and review the self-certification statement and sign the section.

¹⁵¹⁸ $(21,800 \text{ (persons required to amend Form MA-I during any given year)} \times 0.5 \text{ hours (average estimated time to prepare any updating amendment for Form MA-I)} \times 1.7 \text{ (average number of amendments per year)}) + (21,800 \text{ (persons required to complete annual self-certification on Form MA-I)} \times 0.1 \text{ hours (average estimated time to complete self-certification)}) = 20,710 \text{ hours per year. See } id. \text{ at } 869.$

¹⁵¹⁹ The Commission, relying on the proportion of individuals who fully terminated FINRA registration to all Form U4 registrants, estimated that the average number of Form MA-I withdrawals per year would be approximately 2,700. $21,800 \text{ (all Form MA-I applicants)} \times (79,722 \div 637,000) \text{ (proportion of individuals who fully terminated FINRA registration to all Form U4 registrants)} = 2,728.$ See Proposal, 76 FR at 869. $2,700 \text{ (estimated number of persons withdrawing from Form MA-I registration each year)} \times 0.5 \text{ hours (average estimated time to complete Form MA-W)} = 1,350 \text{ hours per year. Id.}$

the form or no longer engaged in municipal advisory activities on its behalf.

Given the revised estimate of the number of individuals for whom municipal advisory firms will need to submit a Form MA-I, the Commission now estimates that the average number of amendments to Form MA-I that municipal advisory firms will need to submit to indicate that an individual is no longer an associated person of the municipal advisory firm filing the form or no longer engages in municipal advisory activities on its behalf will be approximately 1,340.¹⁵²⁰ Thus, the total annual ongoing burden for municipal advisory firms to amend Form MA-I for this purpose will be approximately 670 hours.¹⁵²¹

Given the change to Form MA-I described above and the overall revised estimate of the number of individuals for whom municipal advisors will be required to submit a Form MA-I, the Commission now estimates that the total annual burden municipal advisors will incur to prepare updating amendments to Form MA-I will be approximately 9,563 hours.¹⁵²² As discussed in Section III.A.2, the final rules do not require an annual self-certification on Form MA-I.

The Commission received one comment that specifically addressed the estimated burden for amendments to Form MA and Form MA-I.¹⁵²³ Although the commenter did not provide its own burden estimates, it argued that “[a]nnual updates are estimated to require exponentially higher

¹⁵²⁰ 11,250 (estimated number of individuals for whom municipal advisors will be required to submit Form MA-I) \times (79,722 \div 670,016) (proportion of individuals who fully terminated FINRA registration to all Form U4 registrants) = 1,338.6.

¹⁵²¹ 1,340 (estimated number of persons withdrawing from Form MA-I each year) \times 0.5 hours (average estimated time to prepare an updating amendment to Form MA-I) = 670 hours per year.

¹⁵²² 11,250 (estimated number of individuals who are employed at municipal advisors for whom updating amendments to Form MA-I will need to be filed) \times 0.5 hours (average estimated time to prepare an updating amendment to Form MA-I) \times 1.7 (average number of amendments per year) = 9,562.5 hours per year.

¹⁵²³ See Financial Services Roundtable Letter.

hours to update and maintain the filing.”¹⁵²⁴ This commenter also did not provide specific figures by which to recalculate the estimates, making it difficult to evaluate these assertions.

While the Commission is aware that in some cases (*i.e.*, for some larger municipal advisors with a large number of municipal entity and obligated person clients) annual updates may require significantly more time than estimated in the Proposal, the Commission does not agree that regular updates will generally require “exponentially higher” hours. The Commission anticipates that such updates will involve incremental or minor changes in reporting and in most cases will not require large-scale changes to Form MA or Form MA-I. Thus, the Commission believes that its hourly burden estimates for amendments to Form MA and Form MA-I remain reasonable and retains them as originally proposed.

In summary, the Commission estimates that the total annual burden for municipal advisors to complete amendments to Form MA and Form MA-I will be approximately 12,053 hours.¹⁵²⁵

The collection of information made pursuant to amendments to Form MA and Form MA-I is mandatory and generally will not be confidential and will be made publicly available. Some information, such as social security numbers, will be kept confidential subject to applicable law.

4. Withdrawal from Municipal Advisor Registration

In the Proposal, the Commission estimated that the average time necessary to complete Form MA-W would be approximately 0.5 hours.¹⁵²⁶ The Commission based this estimate on

¹⁵²⁴ See id.

¹⁵²⁵ 1,820 (estimated annual burden for municipal advisors to amend Form MA) + 670 (estimated annual burden for municipal advisors to amend Form MA-I to indicate that an individual is no longer an associated person of the municipal advisory firm filing the form or no longer engages in municipal advisory activities on its behalf) + 9,563 (estimated annual burden for municipal advisors to prepare updating amendments to Form MA-I) = 12,053 hours.

¹⁵²⁶ See Proposal, 76 FR at 869.

burden estimates for Form ADV-W.¹⁵²⁷ Further, in the Proposal, the Commission estimated that the average number of withdrawals from Form MA registration per year would be 60,¹⁵²⁸ and that the total annual burden would be approximately 30 hours.¹⁵²⁹

The Commission received no comment letters that specifically addressed the Form MA-W hourly burden estimates. Although the Commission has made modifications to Form MA-W since the Proposal, because those changes are minor,¹⁵³⁰ the Commission is retaining its hourly burden estimates for Form MA-W as originally proposed.

The Commission has reviewed Form MA-T data as of December 31, 2012, and estimates that approximately 22 municipal advisors filed a withdrawal on Form MA-T in 2011 and approximately 24 municipal advisors filed a withdrawal on Form MA-T in 2012. Based on experience with withdrawals on Form MA-T, the Commission now estimates that the average number of withdrawals from Form MA registration per year will be 30,¹⁵³¹ and that the total annual burden will be approximately 15 hours.¹⁵³²

The collection of information made pursuant to Form MA-W is mandatory and generally will not be confidential and will be made publicly available. Some information, such as social

¹⁵²⁷ See id.

¹⁵²⁸ To estimate the annual number of withdrawals for Form MA registrants, the Commission staff relied on investment adviser registration data, which indicated that, annually, investment adviser withdrawals comprise, on average, approximately 6.4% of the total number of registered investment advisers. $1,000$ (all Form MA applicants) \times 6.4% = 64 Form MA withdrawals per year. See id.

¹⁵²⁹ 60 (estimated number of persons withdrawing from Form MA registration each year) \times 0.5 hours (average estimated time to complete Form MA-W) = 30 hours per year. See id.

¹⁵³⁰ See supra Section III.A.4.

¹⁵³¹ This estimate represents an average of the number of withdrawals on Form MA-T in 2011 (22) and 2012 (24) rounded to the nearest higher multiple of ten.

¹⁵³² 30 (estimated number of persons withdrawing from Form MA registration per year) \times 0.5 hours (average estimated time to complete Form MA-W) = 15 hours per year.

security numbers, will be kept confidential subject to applicable law.

5. Non-Resident Municipal Advisors

In the Proposal, the Commission estimated that there would be approximately 20 Form MA-NR filers: 16 non-resident general partners or non-resident managing agents¹⁵³³ and three non-resident municipal advisory firms.¹⁵³⁴ In the Proposal, the Commission noted that the average time necessary to complete Form ADV-NR, which is similar to Form MA-NR, is approximately one hour.¹⁵³⁵ The Commission estimated that, because of the additional time required to find and designate an agent, the process to complete Form MA-NR would take longer than Form ADV-NR, or approximately 1.5 hours on average.¹⁵³⁶ Thus, the Commission estimated that the total initial burden to complete Form MA-NR would be approximately 30 hours.¹⁵³⁷

In addition, the Commission estimated that the additional burden to provide an opinion of counsel would add approximately three hours and \$900 in outside legal costs per respondent.¹⁵³⁸ To obtain this estimate, the Commission relied on its burden estimates for Form 20-F, a form submitted

¹⁵³³ 1,000 (all Form MA applicants) \times 1.64% (percentage of Form ADV-NR filings to total number of investment adviser applicants) = 16 Form MA-NR filers that are non-resident general partners or non-resident managing agents. See Proposal, 76 FR at 869-70.

¹⁵³⁴ 1,000 (all Form MA applicants) \times (2 \div 800) (proportion of non-U.S.-based Form MA-T registrants compared to all Form MA-T registrants) = 2.5 Form MA-NR filers that are non-resident municipal advisors. See id. at 870.

¹⁵³⁵ See id. at 869.

¹⁵³⁶ See id. The burden associated with this process would primarily involve the designation and authorization of a United States person as an agent for service of process.

¹⁵³⁷ 20 (persons expected to file Form MA-NR for the first time) \times 1.5 hours (average estimated time to complete Form MA-NR) = 30 hours. See id. at 870.

¹⁵³⁸ See id. The \$900 figure is based on an hourly cost estimate of \$400 on average for an outside attorney, which is based on Commission conversations with law firms that regularly assist regulated financial firms with compliance matters. See Investment Advisers Act Release No. 3222 (June 22, 2011), 76 FR 39646 (July 6, 2011). Based on previous burden estimates, the Commission estimated that outside counsel will take, on average, 2.25 hours to assist in preparation of the opinion of counsel, for an average cost of \$900 per respondent.

by certain foreign private issuers, which has a similar opinion of counsel requirement to Rule 15Ba1-6(d).¹⁵³⁹ The Commission estimated that the total initial burden to provide an opinion of counsel would be approximately 9 hours¹⁵⁴⁰ and that the total initial cost for all non-resident municipal advisory firms to hire outside counsel as part of providing an opinion of counsel would be approximately \$2,700.¹⁵⁴¹ Thus, the Commission estimated that the total initial burden to complete Form MA-NR and provide an opinion of counsel would be 39 hours.

The Commission received no comment letters that specifically addressed the Form MA-NR hourly burden estimates. Although the Commission has made modifications to Form MA-NR since the Proposal, because most of the changes are clarifications not requiring additional information, on balance, the Commission does not believe the additional information requirements will impose significant additional burdens on municipal advisors,¹⁵⁴² and is retaining its hourly burden estimates to complete Form MA-NR as originally proposed.¹⁵⁴³ Given the revised estimate of Form MA applicants as described above, the Commission now estimates that two non-resident municipal advisory firms will need to complete Form MA-NR.¹⁵⁴⁴ In addition, the Commission estimates that those non-resident municipal advisory firms will need to furnish Form MA-NR for 15 non-resident

¹⁵³⁹ See Proposal, 76 FR at 870.

¹⁵⁴⁰ 3 (non-resident municipal advisory firms expected to provide an opinion of counsel) \times 3.0 hours (average estimated time to provide an opinion of counsel) = 9 hours. See *id.*

¹⁵⁴¹ 3 (non-resident municipal advisory firms expected to provide opinion of counsel) \times \$900 (average estimated cost to hire outside counsel for providing an opinion of counsel) = \$2,700. See *id.*

¹⁵⁴² See *supra* Section III.A.6.

¹⁵⁴³ See *supra* note 1536 and accompanying text.

¹⁵⁴⁴ 910 (all Form MA applicants) \times $(2 \div 900)$ (proportion of non-U.S.-based Form MA-T registrants compared to all Form MA-T registrants) = 2.02 Form MA-NR filers that are non-resident municipal advisors.

general partners and non-resident managing agents.¹⁵⁴⁵

The final rules and forms will also require each non-resident municipal advisory firm to file Form MA-NR for each non-resident natural person associated with the municipal advisor who engages in municipal advisory activities on behalf of the municipal advisor. The Commission estimates that the number of such non-resident natural persons will be the same as the number of non-resident general partners or non-resident managing agents, or 15.¹⁵⁴⁶ Thus, the total number of Form MA-NR filers will be approximately 32, and the total initial burden to complete Form MA-NR will be approximately 48 hours.¹⁵⁴⁷

The Commission also estimates that the total initial burden to provide an opinion of counsel will be approximately 6 hours.¹⁵⁴⁸ Thus, the Commission estimates that the total initial burden to complete the estimated number of Form MA-NR submissions and provide an opinion of counsel will be 54 hours.¹⁵⁴⁹ In addition, the Commission now estimates that the total initial cost for all non-resident municipal advisory firms to hire outside counsel as part of providing an opinion of counsel will be approximately \$1,800.¹⁵⁵⁰

In the Proposal, the Commission also estimated the ongoing annual number of new Form

¹⁵⁴⁵ 910 (all Form MA applicants) \times 1.64% (percentage of Form ADV-NR filings to total number of investment adviser applicants) = 14.92 Form MA-NR filers that are non-resident general partners or non-resident managing agents.

¹⁵⁴⁶ See supra note 1545 and accompanying text. The Proposal did not include the number of Form MA-I filers in estimating the burden associated with Form MA-NR.

¹⁵⁴⁷ 32 (persons expected to file Form MA-NR for the first time) \times 1.5 hours (average estimated time to complete Form MA-NR) = 48 hours.

¹⁵⁴⁸ 2 (non-resident municipal advisory firms expected to provide opinion of counsel) \times 3.0 hours (average estimated time to provide an opinion of counsel) = 6 hours.

¹⁵⁴⁹ 48 hours (total initial burden to complete of Form MA-NR) + 6 hours (total initial burden to provide an opinion of counsel) = 54 hours.

¹⁵⁵⁰ 2 (non-resident municipal advisory firms expected to provide opinion of counsel) \times $\$900$ (average estimated cost to hire outside counsel to provide an opinion of counsel) = $\$1,800$.

MA-NR filers that are non-resident general partners or non-resident managing agents. Relying on investment adviser registration data, the Commission estimated that only one municipal advisor respondent per year would have a non-resident general partner or non-resident managing agent that would be required to complete a new Form MA-NR.¹⁵⁵¹ This estimate included the ongoing annual number of new Form MA-NR filers that are non-resident municipal advisors since the small initial number of non-resident municipal advisors suggested that, at most, there would be only one new non-resident municipal advisor every several years. Thus, the Commission estimated that the total burden per year to complete Form MA-NR would be approximately two hours.¹⁵⁵² For the purposes of the analysis, the Commission assumed that the one new non-resident municipal advisor per year would not be a natural person and would thus be required to provide opinion of counsel. The Commission estimated that the total burden per year to provide opinion of counsel would be approximately three hours¹⁵⁵³ and that the ongoing annual cost for non-resident municipal advisors to hire outside counsel as part of providing opinion of counsel would be approximately \$900.¹⁵⁵⁴

The Commission continues to estimate that only one municipal advisor respondent per year will have a non-resident general partner, non-resident managing agent, or associated person that would be required to complete a new Form MA-NR.¹⁵⁵⁵ Thus, as in the Proposal, the Commission

¹⁵⁵¹ $1,000$ (all Form MA applicants) \times 0.09% (average annual percentage filings of Form ADV-NR) = 0.9 Form MA-NR filers per year; this number was rounded up to 1. See Proposal, 76 FR at 870.

¹⁵⁵² 1 (persons expected to file Form MA-NR each year) \times 1.5 (average estimated time to complete Form MA-NR) = 1.5 hours per year. See id.

¹⁵⁵³ 1 (municipal advisory firms expected to provide an opinion of counsel) \times 3.0 (average estimated time to provide opinion of counsel) = 3.0 hours per year. See id.

¹⁵⁵⁴ 1 (persons expected to file Form MA-NR each year) \times $\$900$ (average estimated cost to hire outside counsel to provide opinion of counsel) = $\$900$. See id.

¹⁵⁵⁵ 910 (all Form MA applicants) \times 0.09% (average annual percentage filings of Form ADV-NR) = 0.82 Form MA-NR filers per year; as in the initial estimate, this number is rounded up to 1.

estimates that the total burden per year to complete a new Form MA-NR will be approximately two hours;¹⁵⁵⁶ the total burden per year to provide opinion of counsel will be approximately three hours;¹⁵⁵⁷ and the ongoing annual cost for non-resident municipal advisors to hire outside counsel as part of providing opinion of counsel will be approximately \$900.¹⁵⁵⁸

The Commission notes that filers may incur recurring burdens associated with Form MA-NR, such as costs incurred to monitor and maintain the information required by the form. For the purposes of this analysis, these recurring burdens are included in the estimates noted above. Rule 15Ba1-6 also will require that municipal advisors update the information on Form MA-NR if it becomes inaccurate. Similarly, these burdens are accounted for in the above estimates.

In summary, the Commission now estimates that the total initial burden for Form MA-NR will be approximately 54 hours;¹⁵⁵⁹ the total ongoing annual burden to complete a new Form MA-NR will be approximately two hours;¹⁵⁶⁰ the total initial cost for all non-resident municipal advisory firms to hire outside counsel as part of providing an opinion of counsel will be approximately \$1,800;¹⁵⁶¹ and the ongoing annual cost for non-resident municipal advisors to hire outside counsel as part of providing opinion of counsel will be approximately \$900.¹⁵⁶²

The collection of information made pursuant to Form MA-NR is mandatory and will not be confidential and will be made publicly available.

¹⁵⁵⁶ 1 (persons expected to file Form MA-NR each year) × 1.5 (average estimated time to complete Form MA-NR) = 1.5 hours per year.

¹⁵⁵⁷ 1 (municipal advisory firms expected to provide an opinion of counsel) × 3.0 (average estimated time to provide opinion of counsel) = 3.0 hours per year.

¹⁵⁵⁸ See supra notes 1552–1554.

¹⁵⁵⁹ See supra note 1549 and accompanying text.

¹⁵⁶⁰ See supra note 1552 and accompanying text.

¹⁵⁶¹ See supra note 1550 and accompanying text.

¹⁵⁶² See supra note 1554 and accompanying text.

6. Outside Counsel

In the Proposal, the Commission stated its belief that some municipal advisory firms would seek outside counsel to help them comply with the requirements of the proposed rules, if adopted, and to complete Form MA.¹⁵⁶³ The Commission also stated its belief that it would be unlikely that natural person municipal advisors would obtain or consult with counsel for purposes of completing Form MA-I.¹⁵⁶⁴ For PRA purposes, the Commission assumed that all 1,000 municipal advisory firms registering on Form MA would, on average, consult with outside counsel for one hour to help them comply with the requirements.¹⁵⁶⁵ The Commission estimated that the total cost for all municipal advisory firms to hire outside counsel to review their compliance with the requirements of the proposed rules and forms would be approximately \$400,000.¹⁵⁶⁶ Given the revised estimate of Form MA applicants as described above, the Commission now estimates that such cost will be approximately \$364,000.¹⁵⁶⁷ In addition, firms that seek to register as municipal advisors in each year after the first will likely hire outside counsel to review their compliance with the requirements of the proposed rules and forms. As discussed above, the Commission estimates that approximately

¹⁵⁶³ See Proposal, 76 FR at 871.

¹⁵⁶⁴ See *id.*

¹⁵⁶⁵ See *id.*

¹⁵⁶⁶ $1,000$ (estimated number of municipal advisory firms that would hire outside counsel) \times 1 hour (average estimated time spent by outside counsel to help a municipal advisory firm comply with the rule) \times \$400 (hourly rate for an outside attorney) = \$400,000. The hourly cost estimate of \$400 on average for an attorney is based on Commission conversations with law firms that regularly assist regulated financial firms with compliance matters. See *id.*

¹⁵⁶⁷ 910 (estimated number of municipal advisory firms that would hire outside counsel) \times 1 hour (average estimated time spent by outside counsel to help a municipal advisory firm comply with the rule) \times \$400 (hourly rate for an outside attorney) = \$364,000. The hourly cost estimate of \$400 on average for an attorney is based on Commission conversations with law firms that regularly assist regulated financial firms with compliance matters. See *supra* note 1538 (calculating the hourly rate for an outside attorney).

100 new municipal advisory firms will register on Form MA each year.¹⁵⁶⁸ Accordingly, the Commission estimates that the ongoing cost for all municipal advisory firms to hire outside counsel to review their compliance with the requirements of the proposed rules and forms would be approximately \$40,000.¹⁵⁶⁹

As discussed above, the Commission received many comments that opined generally that municipal advisor registration under the proposed rules would be overly burdensome and would impose significant costs that would prove detrimental, especially to smaller “community banks” and local and state municipalities.¹⁵⁷⁰ Among these comments, many noted that local governments would need to hire counsel with expertise in dealing with the Commission to ensure that these officials are properly trained and advised in the intricacies of securities law.¹⁵⁷¹

As already discussed above, however, Rule 15Ba1-1(d)(3)(ii) now provides an exemption from the definition of municipal advisor for any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person to the extent that such person is acting within the scope of such person’s official capacity, regardless of whether such person is an employee of the municipal entity or obligated person.¹⁵⁷² Therefore, the concern that local governments would need to hire counsel to assist local government officials that are required to register as municipal

¹⁵⁶⁸ See supra note 1470 and accompanying text.

¹⁵⁶⁹ 100 (estimated number of new municipal advisory firms that would hire outside counsel each year) × 1 hour (average estimated time spent by outside counsel to help a municipal advisory firm comply with the rule) × \$400 (hourly rate for an outside attorney) = \$40,000. See supra note 1538 (calculating the hourly rate for an outside attorney).

¹⁵⁷⁰ See, e.g., Form Letter A.

¹⁵⁷¹ See, e.g., City of St. Petersburg, Florida Letter; City of Yuma, Arizona Letter; Texas Municipal League Letter; Spiroff & Gosselar Letter.

¹⁵⁷² See supra Section III.A.1.c.i.

advisors, thus raising the annual burden, is no longer warranted.

Another commenter argued that a natural person municipal advisor that registers on Form MA-I would require the assistance of an attorney well-versed in the federal securities laws.¹⁵⁷³ As discussed above, it is the obligation of the municipal advisory firm applying for registration with the Commission to complete Form MA-I for each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf. In addition, the Commission notes that the information requested on Form MA-I is similar to the information requested on FINRA's Form U4. The Commission believes that Form MA-I, like Form U4, does not require applicants to possess any specialized knowledge of federal securities laws or retain the services of a securities lawyer. For municipal advisory firms that are not sole proprietors, the Commission does not anticipate that such associated persons will require outside counsel to assist in the completion of Form MA-I. With regard to municipal advisory firms that are sole proprietors, the Commission anticipates that the estimate above regarding firms that would consult with outside counsel to assist in completing Form MA would also include the time required to complete Form MA-I.

One commenter argued that in many cases the Commission's estimate of \$400 per hour for outside counsel is too low because applicants would generally seek to retain more experienced counsel when faced with the new registration requirements.¹⁵⁷⁴ The commenter also stated its belief that, for a financial institution that provides a variety of services to municipal clients, outside legal fees could easily exceed \$25,000.¹⁵⁷⁵ However, this commenter did not provide specific figures by which to recalculate the Commission's estimates.

¹⁵⁷³ See College Savings Plans of Maryland Letter.

¹⁵⁷⁴ See Financial Services Roundtable Letter.

¹⁵⁷⁵ Id.

The Commission recognizes that, for such larger financial institutions offering diversified services, the outside legal fees will likely exceed the \$400-per-hour estimate. However, the Commission calculated the estimate as an average cost across all municipal advisory firms, and many smaller firms require far less assistance from outside counsel or, in some cases, none at all. The \$400 hourly rate for outside legal counsel, based on Commission staff conversations with law firms that regularly assist regulated financial firms with compliance matters, represents an average from a diverse group of industry sources, reflecting different geographical regions and seniority levels. The Commission notes that, depending on such variables, some outside counsel will charge more than \$400 per hour, but many others will charge less. The Commission, therefore, continues to believe that its average hourly cost estimates for all municipal advisory firms to hire outside counsel are accurate and retains them as originally proposed.

7. Consent to Service of Process from Certain Associated Persons

If Form MA-I is being filed by a municipal advisory firm with respect to a natural person engaged in municipal advisory activities on its behalf, the authorized representative of the municipal advisory firm who signs the Execution Page of Form MA-I must attest that the municipal advisory firm has obtained and retained written consent from the individual that service of any civil action brought by, or notice of any proceeding before, the Commission or any SRO in connection with the individual's municipal advisory activities may be given by registered or certified mail to the individual's address given in Item 1 of Form MA-I. If Form MA-I is being filed by a natural person municipal advisor who is a sole proprietor, by signing the Execution Page of Form MA-I, he or she must consent that service of any civil action brought by, or notice of any proceeding before, the Commission or any SRO in connection with the sole proprietor's municipal advisory activities may be given by registered or certified mail to the sole proprietor's address given in Item 1 of Form

MA-I.

The Commission estimates that each municipal advisory firm, other than sole proprietors, seeking to register with the Commission following adoption of the final rules and forms will need to obtain and retain¹⁵⁷⁶ a written consent to service of process from each natural person engaged in municipal advisory activities on its behalf.¹⁵⁷⁷ The Commission does not have the information necessary to provide a reasonable estimate regarding the number of sole proprietors that will register with the Commission as municipal advisors because this data is not currently available to the Commission and the Commission is unaware of any such data being publicly available.

Accordingly, the Commission estimates that all municipal advisory firms seeking to register with the Commission (*i.e.*, 910 applicants) will need to obtain written consents to service of process.¹⁵⁷⁸

The Commission estimates that each municipal advisory firm would need approximately 1 hour to draft a template document to use in obtaining the written consents to service of process, amounting to an initial, one-time burden of approximately 910 hours.¹⁵⁷⁹ In addition, as discussed above, the Commission estimates that, during the first year, municipal advisors will need to complete a Form

¹⁵⁷⁶ Rule 15Ba1-8(a)(8) will require each municipal advisory firm to retain written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such registered municipal advisor.

¹⁵⁷⁷ Because sole proprietors will consent to service of process by signing the Execution Page of Form MA-I, sole proprietors will not need to obtain a separate consent to service of process. The requirement related to sole proprietors is already accounted for in the Commission's estimated burden to complete Form MA-I. See supra Section VII.D.1.b.

¹⁵⁷⁸ As discussed above, the Commission estimates that 910 municipal advisory firms, including sole proprietors, will register under the permanent registration regime. See supra note 1446 and accompanying text.

¹⁵⁷⁹ 910 (estimated number of applicants for municipal advisor registration during the first year) \times 1.0 hours (estimated time required to draft a template to use in obtaining the written consents to service of process) = 910 hours.

MA-I for approximately 11,250 individuals.¹⁵⁸⁰ The Commission estimates that, once drafted, each applicant would need approximately 6 minutes, or 0.10 hours, to obtain a written consent to service of process from each natural person engaged in municipal advisory activities on its behalf, amounting to an initial, one-time burden of approximately 1,125 hours.¹⁵⁸¹ Accordingly, the Commission estimates that the total initial, one-time burden for all municipal advisory firms to obtain written consents to service of process from each natural person engaged in municipal advisory activities on their behalf will be approximately 2,035 hours.¹⁵⁸²

In addition, firms that seek to register as municipal advisors in each year after the first will need to obtain a written consent to service of process from each natural person engaged in municipal advisory activities on their behalf. As discussed above, the Commission estimates that approximately 100 new municipal advisory firms will register on Form MA each year.¹⁵⁸³ Accordingly, the Commission estimates that the total ongoing annual burden for firms that will newly register as municipal advisors each year to draft a template document to use in obtaining the written consents to service of process will be approximately 100 hours.¹⁵⁸⁴ In addition, as discussed above, the Commission estimates that municipal advisors will need to submit a new Form MA-I for

¹⁵⁸⁰ See supra note 1448 and accompanying text.

¹⁵⁸¹ $11,250$ (estimated number of natural persons engaged in municipal advisory activities on behalf of a municipal advisory firm during the first year) \times 0.10 hours (estimated time required to obtain the written consents to service of process) = $1,125$ hours.

¹⁵⁸² 910 hours (estimated one-time burden for all municipal advisory firms to draft a template to use in obtaining the written consents to service of process) + $1,125$ hours (estimated one-time burden for all municipal advisory firms to obtain the written consents to service of process) = $2,035$ hours.

¹⁵⁸³ See supra note 1470 and accompanying text.

¹⁵⁸⁴ 100 (estimated number of new Form MA applicants per year) \times 1.0 hours (estimated time required to draft a template to use in obtaining the written consents to service of process) = 100 hours.

approximately 950 individuals annually.¹⁵⁸⁵ Accordingly, the Commission estimates that the total ongoing annual burden for firms to obtain written consents to service of process from these persons will be approximately 95 hours.¹⁵⁸⁶ The Commission estimates that the total ongoing burden for all municipal advisory firms to obtain written consents to service of process from each natural person engaged in municipal advisory activities on their behalf in each year after the first will be approximately 195 hours.¹⁵⁸⁷

8. Maintenance of Books and Records

The Commission proposed that all municipal advisory firms would be required, pursuant to proposed Rule 15Ba1-7, to maintain books and records relating to their municipal advisory activities. These books and records requirements were generally based on Exchange Act Rules 17a-3 and 17a-4 and Investment Advisers Act Rule 204-2, which set forth books and records requirements with respect to broker-dealers and investment advisers, respectively.¹⁵⁸⁸

In the Proposal, the Commission estimated that the average annual burden for a municipal advisory firm to comply with the proposed recordkeeping requirements would be similar to that of an investment adviser, or 181 hours.¹⁵⁸⁹ The Commission noted that the proposed recordkeeping requirements would likely impose initial burdens on respondents in connection with necessary

¹⁵⁸⁵ See supra note 1472 and accompanying text.

¹⁵⁸⁶ 950 (estimated number of new Form MA-I filings per year) \times 0.10 hours (estimated time required to obtain the written consents to service of process) = 95 hours.

¹⁵⁸⁷ 100 hours (estimated ongoing annual burden for all firms that will newly register as municipal advisors to draft a template to use in obtaining the written consents to service of process) + 95 hours (estimated ongoing annual burden for municipal advisory firms to obtain written consents to service of process) = 195 hours.

¹⁵⁸⁸ See 17 CFR 240.17a-3 and 17a-4, and 17 CFR 275.204-2. See also Proposal, 76 FR at 871.

¹⁵⁸⁹ See Proposal, 76 FR at 871.

updates to their recordkeeping systems, such as systems development or modifications.¹⁵⁹⁰ For the purposes of the Commission's analysis, these initial burdens were included in the estimate of 181 burden hours per respondent per year. Thus, the Commission estimated the total compliance burden would be approximately 181,000 hours per year.¹⁵⁹¹

The Commission has made two substantive modifications to the recordkeeping requirements since the Proposal. As discussed above, Rule 15Ba1-8(a)(2) will require municipal advisors to maintain general ledgers, a requirement that was inadvertently left out of proposed Rule 15Ba1-7.¹⁵⁹² In addition, as discussed above, Rule 15Ba1-8(a)(8) will require each municipal advisory firm to retain written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such municipal advisor.¹⁵⁹³ In light of these changes, the Commission now estimates that the average annual burden for a municipal advisory firm to comply with the recordkeeping requirements will be approximately 182 hours. Given the revised estimates of the number of Form MA applicants, the Commission now estimates that the total compliance burden will be approximately 165,620 hours per year.¹⁵⁹⁴

The Commission received two comment letters that specifically addressed the annual books and records burden estimate. One commenter noted that, although the Commission estimated an

1590

Id.

1591

1,000 (estimated number of municipal advisors) × 181 hours (estimated time spent by municipal advisors to ensure annual compliance with the books and records requirement) = 181,000 hours. Id.

1592

See supra notes 1359–1360 and accompanying text.

1593

See Proposal, 76 FR at 871.

1594

910 (estimated number of municipal advisors) × 182 hours (estimated time spent by municipal advisors to ensure annual compliance with the books and records requirement) = 165,620 hours.

annual burden of 181 hours for a municipal advisory firm, the estimate was not broken down further to an individual municipal advisor, such as a retirement board trustee.¹⁵⁹⁵ The Commission notes that, as proposed, the recordkeeping requirement would have applied only to municipal advisory firms and sole proprietors.¹⁵⁹⁶ For this reason, the Commission estimated the books and records burden for municipal advisory firms and sole proprietors only, and the estimate was not intended to reflect any recordkeeping burden for any other persons. Similarly, Rule 15Ba1-8(a), as adopted, states that the books and records requirement applies to “[e]very person registered or required to be registered under section 15B of the Act.”¹⁵⁹⁷ Because natural person municipal advisors, other than sole proprietors, are not required to register with the Commission under the final rules,¹⁵⁹⁸ the books and records requirement does not apply to natural person municipal advisors that are not sole proprietors.

Another commenter asserted that the Commission’s estimate was “optimistic,” and that, although the estimated burden represents nearly ten percent of a full-time person’s time, the number of hours did not include the cost of storage, and the actual burden would likely be higher.¹⁵⁹⁹

The Commission recognizes that, for larger municipal advisory firms, the annual burden estimate of 182 hours may be low. The Commission anticipates that, for the purposes of calculating the applicable PRA burden, the annual burden for larger municipal advisory firms that offer a

¹⁵⁹⁵ See Pennsylvania Public School Employees’ Retirement Board Letter.

¹⁵⁹⁶ See Proposed Rule 15Ba1-7.

¹⁵⁹⁷ See Rule 15Ba1-8(a).

¹⁵⁹⁸ Rule 15Ba1-3, as adopted, exempts from the registration requirement a natural person municipal advisor who is an associated person of an advisor that is registered with the Commission pursuant to Section 15B(a)(2) of the Exchange Act (15 U.S.C. 78o-4(a)(2)) and the rules and regulations thereunder, and engages in municipal advisory activities solely on behalf of a registered municipal advisor.

¹⁵⁹⁹ See UFS Bancorp Letter.

variety of services to municipal entities and have significantly greater volumes of books and records to maintain will be offset in the average by the significantly lower annual burden for smaller firms. As the Commission stated in the Proposal,¹⁶⁰⁰ given the relatively smaller size of municipal advisory firms compared to investment advisory firms and the fewer books and records requirements imposed by Rule 15Ba1-8, in the Commission's view, the annual hourly burden for smaller municipal advisory firms will likely be lower than 182 hours.

The Commission also believes that variations in the current records storage systems of respondents make it difficult for the Commission to estimate separately the cost of storage for a typical respondent. To the extent that the additional records required by the recordkeeping requirements can be stored and produced for inspection by electronic means, the additional costs should not be substantial. The Commission also reiterates that the books and records estimate, as originally proposed, included storage costs and any needed technology refinements or upgrades.¹⁶⁰¹ Accordingly, the Commission believes that the 182-hour figure, as an average annual hourly burden across all firms regardless of their size is an appropriate estimate.

This collection of information is mandatory. The Commission staff will use the mandatory collection of information for maintenance of books and records in its examinations and oversight program, and the information will be kept confidential subject to applicable law.

9. Exemption When a Municipal Entity or Obligated Person is Represented by an Independent Registered Municipal Advisor

The Commission believes that underwriters in negotiated deals, because of the services they

¹⁶⁰⁰ See Proposal, 76 FR at 871. The Commission also addresses the burden for smaller municipal advisory firms in the Final Regulatory Flexibility Analysis below. See *infra* Section IX.

¹⁶⁰¹ See Proposal, 76 FR at 871.

provide and the nature of negotiated deals,¹⁶⁰² are the persons most likely to rely on the exemption available to persons engaging in municipal advisory activities where a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor. The Commission believes other persons will be less likely to rely on this exemption because the nature of the services they provide may not require a municipal entity or obligated person to engage an independent registered municipal advisor. The determination of whether to rely on this exemption will depend on the facts and circumstances of a particular deal and the parties involved in that deal, as well as the type of entity seeking to rely on the exemption. It is possible that not many persons will seek to rely on the exemption because another exclusion or exemption from the definition of municipal advisor is available. Although the Commission is providing this exemption, any efforts to rely on the exemption in Rule 15Ba1-1(d)(3)(vi) are purely voluntary.

According to available market data for 2012, approximately 204 underwriters participated in negotiated deals of municipal securities in 2012.¹⁶⁰³ The Commission estimates that 210 persons will seek to rely on this exemption.¹⁶⁰⁴

A person seeking to rely on the exemption pursuant to Rule 15Ba1-1(d)(3)(vi) must obtain a written representation from the municipal entity or obligated person that it will not rely on the advice of the person seeking to rely on the exemption, and that it will rely on the advice of an independent registered municipal advisor. The Commission estimates that each person seeking to

¹⁶⁰² See *supra* note 604 and accompanying text (describing typical services provided by an underwriter in a negotiated deal) and note 614 (stating the definition of “negotiated sale”).

¹⁶⁰³ According to data obtained from Thomson Reuters’ SDC Platinum database, in 2012, 156 lead underwriters participated in negotiated deals. Including all underwriters that participated in negotiated deals in 2012, that number increases to 204.

¹⁶⁰⁴ This estimate rounds to the nearest higher multiple of ten the number of underwriters that participated in negotiated deals of municipal securities. The Commission believes this estimate, which likely overestimates the number of underwriters who are likely to seek to rely on this exemption, is inclusive of other persons who may seek to rely on this exemption.

rely on this exemption would need approximately 1 hour to draft a template document to use in obtaining the written representation, amounting to an initial, one-time burden of 210 hours.¹⁶⁰⁵

There will also be an ongoing burden each time a person seeks to rely on this exemption. The Commission estimates that, on average, there are approximately 8,770 negotiated deals involving an underwriter each year.¹⁶⁰⁶ The Commission estimates that a person seeking to rely on this exemption would need approximately 15 minutes, or 0.25 hours, to obtain a written representation from a municipal entity or obligated person, amounting to an annual burden of approximately 2,193 hours.¹⁶⁰⁷

In addition, the person seeking to rely on this exemption must make certain disclosures to the municipal entity or obligated person, and provide a copy of such disclosures to the municipal entity's or obligated person's independent registered municipal advisor. With respect to a municipal entity, such person must disclose in writing that, by obtaining the representation discussed above from the municipal entity, such person is not a municipal advisor and is not subject to the fiduciary duty set forth in Section 15B(c)(1) of the Exchange Act with respect to municipal financial products or the issuance of municipal securities.¹⁶⁰⁸ With respect to an obligated person, such person must disclose in writing that, by obtaining the representation discussed above from the obligated person, such person is not a municipal advisor with respect to the municipal financial product or issuance of municipal securities.¹⁶⁰⁹ The Commission estimates that each person seeking

¹⁶⁰⁵ 210 (estimated number of persons who will seek to rely on the exemption) × 1.0 hours (estimated time required to draft the written representation) = 210 hours.

¹⁶⁰⁶ This estimate represents an average of the number of negotiated deals each year from 2009 through 2012 relying upon data obtained from Thomson Reuters' SDC Platinum database.

¹⁶⁰⁷ 8,770 (estimated number of negotiated deals per year) × 0.25 hours (estimated time required to obtain the written representation) = 2,192.5 hours.

¹⁶⁰⁸ See Rule 15Ba1-1(d)(3)(vi)(C)(1).

¹⁶⁰⁹ See Rule 15Ba1-1(d)(3)(vi)(C)(2). Each such disclosure must be made at a time and in a

to rely on this exemption would need approximately 1 hour to draft the required disclosure, amounting to an initial, one-time burden of approximately 210 hours.¹⁶¹⁰ The Commission believes that once these disclosures have been drafted, such language would become part of the standard municipal advice documentation and, accordingly, there would be no further ongoing associated burden.

In summary, the Commission estimates that the initial burden related to the exemption when a municipal entity or obligated person is represented by an independent registered municipal advisor will be 2,613 hours.¹⁶¹¹ In addition, the Commission estimates that the ongoing burden will be 2,193 hours.¹⁶¹²

The Commission staff will use the collection of information under the exemption for independent registered municipal advisors in its examinations and oversight program to ensure that unregistered municipal advisors are properly exempt from registration. Any information reviewed by the Commission will be kept confidential subject to applicable law. In addition, the collection of information will allow municipal entities and obligated persons to understand whether a person is acting as a municipal advisor, and will allow persons relying on the exemption to demonstrate that registration with the Commission as municipal advisors was not required.

manner reasonably designed to allow the municipal entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities. See Rule 15Ba1-1(d)(3)(vi)(C)(3).

¹⁶¹⁰ 210 (estimated number of persons who will seek to rely on the exemption) × 1.0 hours (estimated time required to draft the required disclosure) = 210 hours.

¹⁶¹¹ 210 hours (estimated time to draft a template document to use in obtaining the written representation) + 2,193 hours (estimated time to obtain a written representation from a municipal entity or obligated person) + 210 hours (estimated time to draft the required disclosure) = 2,613 hours.

¹⁶¹² See supra note 1607 and accompanying text.

10. Municipal Escrow Investments

Rule 15Ba1-1(h) defines “municipal escrow investments” to mean proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium, if any, and interest on one or more issues of municipal securities. As discussed above,¹⁶¹³ in determining whether or not funds to be invested or reinvested constitute municipal escrow investments, a person may rely on representations in writing made by a knowledgeable official of a municipal entity or obligated person whose funds are to be invested or reinvested regarding the nature of such investments, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.¹⁶¹⁴

The Commission believes that state-registered investment advisers with municipal entity clients are the persons most likely to rely on Rule 15Ba1-1(h)(2) for reasonable reliance on representations related to municipal escrow investments. The Commission notes that no entity is required to utilize Rule 15Ba1-1(h)(2) and that any efforts to do so are voluntary.

The Commission estimates that approximately 700 persons may seek to rely on the exception for reasonable reliance on representations related to municipal escrow investments.¹⁶¹⁵

¹⁶¹³ See supra notes 383–384 and accompanying text.

¹⁶¹⁴ See Rule 15Ba1-1(h)(2).

¹⁶¹⁵ To calculate this estimate, the Commission staff examined data regarding investment advisers with assets under management under \$100 million as of May 3, 2010. Section 410 of the Dodd-Frank Act reallocated primary responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain investment advisers with assets under management between \$25 million and \$100 million (“mid-sized advisers”). The Commission does not maintain aggregate data regarding state-registered investment advisers, including mid-sized advisers registered with one or more state securities authorities, and is not aware of any publicly available data regarding state-registered investment advisers that could be used to calculate this estimate. As described in the paragraph below, however, the Commission does have such data as of May 3, 2010, which was prior to the passage of the Dodd-Frank Act (and the time those advisers were required to switch to state registration). Given the relatively short period of time that has elapsed since 2010 and the Commission’s belief that, for purposes of this analysis, the

The Commission estimates that each person seeking to rely on this exception would need approximately 1 hour to draft a template document to use in obtaining the written representation, amounting to an initial, one-time burden of approximately 700 hours.¹⁶¹⁶

In addition, the Commission estimates that, once drafted, a person seeking to rely on this exception would need approximately 15 minutes, or 0.25 hours, to obtain a written representation from its client. The Commission estimates that persons that will seek to rely on this exception have approximately 8,620 clients that are municipal entities.¹⁶¹⁷ Thus, the Commission estimates that the

nature of the investment advisory industry has not changed significantly since that time, the Commission is relying on data from 2010 to calculate these estimates.

According to registration information from the Investment Adviser Registration Depository (“IARD”) as of May 3, 2010, responses to Item 5.F(2)(c) of Part 1 of Form ADV indicate that there were 5,550 investment advisers with less than \$100 million in assets under management registered with the Commission. According to responses to Item 5.D(9) of Part 1 of Form ADV, 211 of those investment advisers (or approximately 4%) ($211 \div 5,550 = 0.038$) had clients that were “state or municipal government entities.”

As of January 1, 2013, there were 17,259 state-registered investment advisers. Using the same percentage of investment advisers with clients that were state or municipal government entities, the Commission staff estimates that approximately 700 state-registered investment advisers have clients that are state or municipal government entities. $17,259$ (number of state-registered investment advisers as of January 1, 2013) $\times 0.04$ (estimated percentage of state-registered investment advisers with state or municipal government entity clients) = 690.36. This estimate rounds to the nearest higher multiple of ten the number of state-registered investment advisers that have clients that are state or municipal government entities. The Commission believes this estimate, which likely overestimates the number of state-registered investment advisers who are likely to seek to rely on this exception, is inclusive of other persons who may seek to rely on this exception.

¹⁶¹⁶ 700 (estimated number of persons who will seek to rely on the exception) $\times 1.0$ hours (estimated time required to draft the written representation) = 700 hours.

¹⁶¹⁷ According to responses to Item 5.D(9) of Part 1 of Form ADV, as of May 3, 2010, the 211 investment advisers identified above (see *supra* note 1615) had approximately 2,770 state or municipal government entity clients. The Commission staff used the midpoint of each range to estimate the number of such clients. The Commission does not have exact data from 2010 on the number of clients of investment advisers that are state or municipal government entities because Form ADV responses are in the format of a range (e.g., 26–100 clients). In addition, the Commission does not have the information necessary to provide another point estimate.

burden to obtain the written representation will be 2,155 hours.¹⁶¹⁸

Accordingly, the Commission estimates that the total initial burden for all persons to rely on the exception for reasonable reliance on representations related to municipal escrow investments will be 2,855 hours.¹⁶¹⁹ Because the person seeking to rely on this exception only needs to obtain the written representation one time, the Commission does not believe that there will be an ongoing burden.

The Commission staff will use the collection of information under Rule 15Ba1-1(h)(2) in its examinations and oversight program to determine whether a person engaging in municipal advisory activities has failed to register with the Commission. Any information reviewed by the Commission will be kept confidential subject to applicable law. In addition, the collection of information will allow persons relying on Rule 15Ba1-1(h)(2) to demonstrate that registration with the Commission as municipal advisors was not required.

The Commission staff, extrapolating from the ratio of the estimated number of state or municipal government entity clients in May 2010 to the number investment advisers with less than \$100 million in assets under management registered with the Commission as of May 2010, estimates that, currently, state-registered investment advisers have approximately 8,620 clients that are state or municipal government entities. $(2,770$ (approximate number of state or municipal government entity clients of investment advisers having less than \$100 million in assets under management that were registered with the Commission as of May 3, 2010) \div $5,550$ (number of investment advisers with less than \$100 million in assets under management that were registered with the Commission as of May 3, 2010)) \times $17,259$ (number of state-registered investment advisers as of January 1, 2013) $= 8,613.95$. This estimate rounds to the nearest higher multiple of ten the number of clients of state-registered investment advisers that are state or municipal government entities. The Commission believes this estimate, which likely overestimates the number of clients from which state-registered investment advisers would obtain written representations in reliance on this exception, is inclusive of the clients of other persons who may seek to rely on this exception.

¹⁶¹⁸ $8,620$ (estimated number of clients from which written representation will be obtained) \times 0.25 hours (estimated time required to obtain the written representation) $= 2,155$ hours.

¹⁶¹⁹ 700 hours (estimated time to draft a template document to use in obtaining the written representation) $+ 2,155$ hours (estimated time required to obtain the written representations from clients) $= 2,855$ hours.

11. Proceeds of Municipal Securities

The definition of “proceeds of municipal securities” includes a qualification similar to Rule 15Ba1-1(h)(2) pertaining to municipal escrow investments. Namely, in determining whether or not funds to be invested constitute proceeds of municipal securities, a person may rely on representations in writing made by a knowledgeable official of a municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.¹⁶²⁰

The Commission believes state-registered investment advisers with clients that are municipal entities or certain pooled investment vehicles in which municipal entities invest are the persons most likely to rely on Rule 15Ba1-1(m)(3) for reasonable reliance on representations related to proceeds of municipal securities. The Commission notes that no entity is required to utilize Rule 15Ba1-1(m)(3) and that any efforts to do so are voluntary.

The Commission estimates that approximately 880 persons may seek to rely on the exception for reasonable reliance on representations related to proceeds of municipal securities.¹⁶²¹

¹⁶²⁰ See Rule 15Ba1-1(m)(3). See also *supra* notes 363–365 and accompanying text.

¹⁶²¹ As discussed above, as of May 3, 2010, of the 5,550 investment advisers with less than \$100 million in assets under management registered with the Commission, 211 (or 4%) had clients that were state or municipal government entities. See *supra* note 1615. So as not to double-count those investment advisers that had clients that were state or municipal government entities, the Commission staff identified 5,339 investment advisers with less than \$100 million in assets under management that did not respond that they had clients that were state or municipal government entities ($5,550 - 211 = 5,339$). Of those, responses to Item 5.D(6) of Part 1 of Form ADV indicate that 713 investment advisers with less than \$100 million in assets under management that did not respond that they had clients that were state or municipal government entities responded that they had some clients that were pooled investment vehicles (other than registered investment companies). If the Commission estimates that the same percentage of investment advisers advise pooled investment vehicles (other than registered investment companies) with municipal entity investors as investment advisers that advise state or municipal government entities (*i.e.*, 4%), 29 of these investment advisers would be advisers to pooled investment vehicles (other than registered investment companies) with municipal entity investors ($713 \times 4\% = 28.52$).

The Commission estimates that each person seeking to rely on this exception would need approximately 1 hour to draft a template document to use in obtaining the written representation, amounting to an initial, one-time burden of approximately 880 hours.¹⁶²²

In addition, the Commission estimates that, once drafted, a person seeking to rely on this exception would need approximately 15 minutes, or 0.25 hours, to obtain a written representation from its client. The Commission estimates that persons that will seek to rely on this exception have approximately 25,420 clients that are state or municipal government entities or that are pooled investment vehicles (other than registered investment companies) with municipal entity

Accordingly, the Commission estimates that approximately 1% of the 5,550 investment advisers with less than \$100 million in assets under management registered with the Commission as of May 3, 2010, had clients that were pooled investment vehicles (other than registered investment companies) with municipal entity investors ($29 \div 5,550 = 0.0052$). As of January 1, 2013, there were 17,259 state-registered investment advisers. Using the same percentage, the Commission staff estimates that approximately 180 state-registered investment advisers have clients that are pooled investment vehicles (other than registered investment companies) with municipal entity investors. $17,259$ (number of state-registered investment advisers as of January 1, 2013) \times 1% (estimated percentage of state-registered investment advisers with clients that are pooled investment vehicles (other than registered investment companies) with municipal entity investors) = 172.59.

In addition, as discussed above, the Commission staff estimates that 700 state-registered investment advisers have clients that are state or municipal government entities. See supra note 1615. Therefore, the Commission staff estimates that 880 state-registered investment advisers have clients that are state or municipal government entities or that are pooled investment vehicles (other than registered investment companies) with municipal entity investors. 700 (estimated number of state-registered investment advisers with clients that are state or municipal government entities) + 180 (estimated number of state-registered investment advisers with clients that are pooled investment vehicles (other than registered investment companies) with municipal entity investors) = 880. This estimate rounds to the nearest higher multiple of ten the estimated number of state-registered investment advisers that have clients that are state or municipal government entities and the estimated number of state-registered investment advisers that have clients that are pooled investment vehicles (other than registered investment companies) with municipal entity investors. The Commission believes this estimate, which likely overestimates the number of state-registered investment advisers who are likely to seek to rely on this exception, is inclusive of other persons who may seek to rely on this exception.

¹⁶²² 880 (estimated number of persons who will seek to rely on the exception) \times 1.0 hours (estimated time required to draft the written representation) = 880 hours.

investors.¹⁶²³ Thus, the Commission estimates that the burden to obtain the written representation

¹⁶²³ According to responses to Item 5.D(6) of Part 1 of Form ADV, as of May 3, 2010, 756 investment advisers registered with the Commission having less than \$100 million in assets under management indicated that they had approximately 5,400 clients that were pooled investment vehicles (other than registered investment companies) with municipal entity investors. This estimate includes those investment advisers that had clients that were state or municipal government entities that were excluded from the estimate of the number of investment advisers with clients that were pooled investment vehicles (other than registered investment companies) with municipal entity investors. See *supra* note 1621. The Commission staff used the midpoint of each range to estimate the number of such clients. The Commission does not have exact data from 2010 on the number of clients of investment advisers because Form ADV responses are in the format of a range (e.g., 26–100 clients). In addition, the Commission does not have the information necessary to provide another point estimate.

The Commission staff, extrapolating from the ratio of the estimated number of pooled investment vehicle (other than registered investment company) clients with municipal entity investors in May 2010 to the number investment advisers with less than \$100 million in assets under management registered with the Commission as of May 2010, estimates that, currently, state-registered investment advisers now have approximately 16,800 clients that are pooled investment vehicles (other than registered investment companies) with municipal entity investors. $(5,400 \text{ (approximate number of pooled investment vehicle (other than registered investment company) clients with municipal entity investors of investment advisers having less than \$100 million in assets under management that were registered with the Commission as of May 3, 2010)} \div 5,550 \text{ (number of investment advisers with less than \$100 million in assets under management that were registered with the Commission as of May 3, 2010)}) \times 17,259 \text{ (number of state-registered investment advisers as of January 1, 2013)} = 16,792.54.$

In addition, as discussed above, the Commission staff estimates that state-registered investment advisers now have approximately 8,620 clients that are state or municipal government entities. See *supra* note 1617. Therefore, the Commission staff estimates that state-registered investment advisers now have 25,420 clients that are state or municipal government entities or that are pooled investment vehicles (other than registered investment companies) with municipal entity investors. $8,620 \text{ (estimated number of state or municipal government entity clients of state-registered investment advisers)} + 16,800 \text{ (estimated number of clients of state-registered investment advisers that are pooled investment vehicle (other than registered investment company) clients with municipal entity investors)} = 25,420.$ This estimate rounds to the nearest higher multiple of ten the number of clients of state-registered investment advisers that are state or municipal government entities or pooled investment vehicles (other than registered investment companies) with municipal entity clients. The Commission believes this estimate, which likely overestimates the number of clients from which state-registered investment advisers would obtain written representations in reliance on this exception, is inclusive of the clients of other persons who may seek to rely on this exception.

will be 6,355 hours.¹⁶²⁴

Accordingly, the Commission estimates that the total initial burden for all persons to rely on the exception for reasonable reliance on representations related to proceeds of municipal securities will be 7,235 hours.¹⁶²⁵ Because the person seeking to rely on this exception only needs to obtain the written representation one time, the Commission does not believe that there will be an ongoing burden.

The Commission staff will use the collection of information under the qualification in the definition of proceeds of municipal securities in its examinations and oversight program to determine whether a person engaging in municipal advisory activities has failed to register with the Commission. Any information reviewed by the Commission will be kept confidential subject to applicable law. In addition, the collection of information will allow persons relying on the exception for reasonable reliance on representations related to proceeds of municipal securities to demonstrate that registration with the Commission as municipal advisors was not required.

<u>Nature of Information Collection Burden</u>	<u>Total Hourly Burden Estimate</u>	
	<u>Initial</u>	<u>Ongoing</u>
Form MA: Application for Municipal Advisor Registration	3,185	350
Form MA-I: Information Regarding Natural Persons Who Engage in Municipal Advisory Activities	33,750	2,850
Form MA-W: Notice of Withdrawal from Registration as a Municipal Advisor	0	15
Rule 15Ba1-5: Amendments to Form MA and Form MA-I	0	12,053

¹⁶²⁴ 25,420 (estimated number of clients from which written representation will be obtained) × 0.25 hours (estimated time required to obtain the written representation) = 6,355 hours.

¹⁶²⁵ 880 hours (estimated time to draft a template document to use in obtaining the written representation) + 6,355 hours (estimated time required to obtain the written representations from clients) = 7,235 hours.

Form MA-NR: Designation of U.S. Agent for Service of Process for Non-Residents	54	5
Consent to Service of Process for Certain Associated Persons	2,035	195
Rule 15Ba1-8: Books and Records to be Made and Maintained by Municipal Advisors	0	165,620
Rule 15Ba1-1(d)(3)(vi): Exemption When a Municipal Entity or Obligated Person is Represented by an Independent Registered Municipal Advisor	2,613	2,193
Rule 15Ba1-1(h)(2): Exception to Definition of Municipal Escrow Investments	2,855	0
Rule 15Ba1-1(m)(3): Exception to Definition of Proceeds of Municipal Securities	7,235	0
Total Burden	51,727	183,281

12. Total Burden

In the Proposal, the Commission estimated that the total initial one-time burden for all respondents would be approximately 71,939 hours,¹⁶²⁶ while the total ongoing annual burden for all respondents would be approximately 212,135 hours.¹⁶²⁷ The total initial outside cost for all respondents would be \$402,700,¹⁶²⁸ while the total ongoing outside cost for all respondents would be \$900 per year.¹⁶²⁹

The Commission now estimates that, under the final rules and forms, the total initial burden

¹⁶²⁶ 6,500 hours (initial burden for Form MA applicants) + 65,400 hours (initial burden to complete Form MA-I) + 39 hours (initial burden for Form MA-NR filers) = 71,939 hours. See Proposal, 76 FR at 871.

¹⁶²⁷ 650 hours (annual burden for new Form MA applicants) + 5,400 hours (annual burden to complete new Form MA-I) + 3,000 hours (annual burden for Form MA amendments) + 20,700 hours (annual burden for Form MA-I amendments) + 30 hours (annual burden for Form MA withdrawal) + 1,350 hours (annual burden for Form MA-I withdrawal) + 5 hours (annual burden for Form MA-NR filers) + 181,000 hours (annual burden for books and records requirement) = 212,135 hours. See *id.*

¹⁶²⁸ \$2,700 (estimated initial cost to hire outside counsel for providing opinion of counsel) + \$400,000 (initial cost for review by outside counsel) = \$402,700. See *id.* at 872.

¹⁶²⁹ \$900 = estimated ongoing cost to hire outside counsel for providing opinion of counsel. See *id.*

for all respondents will be approximately 51,727 hours,¹⁶³⁰ while the total ongoing annual burden for all respondents will be approximately 183,281 hours.¹⁶³¹ The total initial outside cost for all respondents will be \$365,800,¹⁶³² while the total ongoing outside cost for all respondents will be \$40,900 per year.¹⁶³³

VIII. ECONOMIC ANALYSIS

A. Overview

The Commission is sensitive to the costs and benefits of its rules. When engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, Section 3(f) of the Exchange Act requires the Commission to consider, in addition to the protection of investors, whether the action will promote efficiency,

¹⁶³⁰ 36,935 hours (estimated initial burden for Form MA and MA-I) + 54 hours (estimated initial burden for Form MA-NR filers) + 2,035 hours (estimated initial burden for all municipal advisory firms to obtain written consents to service of process from each natural person engaged in municipal advisory activities on their behalf) + 2,613 hours (estimated initial burden for exemption when a municipal entity or obligated person is represented by an independent registered municipal advisor) + 2,855 (estimated initial burden for exception for reasonable reliance on representations related to municipal escrow investments) + 7,235 (estimated initial burden for exception for reasonable reliance on representations related to proceeds of municipal securities) = 51,727 hours.

¹⁶³¹ 3,200 hours (estimated annual burden for new Form MA and Form MA-I) + 12,053 hours (estimated annual burden for Form MA and Form MA-I amendments) + 15 hours (estimated annual burden for Form MA withdrawal) + 5 hours (estimated annual burden for Form MA-NR filers) + 165,620 hours (estimated annual burden for books and records requirement) + 195 hours (estimated ongoing burden for all municipal advisory firms to obtain written consents to service of process from each natural person engaged in municipal advisory activities on their behalf) + 2,193 (estimated annual burden for exemption when a municipal entity or obligated person is represented by an independent registered municipal advisor) = 183,281 hours.

¹⁶³² \$1,800 (estimated initial cost to hire outside counsel for providing opinion of counsel) + \$364,000 (estimated initial cost for review by outside counsel) = \$365,800.

¹⁶³³ \$900 (estimated ongoing cost to hire outside counsel for providing opinion of counsel) + \$40,000 (estimated ongoing cost for all municipal advisory firms to hire outside counsel to review their compliance with the requirements of the proposed rules and forms) = \$40,900.

competition, and capital formation.¹⁶³⁴ In addition, Section 23(a)(2) of the Exchange Act requires the Commission to consider the effects on competition of any rules the Commission adopts under the Exchange Act and 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.¹⁶³⁵

In the Proposal, the Commission solicited comment on the costs and benefits of the proposed rule, including the proposed definition of “municipal advisor” and related terms; exclusions and exemptions of certain persons from the definition of municipal advisor; registration forms; and recordkeeping requirements.¹⁶³⁶ The Commission also requested comment on the competitive or anticompetitive effects, as well as efficiency and capital formation effects, of the proposed rules and forms on any market participants.¹⁶³⁷ The Commission further encouraged commenters to provide specific data and analysis in support of their views.¹⁶³⁸

The Commission received approximately 38 letters that addressed the Commission’s estimates of the costs and benefits of the proposed rule.¹⁶³⁹ Several commenters opined generally

¹⁶³⁴ 15 U.S.C. 78c(f).

¹⁶³⁵ 15 U.S.C. 78w(a)(2).

¹⁶³⁶ See Proposal, 76 FR at 862–63, 878. An economic analysis was included in the proposing release. See *id.* at 872–78.

¹⁶³⁷ See *id.* at 878.

¹⁶³⁸ See *id.* at 863.

¹⁶³⁹ See, e.g., City of St. Petersburg Letter; Dan A. Gray, President, Industrial Development Authority, City of Yuma, AZ; Vosburg Letter; Bill Longley, Texas Municipal League, Austin, TX; Rick Platt, President and CEO, Heath-Newark-Licking County Port Authority, Heath, OH; Nancy K. Kopp, State Treasurer and Board Chair, College Savings Plans of Maryland; Wayne County Airport Authority Letter; Larry E. Naake, Executive Director, National Association of Counties, Washington, DC; Laurie D. Grabow, Executive Vice President/CFO, Old Point National Bank (“Old Point Bank Letter”); National Association of Health & Educational Facilities Finance Authorities Letter; Ranson Financial Consultants Letter; Union Bank Letter; Texas Bankers Association Letter; Harlan Spiroff, Spiroff & Gosselar, Ltd.; Joy Howard WM Financial Strategies Letter; California State Treasurer’s Office Letter; NAIPFA Letter; Specialized Public Finance Letter; State of Texas Letter;

that municipal advisor registration as proposed would be overly burdensome and would impose costs that would be detrimental to the commenters. Further, some commenters criticized the Proposal's economic analysis generally, stating that the expected costs of the permanent registration regime were greatly underestimated.¹⁶⁴⁰ Other commenters asserted that the economic analysis was "superficial" in that it related "almost entirely to filling out paperwork and hardly scratches the surface of the true regulatory burden"¹⁶⁴¹ and that the cost-benefit analysis was flawed because it only addressed the labor costs directly associated with registration and recordkeeping.¹⁶⁴² One commenter stated that the Commission did not appear to consider adequately the costs of the proposed rules, particularly implementation costs and costs incurred by municipal entities and obligated persons as a result of increases in the price of advisory services.¹⁶⁴³

Pennsylvania Public School Employees' Retirement Board Letter; Ismael Guerrero, Housing Authority of the City and County of Denver; Jean Marie Buckley, President, Tamalpais Advisors, Inc. ("Tamalpais Advisors Letter"); SIFMA Letter I; ACLI Letter; MSRB Letter I; Public FA Letter; Financial Services Roundtable Letter; BMO Capital Markets Letter; Susan Gaffney, Government Finance Officers Association; Fieldman Rolapp Letter; UFS Bancorp Letter; John Sullivan ("John Sullivan Letter"); Bradley Payne Letter; William J. Caraway, President, Chancellor Financial Associates ("Chancellor Financial Associates Letter"); Committee of Annuity Insurers Letter I; NAESCO Letter; Solar Energy Industries Association Letter; Cristeena Naser, Senior Counsel, Center for Securities, Trust & Investment, American Bankers Association ("American Bankers Association Letter II").

¹⁶⁴⁰ See, e.g., American Counsel of Life Insurers Letter (stating that "the Commission has significantly underestimated the complexity and costs associated with the proposed rule"); BMO Capital Markets Letter (stating that "the costs analysis is not even remotely close to reality"); Bradley Payne Letter (stating that "cost estimates published in the proposed regulations are wild guesses and were obviously generated by analysts who know absolutely nothing about my business").

¹⁶⁴¹ See Mintz Levin Letter; and State of California Letter.

¹⁶⁴² See letter from Terry E. Singer, Executive Director, National Association of Energy Service Companies, dated September 26, 2011 ("NAESCO Letter II").

¹⁶⁴³ See SIFMA Letter I. In addition, the Commission's Office of Inspector General prepared a report analyzing the economic analysis of several rule proposals and suggested that the Commission could have provided additional quantitative analyses to derive certain qualitative predictions in connection with the Proposal. See Office of Inspector General, Commission, Report of Review of Economic Analyses Performed by the Securities and

The Commission does not agree that the economic analysis in the Proposal was “superficial” or that it focused solely on the registration and recordkeeping burdens. In developing the proposed rules and forms, the Commission considered the costs and benefits of requiring persons to register as municipal advisors, including the costs-benefit tradeoffs implicated in interpreting the definition of “municipal advisor” and related terms, interpreting the statutory exclusions, and proposing additional exemptions from the definition of municipal advisor. As stated in the Proposal, in addition to the direct, out-of-pocket costs estimated for PRA purposes, the Commission considered the economic costs of the proposed permanent registration regime.¹⁶⁴⁴ The Commission also stated its belief that few, if any, of the costs would be passed on to municipal entities or obligated persons in the form of higher fees.¹⁶⁴⁵

Similarly, in light of the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities and data currently available to the Commission, in determining the appropriate scope of the final rules and forms the Commission considered the types of persons that should be regulated as municipal advisors under Section 15B of the Exchange Act. The Commission has sought to tailor these rules so as not to impose unnecessary or inappropriate costs and burdens on municipal advisors. As discussed throughout this release, partly in response to comments, the Commission has modified the rules to minimize compliance burdens where consistent with investor protection. In addition, as discussed below, where commenters identified costs the Commission did not consider, the Commission has revised its economic analysis of the final rules to take these costs into account.

Exchange Commission in Connection with Dodd-Frank Act Rulemakings, June 13, 2011, available at http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf.

¹⁶⁴⁴ See Proposal, 76 FR at 876. See also supra note 1643 and accompanying text (discussing comments related to increased prices for municipal entities and obligated persons).

¹⁶⁴⁵ See *id.*

As discussed above in Section II.A.2.b, prior to the enactment of the Dodd-Frank Act, municipal advisors were largely unregulated as to their municipal advisory activities. Section 975 of the Dodd-Frank Act amended the Exchange Act to establish a federal regulatory regime that requires municipal advisors to register with the Commission,¹⁶⁴⁶ grants the MSRB regulatory authority over municipal advisors,¹⁶⁴⁷ and imposes, among other things, a fiduciary duty on municipal advisors when advising municipal entities.¹⁶⁴⁸ The Commission recognizes that while the final rules, which define municipal advisor and related terms as well as prescribe the exclusions and exemptions therefrom, are integral in determining which persons will be subject to the regulatory requirements established by Section 975 of the Dodd-Frank Act, the definitions, exclusions, and exemptions do not themselves establish the scope or nature of those substantive requirements or their related costs and benefits. For example, although a municipal advisor is subject to a fiduciary duty when advising a municipal entity client,¹⁶⁴⁹ the Commission is not interpreting the scope or nature of such duty in this rulemaking. Instead, the Commission notes that the Exchange Act provides that the MSRB shall prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients.¹⁶⁵⁰

The Commission anticipates that any additional rules that the Commission adopts to implement the substantive requirements under Section 15B of the Exchange Act will be subject to their own economic analysis. In addition, the Commission has direct oversight authority over the

¹⁶⁴⁶ See Section 975(a)(1)(B) of the Dodd-Frank Act; 15 U.S.C. 78o-4(a)(1)(B).

¹⁶⁴⁷ See 15 U.S.C. 78o-4(b).

¹⁶⁴⁸ See 15 U.S.C. 78o-4(c)(1).

¹⁶⁴⁹ See 15 U.S.C. 78o-4(c)(1).

¹⁶⁵⁰ See 15 U.S.C. 78o-4(b)(2)(L)(i).

MSRB, including the ability to approve or disapprove the MSRB's rules.¹⁶⁵¹

In adopting the final rules and forms, the Commission has considered the costs and benefits that accrue from subjecting municipal advisors and municipal advisory activities to the regulatory regime created by Section 975 of the Dodd-Frank Act. The Commission refers to those costs and benefits as "programmatic" costs and benefits.¹⁶⁵² The programmatic costs and benefits have informed the Commission's decisions and actions in defining municipal advisor and related terms, its interpretations of the statutory exclusions, and its decision to provide further exemptions from the definition of municipal advisor as described throughout the release. The Commission has also considered the costs that persons will incur to assess whether registration as a municipal advisor is required (*i.e.*, "assessment" costs), as well as the costs and benefits that will accrue from the requirement that municipal advisors register with the Commission (*i.e.*, "registration" costs and benefits) and maintain the books and records as required by Rule 15Ba1-8 (*i.e.*, "recordkeeping" costs and benefits).

¹⁶⁵¹ Section 19(b) of the Exchange Act requires an SRO to file with the Commission any proposed rule change, and provides that a proposed rule change may not take effect unless it is approved by the Commission or becomes immediately effective upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act. *See* 15 U.S.C. 78s(b). Section 3 of the Exchange Act defines the term "self-regulatory organization" to include the MSRB. *See* 15 U.S.C. 78c(a)(26). Section 15B(b)(2)(C) of the Exchange Act requires, among other things, that the rules of the MSRB not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78o-4(b)(2)(C). In addition, with respect to municipal advisors, MSRB rules shall not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. *See* 15 U.S.C. 78o-4(b)(2)(L)(iv).

¹⁶⁵² The Commission expects that the costs and benefits resulting from the municipal advisory regulatory regime will likely accrue primarily at the programmatic level. *See infra* Sections VIII.C.1 and VIII.D.2. To the extent appropriate given the purposes of Section 975 of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities and data currently available to the Commission, the Commission has sought to mitigate the costs entities will incur in connection with the registration and recordkeeping requirements.

In the discussion below, the Commission begins by identifying its motivation for adopting the rules and forms and the baseline against which the Commission considers both the costs and benefits, as well as the effects on efficiency, competition, and capital formation, of the final rules and forms. Next, the Commission discusses broad economic considerations that stem from the final rules and forms, including the assessment costs. The Commission then discusses the potential programmatic, registration, and recordkeeping costs and benefits that the final rules and forms implicate, as well as the effects of the final rules and forms on efficiency, competition, and capital formation. The discussion focuses on the Commission's reasons for adopting the rules and forms, the affected parties, and the costs and benefits of the rules and forms compared to the baseline (*i.e.*, the temporary registration regime and the requirements imposed by the Dodd-Frank Act) and to alternative courses of action the Commission has considered.

B. Motivation for Rules and Forms

The rules and forms adopted today are designed to enhance the Commission's oversight of municipal advisors.¹⁶⁵³ The Commission believes the information provided pursuant to the final rules and forms may aid municipal entities and obligated persons in choosing municipal advisors that help municipal entities and obligated persons engage in issuances of municipal securities as well as investments in municipal financial products. The motivation for the rules and forms, which are discussed throughout this release, are summarized below.

¹⁶⁵³ See *supra* notes 101–103 and accompanying text. According to a Senate Report related to the Dodd-Frank Act, “[t]he \$3 trillion municipal securities market is subject to less supervision than corporate securities markets, and market participants generally have less information upon which to base investment decisions. During the [financial] crisis, a number of municipalities suffered losses from complex derivatives products that were marketed by unregulated financial intermediaries.” See S. Rep. No. 111-176, at 38 (2010). Accordingly, in response to the financial crisis that began in 2008, the Dodd-Frank Act amended the Exchange Act to require “a range of municipal financial advisors to register with the [Commission] and comply with regulations issued by the [MSRB].” See *id.*

First, the rules are designed to provide guidance related to the definition of municipal advisor and exclusions therefrom, as well as to provide exemptions from the municipal advisor regulatory regime. The statutory definition of municipal advisors is broad and includes persons that have not previously been considered municipal financial advisors.¹⁶⁵⁴ There are also relevant exclusions from the definition of municipal advisor that limit the scope of persons included in the municipal advisor regulatory regime. The statute, however, leaves undefined or ambiguous certain terms that are critical for market participants to discern who is or is not a municipal advisor.

Second, the final rules and forms establish a permanent mechanism for municipal advisors to register with the Commission. Effective October 1, 2010, the Dodd-Frank Act requires the establishment of a registration regime for municipal advisors.¹⁶⁵⁵ As discussed above, the Commission adopted a temporary registration regime to allow municipal advisors to satisfy temporarily the statutory registration requirement by submitting certain information electronically through the Commission's public website on Form MA-T.¹⁶⁵⁶ However, as that registration regime was intended to be temporary, the Commission is now establishing a permanent registration regime.

Third, the final rules and forms will expand the amount of publicly available information about municipal advisors, including conflicts of interest and disciplinary history. Because municipal advisors had been largely unregulated as to their municipal advisory activities prior to the Dodd-Frank Act,¹⁶⁵⁷ apart from information gathered through Form MA-T, there is little publicly and centrally available information about municipal advisors. In addition, although the information submitted on Form MA-T is publicly available on the Commission's website, the final rules and

¹⁶⁵⁴ See supra text accompanying notes 129–131.

¹⁶⁵⁵ See Section 975(i) of the Dodd-Frank Act.

¹⁶⁵⁶ See supra notes 107–110 and accompanying text.

¹⁶⁵⁷ See supra notes 93–96 and accompanying text.

forms will require municipal advisors to disclose a greater amount of information, including conflicts of interest and more information pertaining to disciplinary history.¹⁶⁵⁸ In addition, the final rules and forms will increase the ability of municipal entities and obligated persons to become more fully informed about municipal advisors in a more efficient manner, and thereby, at a lower cost.¹⁶⁵⁹

Fourth, the permanent registration regime is designed to enhance the ability of securities regulators to oversee municipal advisors, which could increase the willingness of market participants, specifically municipal entities and obligated persons, to utilize municipal advisors. The Commission staff will review applications for registration and by order grant registration or the Commission will institute proceedings to determine whether registration should be denied.¹⁶⁶⁰ Requiring municipal advisors to register with the Commission under the permanent registration regime will allow the Commission to collect additional information about municipal advisors that can be used to facilitate examination and enforcement efforts. The Commission believes that its authority to examine and sanction municipal advisors for false and misleading statements submitted by municipal advisors on Form MA or Form MA-I under the permanent registration regime, including the additional information on Form MA that is not required on Form MA-I, may result in increased reliability of the information, which could increase the willingness of municipal entities and obligated persons to utilize municipal advisors. Municipal advisors, knowing that additional information about their disciplinary histories must be disclosed pursuant to the final rules, may be further incentivized to avoid engaging in misconduct.

¹⁶⁵⁸ See *infra* Section VIII.D.1.a.

¹⁶⁵⁹ Investors could also benefit to the extent they consider whether a municipal advisor was involved in negotiating a municipal bond offering.

¹⁶⁶⁰ See 78 U.S.C. 78o-4(a)(2).

Finally, the permanent registration regime will require municipal advisors to maintain books and records regarding their municipal advisory activities. Recordkeeping requirements are a familiar and important element of the Commission's approach to investment adviser and broker-dealer regulation and are designed to maintain the efficiency and effectiveness of the Commission's examination program for regulated entities. Rule 15Ba1-8 will assist the Commission in evaluating a municipal advisor's compliance with Section 15B of the Exchange Act, the rules and regulations thereunder, and MSRB rules.

C. Economic Baseline

The rules and forms adopted today establish a permanent registration regime for municipal advisors. The temporary registration regime, as described below,¹⁶⁶¹ serves as the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of the final rules and forms are measured. The discussion below includes a description of the costs and benefits of the temporary registration regime (*i.e.*, the programmatic and registration costs and benefits) as well as approximate numbers of municipal advisors that would be affected by the final rules and forms adopted today.

By enacting Section 975 of the Dodd-Frank Act, Congress created a federal regulatory regime for municipal advisors that previously did not exist. In determining the economic baseline, the Commission recognizes that, effective October 1, 2010, any person that meets the statutory definition of municipal advisor¹⁶⁶² is currently required to register with the Commission, unless a

¹⁶⁶¹ See *infra* notes 1662–1669 and accompanying text.

¹⁶⁶² Section 15B(e)(4) of the Exchange Act defines “municipal advisor” as a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. See 15 U.S.C. 78o-4(e)(4)(A). As discussed

statutory exclusion applies.¹⁶⁶³ As discussed above, the Commission adopted a temporary registration regime to allow municipal advisors to satisfy temporarily the statutory registration requirement by submitting certain information, including disciplinary history of associated municipal advisor professionals, electronically through the Commission's public website on Form MA-T.¹⁶⁶⁴ The Commission does not impose registration or filing fees in connection with municipal advisor registration, either under the temporary registration regime or the permanent registration regime.

In addition to registering with the Commission, every municipal advisor is required to comply with the requirements imposed by Section 15B of the Exchange Act as well as rules established by the MSRB. For example, Section 15B(a)(5) prohibits a municipal advisor from engaging in any fraudulent, deceptive, or manipulative acts or practices when providing advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or when undertaking a solicitation of a municipal entity or obligated person.¹⁶⁶⁵ A municipal advisor is also deemed to have a fiduciary duty to its municipal entity clients.¹⁶⁶⁶

above, the statutory definition of municipal advisor is broad and includes persons that traditionally have not been considered to be municipal financial advisors. See supra text accompanying notes 129–131. Specifically, the definition of municipal advisor includes “financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors” that engage in municipal advisory activities. See 15 U.S.C. 78o-4(e)(4)(B).

¹⁶⁶³ See 15 U.S.C. 78o-4(a)(1)(B); 15 U.S.C. 78o-4(e)(4)(C).

¹⁶⁶⁴ See supra notes 107–110 and accompanying text. See also Form MA-T, Glossary of Terms (defining “associated municipal advisory professional”). Today, in a separate release, the Commission is extending the expiration date of the temporary registration regime to December 31, 2014. See supra note 115 and accompanying text.

¹⁶⁶⁵ See 15 U.S.C. 78o-4(a)(5).

¹⁶⁶⁶ See 15 U.S.C. 78o-4(c)(1). Section 975 of the Dodd-Frank Act did not define the contours of a municipal advisor's fiduciary duty to its municipal entity clients. Pursuant to Section

The Dodd-Frank Act also provided the MSRB with authority to propose and adopt rules related to municipal advisors.¹⁶⁶⁷ The MSRB has already adopted some rules for municipal advisors.¹⁶⁶⁸ For example, MSRB Rule G-17 requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. In addition, prior to engaging in municipal advisory activities, a municipal advisor must register with the MSRB and pay a \$100 initial fee and a \$500 annual fee.¹⁶⁶⁹

1. Programmatic Costs and Benefits of the Temporary Registration Regime

Subjecting municipal advisors to the requirements of the temporary registration regime has a number of programmatic costs and benefits. Municipal advisors may have incurred, and would continue to incur, costs to comply with the standards and rules discussed above that are currently applicable to municipal advisors by statute or MSRB rules.¹⁶⁷⁰ In addition, as discussed above,

15B(b)(2)(L)(i) of the Exchange Act, the MSRB is authorized to prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients. See 15 U.S.C. 78o-4(b)(2)(L)(i). As discussed above, the Commission has direct oversight authority over the MSRB, including the ability to approve or disapprove the MSRB's rules. See supra note 1651 and accompanying text. For purposes of this economic analysis, Congress's imposition of a fiduciary duty on municipal advisors under Section 975 of the Dodd-Frank Act is part of the baseline.

¹⁶⁶⁷ See 15 U.S.C. 78o-4(b).

¹⁶⁶⁸ Although the MSRB has adopted some rules for municipal advisors, the MSRB has yet to detail many of the requirements that will apply to municipal advisors. For example, the MSRB has yet to establish standards of training, experience, competence, and other qualifications (see 15 U.S.C. 78o-4(b)(2)(A)); prescribe recordkeeping requirements (see 15 U.S.C. 78o-4(b)(2)(G)); provide continuing education requirements (see 15 U.S.C. 78o-4(b)(2)(L)(ii)); or provide professional standards (see 15 U.S.C. 78o-4(b)(2)(L)(iii)).

¹⁶⁶⁹ See MSRB Rule A-12 and MSRB Rule A-14. Section 15B(b)(2)(J) of the Exchange Act permits the MSRB to require municipal advisors to pay reasonable fees and charges. See 15 U.S.C. 78o-4(b)(2)(J). Other MSRB rules applicable to municipal advisors include MSRB Rules G-5 (Disciplinary Actions by Appropriate Regulatory Agencies; Remedial Notices by Registered Securities Associations), G-40 (Electronic Mail Contacts), and A-15 (requiring that a municipal advisor notify the MSRB if it ceases operations).

¹⁶⁷⁰ See supra notes 1665–1669 and accompanying text.

municipal advisors that have registered with the MSRB have incurred fees assessed by the MSRB and would continue to incur fees in each year registered with the MSRB.¹⁶⁷¹

Municipal advisors may also have incurred, and would continue to incur, costs in association with examinations by Commission staff. Section 15B of the Exchange Act authorizes the Commission, or its designee, to conduct periodic examinations of municipal advisors for compliance with the Exchange Act, the rules and regulations thereunder, and the rules of the MSRB.¹⁶⁷² Since the beginning of fiscal year 2012 through fiscal year 2013, OCIE completed 19 examinations of municipal advisors. The time and cost involved in an examination varies depending on the size of the municipal advisor; whether the municipal advisor was also registered with the Commission as a broker-dealer and/or investment adviser; and whether Commission staff identified additional risks posed by the municipal advisor while onsite.¹⁶⁷³

Municipal advisors, faced with the costs imposed by the temporary registration regime, may have responded in a number of ways. Municipal advisors that viewed the costs as too burdensome, or those with extensive disciplinary histories, may have decided to discontinue engaging in activities that would require them to register as municipal advisors (hereinafter referred to as “exiting the market”). Other municipal advisors may have determined to consolidate with other municipal advisory firms to better manage the costs associated with the regulatory regime. Still others may have passed the additional costs of being a registered municipal advisor on to municipal entities and obligated persons in the form of higher fees.¹⁶⁷⁴ In addition, some persons that may

¹⁶⁷¹ See supra note 1669 and accompanying text.

¹⁶⁷² See 15 U.S.C. 78o-4(b)(2)(E); 15 U.S.C. 78o-4(c)(7)(A)(iii). See also supra note 1386 and accompanying text.

¹⁶⁷³ The onsite portion of an examination lasts approximately three business days.

¹⁶⁷⁴ The Commission recognized in the Proposal that the cost of becoming subject to registration for the first time could lead some municipal advisors that are not particularly active to leave

have otherwise newly entered the municipal advisor market may have decided not to enter the market.

The Commission, however, is unable to estimate the number of municipal advisors that may have exited the market or consolidated with other municipal advisory firms as a result of the temporary registration regime because Form MA-T does not require a municipal advisor withdrawing from registration on Form MA-T to indicate the reasons for the withdrawal.¹⁶⁷⁵

Further, the Commission does not have the information necessary to estimate how many municipal advisors may have chosen to exit the market after the enactment of the Dodd-Frank Act but prior to the commencement of the temporary registration regime because such data is not currently available to the Commission or otherwise publicly available. Similarly, the Commission is unable to estimate the extent to which municipal advisors may have passed on to their clients the costs incurred to comply with the temporary registration regime because such data is not currently available to the Commission or otherwise publicly available. Although commenters asserted that such costs could

the business. See Proposal, 76 FR at 876. The Commission received several comment letters that asserted the costs of the regulatory regime could cause municipal advisors to exit the market, consolidate with other firms, or pass the costs incurred to comply with the regime on to clients. See, e.g., Public FA Letter (“The regulations imposed on small firms like ours could be time consuming and costly enough to either put us out of business or cause small firms to merge with larger firms or to create larger firms.”); Fieldman Rolapp Letter (“Most firms, regardless of revenue amount, are small businesses with insufficient margins to bear excessive regulatory burden”); Ranson Financial Consultants Letter (“Our options [in relation to compliance costs] may include joining another firm or simply go out of business”); UFS Bancorp Letter (“[T]he Proposed Rules will have economic costs. These will either come out of the bottom lines of firms or be passed along to municipal clients in the form of fee increases.”).

The Commission is unable to estimate the number of persons who may have decided not to enter the municipal advisor market because such data is not currently available to the Commission or otherwise publicly available. However, the Commission notes that, as discussed above, approximately 205 municipal advisers filed an initial Form MA-T in 2011 and approximately 115 filed an initial Form MA-T in 2012. See supra Section VII.C.

¹⁶⁷⁵

As discussed above, approximately 22 municipal advisors withdrew from registration on Form MA-T in 2011 and 24 withdrew from registration in 2012. See supra Section VII.D.4.

be passed on to clients,¹⁶⁷⁶ commenters did not provide specific figures in this regard, making it difficult to evaluate these assertions.

Section 975 of the Dodd-Frank Act includes new investor protections, including protections for municipal entities and obligated persons when issuing, or investing the proceeds of, municipal securities.¹⁶⁷⁷ For example, municipal advisors are now subject to, among other things, a fiduciary duty to any municipal entity clients and are prohibited from engaging in any act, practice, or course of business which is not consistent with that fiduciary duty.¹⁶⁷⁸ These investor protections may have incentivized municipal advisors not to engage in misconduct. As discussed above, Section 15B provides the Commission with explicit authority to oversee the activities of municipal advisors, and since the beginning of fiscal year 2012 through fiscal year 2013, OCIE completed 19 examinations of municipal advisors.¹⁶⁷⁹ Similarly, Section 15B enhances municipal entity and obligated person protections by providing the Commission with explicit authority to bring disciplinary actions against municipal advisors for misconduct, including the ability to censure, place limitations on the activities, functions, or operations, suspend for a period not exceeding twelve months, or revoke the registration of any municipal advisor.¹⁶⁸⁰

2. Registration Costs and Benefits of the Temporary Registration Regime

In the Temporary Registration Rule Release, the Commission identified certain costs and

¹⁶⁷⁶ See supra note 1674.

¹⁶⁷⁷ See supra note 1653 and accompanying text.

¹⁶⁷⁸ See 15 U.S.C. 78o-4(c)(1).

¹⁶⁷⁹ See supra notes 1672–1673 and accompanying text. The onsite portion of an examination lasts approximately three business days.

¹⁶⁸⁰ See 15 U.S.C. 78o-4(c)(2). The Commission also has the authority to censure or place limitations on the activities or functions of any person associated with a municipal advisor or to suspend or bar any such person from being associated with a municipal advisor. See 15 U.S.C. 78o-4(c)(4); Rule 15Bc4-1.

benefits of the temporary registration regime. Municipal advisors that have registered with the Commission on Form MA-T have incurred costs to gather the information required to complete the form and submit that information through the Commission's website, as well as to amend Form MA-T as necessary. In the Temporary Registration Rule Release, the Commission estimated that the total labor cost for all municipal advisors to complete Form MA-T would be approximately \$735,000.¹⁶⁸¹ The Commission also estimated that the total annual labor cost for all municipal advisors to amend Form MA-T would be approximately \$147,000.¹⁶⁸² In addition, the Commission estimated that the total cost for all municipal advisors to hire outside counsel to review their compliance with the requirements of Rule 15Ba2-6T and Form MA-T would be approximately \$400,000.¹⁶⁸³

In the Temporary Registration Rule Release, the Commission recognized the possibility that the cost of registering could be passed on to municipal entities in the form of higher fees. However, the Commission anticipated that any increase in municipal advisory fees attributable to the temporary registration regime would be minimal given the relatively small magnitude of these costs and the large number of municipal entity issuers.¹⁶⁸⁴

Subjecting municipal advisors to the requirements of the temporary registration regime may have had a number of benefits. The temporary registration regime may have enabled municipal entities and obligated persons to become better informed about a municipal advisor, including

¹⁶⁸¹ See Temporary Registration Rule Release, 75 FR at 54474 (calculating the estimated total labor cost for all municipal advisors to complete Form MA-T). This estimate includes all of the time necessary to research, evaluate, and gather all of the information requested in Form MA-T and all of the time necessary to complete and submit the form. See *id.* at 54473.

¹⁶⁸² See *id.* at 54474 (calculating the estimated total labor cost for all municipal advisors to amend Form MA-T).

¹⁶⁸³ See *id.* (calculating the estimated total cost for all municipal advisors to hire outside counsel to review their compliance with the requirements of Rule 15Ba2-6T and Form MA-T).

¹⁶⁸⁴ See *id.*

disciplinary history of associated municipal advisor professionals,¹⁶⁸⁵ by accessing and reviewing the municipal advisor's Form MA-T on the Commission's website. In addition, because information submitted on Form MA-T is consolidated in a single online location, municipal entities and obligated persons may have been able to access this information more efficiently, and thereby, at a lower cost.¹⁶⁸⁶ In addition, under the temporary registration regime, municipal advisors are required to disclose disciplinary history on Form MA-T, which disclosure may further deter municipal advisors from engaging in misconduct. As discussed in the Proposal, the information currently required by Form MA-T is not reviewed by the Commission or its staff prior to registration, although the Commission retains full authority to review such information and examine any registered municipal advisor at any time.¹⁶⁸⁷

3. Municipal Advisor Market

The discussion below includes approximate numbers of municipal advisors that would be affected by the final rules and forms adopted today. As discussed above, according to MA-T data as of December 31, 2012, there were approximately 1,110 Form MA-T registrants. Of these Form MA-T registrants, as of December 31, 2012, approximately 901 were also registered as municipal advisors with the MSRB, as they are required to do prior to engaging in municipal advisory

¹⁶⁸⁵ See *id.* at 54469. See also *supra* note 1664 and accompanying text.

¹⁶⁸⁶ See Temporary Registration Rule Release, 75 FR at 54474. The Commission is unable to estimate the amount of time and money municipal entities may have saved by reviewing Form MA-T rather than engaging in an RFP process or searching other regulatory documents because such data is not currently available to the Commission or otherwise publicly available. The Commission believes that the ability to access information, including disciplinary history, on municipal advisors in a single location benefits municipal entities and obligated persons by reducing the need to search for other regulatory documents of those municipal advisors that are registered, or have associated persons that are registered, in another capacity. In addition, information submitted on Form MA-T may be the only source of information about some municipal advisors.

¹⁶⁸⁷ See Proposal, 76 FR at 860. See also *infra* note 1705 and accompanying text.

activities.¹⁶⁸⁸ For the reasons discussed below, the Commission believes that the number of Form MA-T registrants may not be an accurate representation of the number of municipal advisors and that MSRB data represents a better basis on which to estimate the number of municipal advisors active in the market.

The Commission believes that a number of persons, recognizing that the Commission does not impose any fees for registration, may have registered with the Commission as municipal advisors out of an initial overabundance of caution.¹⁶⁸⁹ Although some current Form MA-T registrants may not have registered with the MSRB because of uncertainty regarding the scope of the temporary registration regime, others may have determined in the intervening time after October 1, 2010, that registration with the MSRB was not required because they were not engaging in municipal advisory activities. The Commission staff understands based on discussions with market participants that these Form MA-T registrants may have retained Commission registration because there are no associated fees to maintain such registration.¹⁶⁹⁰ Accordingly, based on the MSRB registration data, the Commission now estimates that 910 municipal advisors are currently active in the municipal advisor market.¹⁶⁹¹

MSRB data and MA-T data also provide information regarding the types of services

¹⁶⁸⁸ The Commission obtained this estimate by comparing the list of MSRB registrants to the Commission's list of Form MA-T registrants as of December 31, 2012.

¹⁶⁸⁹ As discussed above, prior to engaging in municipal advisory activities, a municipal advisor must register with the MSRB and pay a \$100 initial fee and a \$500 annual fee. See supra note 1669 and accompanying text.

¹⁶⁹⁰ The Commission staff understands that some municipal advisors may have maintained Form MA-T registration instead of withdrawing to wait and see whether registration would be required under the permanent registration regime, while others may not have realized they could withdraw or may have determined not to withdraw for other reasons.

¹⁶⁹¹ This estimate rounds to the nearest higher multiple of ten the number of municipal advisors that are registered with the MSRB to engage in municipal advisory activities.

provided by registered municipal advisors.¹⁶⁹² According to MSRB data,¹⁶⁹³ as of December 31, 2012, 682 municipal advisors identified themselves as financial advisors; 192 identified themselves as guaranteed investment contract brokers or advisors; 272 identified themselves as placement agents; 159 identified themselves as solicitors or finders; 246 identified themselves as swap or derivative advisors; 135 identified themselves as third-party marketers; and 201 indicated they provide other services.¹⁶⁹⁴ In addition, according to MA-T data, as of December 31, 2012, 226 municipal advisors were also registered with the Commission as broker-dealers; 39 were also registered with the Commission as investment advisers; and 65 were registered with the Commission as both broker-dealers and investment advisers. As discussed above, Form MA-T

¹⁶⁹² The three principal types of municipal advisors are: (1) financial advisors, including, but not limited to, brokers, dealers, and municipal securities dealers already registered with the Commission, that provide advice to municipal entities with respect to their issuance of municipal securities and their use of municipal financial products (“municipal financial advisors”); (2) investment advisers that advise municipal entities on the investment of public monies, including the proceeds of municipal securities (“municipal investment advisers”); and (3) third-party marketers and solicitors (“solicitors”). For purposes of this economic analysis, the Commission uses these terms to describe these distinct types of professionals separately, while using the term “municipal advisor” to describe all municipal advisors generally. As discussed above, for clarity, the Commission notes that financial advisors as referred to herein also include swap advisors, including some that are registered with the CFTC or the SEC in other capacities, that provide advice to municipal entities on their use of municipal financial products.

¹⁶⁹³ Although municipal advisors registering with the MSRB identify the types of services they provide, the Commission staff understands that the MSRB does not validate this information.

¹⁶⁹⁴ Some municipal advisors registered with the MSRB provide more than one type of service. According to MA-T data, as of December 31, 2012, 733 municipal advisors provided advice concerning the issuance of municipal securities; 496 provided advice concerning the investment of the proceeds of municipal securities; 322 provided advice concerning guaranteed investment contracts; 365 provided the recommendation and/or brokerage of municipal escrow investments; 365 provided advice concerning the use of municipal derivatives (e.g., swaps); 383 were third-party marketers, placement agents, solicitors, or finders; 470 provided the preparation of feasibility studies, tax or revenue projections, or similar products in connection with offerings or potential offerings of municipal securities; and 253 provided other services. The Commission staff has not validated the information provided on Form MA-T.

requires municipal advisors to disclose any disciplinary history of associated municipal advisor professionals.¹⁶⁹⁵ According to MA-T data, as of December 31, 2012, 169 registered municipal advisors had disclosed prior disciplinary history.

The Commission and the MSRB do not capture data regarding the concentration¹⁶⁹⁶ of the municipal advisor market. The Commission staff has evaluated data available in Thomson Reuters' SDC Platinum database ("SDC Platinum Database")¹⁶⁹⁷ to analyze concentration. To determine the number of issue offerings in 2012, the Commission staff assumed that bonds issued on the same day by the same issuer were part of the same issue.¹⁶⁹⁸ Under this assumption, and removing any deals for which SDC Platinum Database did not record a CUSIP, the Commission staff found that, in 2012, there were 13,288 municipal bond deals, of which approximately 8,237 used a financial advisor and 3,074 did not use a financial advisor. SDC Platinum Database was not able to provide information regarding the use of a financial advisor for the other 1,977 municipal bond deals. The 8,237 municipal bond deals that used a financial advisor were advised by approximately 318 different financial advisors, with the 50 most-active advisors advising approximately 80% of the advised deals, or approximately 74% by dollar volume issued of advised deals.

D. Analysis of Final Rules and Forms

Below, the Commission addresses the costs and benefits of the final rules and forms against the context of the economic baseline defined above, both in terms of the specific changes from the baseline as well as in terms of overall impact on the municipal advisor market. The Commission

¹⁶⁹⁵ See supra note 1664 and accompanying text.

¹⁶⁹⁶ Concentration refers to how many municipal advisors handle a significant percentage of municipal advisory business.

¹⁶⁹⁷ SDC Platinum is a database that tracks, among other things, information on municipal bond issues, including new municipal bond issues, municipal private placements, and municipal reoffering issues, but not remarketing issues.

¹⁶⁹⁸ This excludes deals where SDC does not record a CUSIP or an offering date.

also addresses the costs and benefits of the requirements that municipal advisors register with the Commission and maintain the books and records required by Rule 15Ba1-8. In considering these costs, benefits, and impacts, the Commission addresses, among other things, comments received, modifications made to the proposed rules and forms, and reasonable alternatives, where applicable.

At the outset, the Commission notes that, where possible, it has attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from adopting these rules and forms. In many cases, however, the Commission is unable to quantify the economic effects because it lacks the information necessary to provide a reasonable estimate. For example, the Commission does not have the information necessary to provide a reasonable estimate of the willingness of municipal entities and obligated persons to utilize municipal advisors and improvements in investor protection. In general, secondary data regarding the municipal advisory market that would assist the Commission in producing quantitative analyses are largely unavailable, and, other than the academic papers cited in the Proposal and this release, few studies on municipal securities have attempted to undertake the efforts to collect such secondary data. Additionally, the costs incurred by a municipal advisor to comply with the final rules and forms generally will depend on its size and the complexity of its business activities. Because the size and complexity of municipal advisors vary significantly,¹⁶⁹⁹ their costs to comply with the final rules and forms could also vary significantly.

The Commission received many comments on the proposed rules and forms, and has incorporated many of the suggested alternatives into the final rules and forms and rejected, after careful consideration, other suggested alternatives, as fully discussed in Section III. The policy choices made to accept or reject the alternatives suggested by the commenters have been informed

¹⁶⁹⁹ See supra note 1694 and accompanying text.

by the costs and benefit considerations. In particular, as stated above, the Commission is mindful of the programmatic, assessment, registration, and recordkeeping costs associated with the municipal advisor regulatory regime.

1. Broad Economic Considerations

a. Benefits of the Final Rules and Forms

The Commission believes that the final rules and forms should result in a number of benefits, including those discussed throughout this economic analysis. As discussed below, the Commission has sought to subject to the municipal advisor regulatory regime those persons that should be regulated as municipal advisors in light of the purposes of the Dodd-Frank Act to regulate those persons that engage in municipal advisory activities. The final rules and forms should increase the amount of publicly available information about municipal advisors and enhance the ability of securities regulators to oversee municipal advisors.

The permanent registration regime will increase the amount of information available about municipal advisors relevant to the baseline.¹⁷⁰⁰ The forms will require municipal advisors to provide information about their businesses, including disciplinary histories and potential conflicts of interest (as well as information that may be useful in assessing conflicts of interest), beyond what is required to be disclosed on Form MA-T. Although much of the additional information required by Form MA is already publicly available with respect to municipal advisors that are already registered with the Commission as investment advisers or broker-dealers, many municipal advisors that are not registered with the Commission will make this type of information publicly available for the first time.¹⁷⁰¹ In addition, while municipal advisors are required to disclose disciplinary history for

¹⁷⁰⁰ As discussed below, the permanent registration regime will also impose registration and recordkeeping costs on municipal advisors. See *infra* Section VIII.D.3–4.

¹⁷⁰¹ For example, little is currently known about solicitors, and disciplinary histories and

some associated persons on Form MA-T, municipal advisors will be required to disclose on Form MA disciplinary history for all associated persons.¹⁷⁰²

To the extent municipal entities and obligated persons consider disciplinary history and conflict of interest information important in selecting a municipal advisor, the permanent registration regime may reduce selection of municipal advisors that have been the subject of disciplinary actions or whose activities or affiliations create, or have the potential to create, conflicts of interest. Moreover, municipal advisors, knowing that more-detailed disciplinary history must now be disclosed, may be further incentivized to avoid engaging in misconduct (or may exit the market).¹⁷⁰³ In addition, municipal advisors, knowing that conflicts of interest must now be disclosed, may also be more likely to avoid associations that create conflicts of interest or may be more likely to avoid recommending financial intermediaries or investments for which conflicts of interest might be present. The increased dissemination of information regarding disciplinary history and conflicts of interest may lead to improved quality-based competition among municipal advisors to the extent municipal advisors rely on this information in the municipal advisor selection process.

conflicts of interest about many solicitors will be disclosed for the first time.

¹⁷⁰² Form MA-T requires disclosure of disciplinary information of a subgroup of associated persons who are closely associated with a municipal advisor's municipal advisory activities (i.e., those who are primarily engaged in a municipal advisor's municipal advisory activities, have supervisory responsibilities over those primarily engaged in municipal advisory activities, are engaged in day-to-day management of the conduct of a municipal advisor's municipal advisory activities, or are responsible for executive management of the municipal advisor).

¹⁷⁰³ As discussed below, the Commission is unable to estimate the number of municipal advisors that have exited the market due to the temporary registration regime or that will exit the market due the permanent registration regime because Form MA-T does not require a municipal advisor withdrawing from registration from Form MA-T to indicate the reasons for withdrawal. See *infra* Section VIII.D.1.b. As a result of the requirement that municipal advisors disclose disciplinary histories, those municipal advisors that may discontinue activity in the market may include disproportionately more municipal advisors with disciplinary records. Further, such public disclosure may deter municipal advisors that have significant disciplinary histories from entering the market.

The Commission also believes that the permanent registration regime will enhance the ability of the Commission and other regulators to oversee the conduct of municipal advisors, as contemplated by the Dodd-Frank Act, which could increase the willingness of municipal entities and obligated persons to utilize municipal advisors.¹⁷⁰⁴ The Commission staff will review applications for registration and by order grant registration or the Commission will institute proceedings to determine whether registration should be denied.¹⁷⁰⁵ Because Rule 15Ba1-2 provides that both Form MA and Form MA-I constitute a “report” within the meaning of Sections 15B(c), 17(a), 18(a), 32(a) (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Exchange Act, it is unlawful for a municipal advisor to willfully make or cause to be made, a false or misleading statement of material fact or omit to state a material fact in Form MA and Form MA-I. The Commission believes that a municipal advisor’s knowledge of the Commission’s authority to examine the municipal advisor and to sanction the municipal advisor for false and misleading statements could help ensure the reliability of the information submitted by municipal advisors under the permanent registration regime, which could increase the willingness of municipal entities and obligated persons to utilize municipal advisors.

In addition, the Commission’s examination staff will be able to use the information provided in Form MA and Form MA-I as a tool to prioritize and plan examinations. By securing information regarding municipal advisors through EDGAR, relative to the baseline, Commission staff should be able to more efficiently retrieve and analyze the data it needs to carry out its mission with respect to municipal advisory activities effectively, such as by identifying potentially violative activities and risky municipal advisory firms.¹⁷⁰⁶ Moreover, Rule 15Ba1-8 will assist the Commission in

¹⁷⁰⁴ See also infra notes 1758–1759 and accompanying text.

¹⁷⁰⁵ See 78 U.S.C. 78o-4(a)(2).

¹⁷⁰⁶ In addition, municipal entities, obligated persons, and other market participants will be able

evaluating a municipal advisory firm's compliance with Section 15B of the Exchange Act,¹⁷⁰⁷ rules and regulations promulgated thereunder, and MSRB rules. By requiring that municipal advisory firms maintain specific types of information, the final rules will enhance the ability of regulators to perform more-efficient inspections and examinations and increase the likelihood of identifying improper conduct at earlier stages in an inspection or examination. In addition, municipal advisory firms may benefit from recordkeeping practices developed pursuant to the requirements of Rule 15Ba1-8 by having their operations interrupted for shorter time periods in response to inspections or examinations.

The requirement that a non-resident municipal advisor file Form MA-NR and obtain an opinion of counsel in connection with the municipal advisor's initial application, as well as annual updates to Form MA-NR and the opinion of counsel, will also help to enhance the Commission's oversight of non-resident municipal advisors, which may promote the willingness of municipal entities and obligated persons to utilize municipal advisors. The Commission believes that requiring Form MA-NR and an opinion of counsel could improve the Commission's oversight of municipal advisors by: minimizing any legal or logistical obstacles that the Commission may encounter when attempting to effect service; conserving Commission resources; and avoiding potential conflicts of law. The requirement that a non-resident municipal advisory firm obtain an opinion of counsel that it can provide access to books and records and can be subject to inspection and examination will allow the Commission to better evaluate and monitor a municipal advisory

to perform their own analyses using EDGAR and provide some market monitoring. Information submitted on Form MA and Form MA-I will be tagged in XML format, which may improve the Commission staff's ability to retrieve and analyze data. In addition, tagging information in XML format could allow municipal entities and obligated persons to perform better research into municipal advisors, which could help improve efficiency if this increased monitoring results in greater market discipline of municipal advisors.

¹⁷⁰⁷ 15 U.S.C. 78o-4.

firm's ability to meet the requirements of registration. These benefits will be the same across all types of municipal advisor – municipal financial advisors, municipal investment advisers, and solicitors.

To the extent that the registration and recordkeeping requirements result in more-effective examinations, the enhanced ability to monitor municipal advisors could lead to increased efficiency relative to the baseline. Enhanced oversight of municipal advisors due to the registration and recordkeeping requirements could improve capital formation relative to the baseline to the extent enhanced oversight increases the willingness of municipal entities and obligated persons to utilize municipal advisors, and municipal entities and obligated persons, in turn, issue more debt or debt with better terms.¹⁷⁰⁸ To the extent that investors decide to make greater investments in the municipal securities market, efficiency could increase as capital is put to a more-efficient use.

b. Potential Changes to the Municipal Advisor Market

The Commission recognizes that the final rules and forms may result in changes to the municipal advisor market. As discussed below, municipal advisors will incur programmatic costs as a result of the statutory municipal advisor regulatory regime.¹⁷⁰⁹ In addition, municipal advisors will incur the registration and recordkeeping costs that result from the final rules and forms.¹⁷¹⁰ The Commission recognizes that, as a result of these costs, municipal advisors may decide to exit the market, consolidate with other firms, or pass the costs on to municipal entities and obligated persons

¹⁷⁰⁸ See *infra* notes 1830–1831 and accompanying text. Investor willingness to invest in municipal bond offerings may increase to the extent that the municipal entity issuing bonds used a municipal advisor and investors understand and consider the benefits of municipal advisor registration.

¹⁷⁰⁹ See *infra* Section VIII.D.2. The Commission expects that the costs and benefits resulting from the statutory municipal advisory regulatory regime will likely accrue primarily at the programmatic level, and that many of these costs are accounted for in the baseline. See *supra* Sections VIII.C.1.

¹⁷¹⁰ See *infra* Section VIII.D.3–4.

in the form of higher fees.

Some municipal advisors currently registered with the Commission may decide to exit the market or reduce services provided to municipal entities or obligated persons because of the costs associated with the final rules and forms. One commenter believed that the Commission did not address in the Proposal potential public costs from a reduction of services to municipal entities.¹⁷¹¹ While the Commission recognizes that some municipal advisors may exit the market as a result of the costs associated with the final rules and forms relative to the baseline, the Commission believes municipal advisors may exit the market for a number of reasons, including business reasons separate from reasons involving the costs associated with the final rules and forms. The Commission anticipates that some exits will result from municipal advisors' unwillingness to disclose required information to the Commission. The Commission believes that municipal advisors that have been subject to past disciplinary actions may decide to exit the market rather than disclose that information, and that the departure of such "bad actors" could improve the quality of the market for municipal advisory services and, therefore, benefit municipal entities and obligated persons.¹⁷¹²

In addition, the costs associated with the final rules and forms relative to the baseline may lead some municipal advisors to consolidate with other municipal advisors, rather than exit the

¹⁷¹¹ See Financial Services Roundtable Letter ("Given the burden of registering as a municipal advisor, particularly for a small bank, we believe that there is a likelihood that smaller banks that offer a few products to a small number of municipal entities providing services in their communities would elect to discontinue serving municipal entities."). See also Public FA Letter; Ranson Financial Consultants Letter.

¹⁷¹² The Commission recognizes that municipal advisors that exit the market would lose any revenue that would have accrued from providing municipal advisory services. Municipal entities and obligated persons could benefit, however, from not having municipal advisors who do not want to comply with the regulatory regime or other bad actors in the market.

market.¹⁷¹³ For example, some municipal advisors may determine to consolidate with other municipal advisors in order to benefit from economies of scale (e.g., by leveraging existing compliance resources of a larger firm) rather than to incur separately the costs associated with the final rules and forms.

The Commission, however, is unable to estimate the number of municipal advisors that have exited the market or consolidated with other firms as a result of the temporary registration regime because Form MA-T does not require a municipal advisor withdrawing from registration on Form MA-T to indicate the reasons for withdrawal. Similarly, the Commission is unable to estimate the number of municipal advisors that will exit the market or consolidate with other firms as a result of the final rules and forms. In addition, the Commission is not aware of any municipal advisors exiting the market or consolidating with other firms as a result of the temporary registration regime.

The Commission recognizes that some of the municipal advisors that may exit the market could be small entity municipal advisors that exit the market for financial reasons and that such exits from the market may lead to a reduced pool of municipal advisors. In the Final Regulatory Flexibility Analysis below, after comparing the estimated registration costs with a small municipal advisory firm's annual revenue, the Commission discusses alternatives considered to accomplish the objectives of the permanent registration regime while minimizing any significant adverse impact on small municipal advisors.¹⁷¹⁴ As discussed in the Final Regulatory Flexibility Analysis, the requirements under the final rules and forms are designed to impose only those burdens necessary to accomplish the objectives of the Dodd-Frank Act. In addition, as discussed below, the Commission

¹⁷¹³ See, e.g., Public FA Letter ("The regulations imposed on small firms like ours could be time consuming and costly enough to either put us out of business or cause small firms to merge with larger firms or to create larger firms."); Ranson Financial Consultants Letter ("Our options [in relation to compliance costs] may include joining another firm or simply go out of business").

¹⁷¹⁴ See infra Section IX.D.

believes that the market for municipal advisory services is likely to remain competitive despite the potential exit of municipal advisors, including small entity municipal advisors.¹⁷¹⁵

Some municipal advisors may pass the costs associated with the rules and forms on to municipal entities and obligated persons in the form of higher fees. For example, one commenter argued that the rules will have economic costs that will either come out of the bottom lines of firms or be passed along to municipal clients in the form of fee increases.¹⁷¹⁶ Although commenters asserted that such costs could be passed on to clients,¹⁷¹⁷ commenters did not provide specific estimates, and the Commission does not have the information necessary to provide a reasonable estimate of the extent to which municipal advisors may pass costs on to clients given the lack of publicly available information on municipal advisory fees.

The Commission believes that the market for municipal advisory services is likely to remain competitive despite the potential exit of municipal advisors, consolidation of municipal advisors, or lack of new entrants into the market.¹⁷¹⁸ As discussed above, the Commission estimates that approximately 100 new entrants to the market will register on Form MA each year¹⁷¹⁹ and that approximately 30 municipal advisors will withdraw from Form MA registration each year.¹⁷²⁰ Because the Commission expects that new entrants to the municipal advisor market will exceed departures therefrom, the Commission does not expect exits from the market or consolidation of

¹⁷¹⁵ See infra notes 1718–1723 and accompanying text.

¹⁷¹⁶ See UFS Bancorp Letter. See also SIFMA Letter I.

¹⁷¹⁷ See, e.g., SIFMA Letter I; UFS Bancorp Letter.

¹⁷¹⁸ The Commission recognizes that the requirements to register with the Commission and maintain certain books and records, and the associated costs, will increase the burdens on those seeking to enter the municipal advisor market, which may negatively impact competition in the municipal advisor market.

¹⁷¹⁹ See supra note 1470 and accompanying text.

¹⁷²⁰ See supra note 1531 and accompanying text.

municipal advisors to result in reduced competition.¹⁷²¹ In addition, the level of competition in the existing markets for each type of municipal advisor – municipal financial advisors, municipal investment advisers, and solicitors – suggests, based on data available to the Commission,¹⁷²² that exits from the market, consolidation, or lack of new entrants into the market are unlikely to lead to market concentration levels at which the remaining municipal advisors are able to increase prices significantly.¹⁷²³ Accordingly, the Commission does not expect the departure of municipal advisors from the market to result in a significant increase in the cost of municipal advisory services.

In addition, the registration and recordkeeping costs should not impact efficiency or capital formation because those costs are unlikely to reduce the utilization of municipal advisors by municipal entities and obligated persons. The Commission believes that any increase in municipal advisory fees attributable to the registration and recordkeeping costs of the permanent registration regime will be minimal given the average cost per municipal advisory firm¹⁷²⁴ and the relatively small magnitude of these costs compared to the large number of municipal entity issuers per

¹⁷²¹ The Commission does not expect an effect on capital formation due to new entrants to the municipal advisor market or from exits from the market.

¹⁷²² As indicated above, as of December 31, 2012, approximately 901 municipal advisors registered with the Commission on Form MA-T were also registered with the MSRB, as they are required prior to engaging in municipal advisory activities. See supra note 1688 and accompanying text. With respect to municipal advisors registered with the MSRB, approximately 682 were financial advisors; 192 were guaranteed investment contract brokers or advisors; 272 were placement agents; 159 were solicitors or finders; 246 were swap or derivative advisors; 135 were third-party marketers; and 201 provided other services. See supra note 1694 and accompanying text (discussing this data as well as similar MA-T data).

¹⁷²³ As discussed above in the economic baseline, the municipal advisor market is not highly concentrated. See supra Section VIII.C.3. See also supra note 1694 and accompanying text (discussing MSRB and MA-T data regarding services provided by municipal advisors registered with the MSRB and the Commission).

¹⁷²⁴ As discussed above, the Commission estimates that the average cost per municipal advisory firm to register with the Commission will be approximately \$8,092. See infra note 1813 and accompanying text.

municipal advisory firm. The Commission recognizes, however, that for smaller municipal advisors with fewer clients the registration and recordkeeping costs may represent a greater percentage of annual revenues, and thus, such advisors may be more likely to pass those costs along to clients.¹⁷²⁵

c. Assessment Costs

Under the temporary registration regime, market participants may have incurred costs to determine whether their business activities meet the definition of municipal advisor or if a statutory exclusion applies, and thus, whether registration with the Commission as a municipal advisor and compliance with the requirements imposed by Section 15B of the Exchange Act as well as rules established by the MSRB was required.¹⁷²⁶ Prior to the enactment of the Dodd-Frank Act and the Commission's adoption of the temporary registration regime, there were no assessment costs with respect to municipal advisor regulation. The Commission received a number of comments in connection with the 2010 interim temporary final rule seeking guidance regarding the scope of the statutory definition of municipal advisor and the statutory exclusions therefrom.¹⁷²⁷

In the Proposal, the Commission stated its belief that the direct costs for respondents to read and apply the definitions in proposed Rule 15Ba1-1(d) would be minimal.¹⁷²⁸ The Commission received several comments regarding the costs to interpret the proposed definition of municipal

¹⁷²⁵ See infra notes 1991–1998 and accompanying text.

¹⁷²⁶ See supra notes 1662–1669 and accompanying text.

¹⁷²⁷ See letters from Brad R. Jacobson, dated September 7, 2010; John J. Wagner, Kutak Rock LLP, dated September 28, 2010; Joy A. Howard, Principal, WM Financial Strategies, received October 5, 2010; Steve Apfelbacher, President, National Association of Independent Public Finance Advisors, received October 8, 2010; Amy Natterson Kroll & W. Hardy Callcott, Bingham McCutchen LLP, on behalf of the National Association of Energy Service Companies, dated October 13, 2010; Carolyn Walsh, Vice-President and Senior Counsel, Center for Securities, Trust and Investments, American Bankers Association, Deputy General Counsel, ABA Securities Association, dated October 13, 2010; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 15, 2010.

¹⁷²⁸ See Proposal, 76 FR at 873.

advisor, proposed interpretations of the statutory exclusions, and proposed exemptions.¹⁷²⁹ One commenter asserted that “given that Form MA and the related rules are new, . . . outside legal fees could easily exceed \$25,000 for a financial institution that provides a variety of services to municipal clients.”¹⁷³⁰

Although the above comment appears to be directed at the Commission’s estimate of the costs to engage outside counsel in connection with completing Form MA, the Commission recognizes that many persons will incur assessment costs to determine whether registration as a municipal advisor is required under the final rules. The Commission, therefore, has reconsidered the direct costs for respondents to read and apply the definitions in Rule 15Ba1-1(d). The Commission recognizes that some market participants are likely to seek legal counsel for interpretation of various aspects of the rule, particularly to determine whether the market participant’s business activities meet the definition of municipal advisor or whether an exclusion or exemption from the definition of municipal advisor is available. The Commission believes that the assessment costs may vary depending on the relevant facts and circumstances, including the complexity of the market participant’s business activities. The Commission also now believes that for larger financial institutions with more complex businesses the assessment costs could range up to \$25,500, as indicated by a commenter.¹⁷³¹

The Commission does not have the information necessary to provide a point estimate of the

¹⁷²⁹ See, e.g., SIFMA Letter I; ACLI Letter; Financial Services Roundtable Letter.

¹⁷³⁰ See Financial Services Roundtable Letter.

¹⁷³¹ See *supra* note 1730. The Commission believes that different market participants will need to undertake different analyses in relation to the definition of municipal advisor and exclusions and exemptions therefrom. The estimate of assessment costs is intended to include analysis of the exclusions and exemptions, although the Commission separately discusses the impacts of the interpretations of the exclusions and exemptions on assessment costs below. See *infra* Section VIII.D.5–6 (discussing the exclusions and exemptions).

potential assessment costs because the Commission believes the assessment costs associated with determining whether a market participant is a municipal advisor under Section 15B of the Exchange Act will vary. However, based on the Commission staff's understanding of the industry and comments received,¹⁷³² the Commission estimates that the costs associated with undertaking this determination may range from \$379 to \$25,500.¹⁷³³ The Commission believes that many entities are clearly municipal advisors and that an in-house attorney, without the assistance of outside counsel, could make such a determination in one hour. If an entity's business is more complex, the Commission estimates the assessment could require approximately 25 hours of in-house counsel time and 40 hours of outside counsel time.

The Commission believes that the assessment costs associated with determining whether a person would be required to register as a municipal advisor would be greater in the absence of the rules the Commission is adopting today. The Commission believes the rules adopted today provide extensive guidance to market participants and should reduce the number of requests for no-action relief and other guidance from the Commission or Commission staff, which, in turn, should lead to lower assessment costs for many firms.

In particular, to further facilitate market participants' analysis of whether their activities

¹⁷³² See supra note 1730.

¹⁷³³ The average cost incurred by market participants is based on the estimated amount of time that the staff believes would be required for both in-house counsel and outside counsel to assess whether a market participant is a municipal advisor, as that term is defined in Section 15B of the Exchange Act (15 U.S.C. 78o-4(e)(4)) and the final rules. For the calculation of the hourly rate for an in-house attorney, see infra note 1779. The Commission estimates the costs for outside legal services to be \$400 per hour. For an explanation of the outside counsel cost estimate, see supra note 1538. Accordingly, the Commission estimates the cost on the high end of the range to be \$25,475 (\$9,475 (based on 25 hours of in-house counsel time × \$379) + \$16,000 (based on 40 hours of outside counsel time × \$400)). This estimate is rounded by two significant digits to avoid the impression of false precision of the estimate. In addition, as discussed below, the Commission estimates that the average cost per municipal advisory firm to register with the Commission will be \$8,092. See infra note 1813.

would require them to register as a municipal advisor, the Commission has adopted several definitions that are consistent with existing regulatory definitions. For example, the Commission is adopting a definition of obligated person¹⁷³⁴ that is generally consistent with Rule 15c2-12. This definition will provide further protections for certain entities that participate in borrowing in the municipal securities market, ensure uniformity among rules relating to that market, and provide clearer guidance to market participants. In addition, the consistency with Rule 15c2-12 will likely reduce any confusion and, thus, may reduce the cost of compliance by allowing advisors to more quickly and accurately determine whether their clients are obligated persons. The Commission also believes that the materiality standard for secondary market disclosure in Rule 15c2-12 is an appropriate standard to identify those obligated persons that should have the protections afforded by Section 15B of the Exchange Act.¹⁷³⁵

Similarly, as discussed above, the Commission is adopting a definition of “proceeds of municipal securities” that is similar to the definition of proceeds for purposes of the arbitrage rules, except that it applies to both taxable and tax-exempt municipal securities, which should lead to lower assessment costs for many firms.¹⁷³⁶ Because the arbitrage rules are central to tax-exempt municipal securities, the Commission believes that market participants will be familiar with and able to understand easily the scope of “proceeds of municipal securities.”¹⁷³⁷ Further, the

¹⁷³⁴ See supra Section III.A.1.b.iii.

¹⁷³⁵ Similarly, in response to commenters, the Commission is providing exemptions from the definition of municipal advisor for swap dealers that will apply the safe harbor requirements applicable to the parties to such transactions under the existing CFTC regulatory regime and, therefore, will apply consistent and comparable protections to municipal entities and obligated persons as under that regime. See Rule 15Ba1-1(d)(3)(v); supra Section III.A.1.c.vi.

¹⁷³⁶ See supra text accompanying note 1733.

¹⁷³⁷ The Commission recognizes that some entities may not be familiar with the arbitrage rules and, thus, that any benefits recognized from the Commission’s reliance on the arbitrage rules

Commission believes that the definition appropriately limits the time and cost of compliance for a person to determine whether it must register as a municipal advisor because if a person makes a reasonable inquiry of a knowledgeable municipal entity or obligated person official and is informed in writing that monies are not proceeds of municipal securities, then absent reason to know otherwise, they are not proceeds of municipal securities.¹⁷³⁸ While municipal entities and obligated persons generally already track proceeds of tax-exempt municipal securities,¹⁷³⁹ and thus, should not incur additional costs in tracking such monies, municipal entities and obligated persons may incur additional costs in tracking proceeds of taxable municipal securities. However, the Commission believes that these costs will not be substantial because municipal entities currently trace proceeds of taxable bonds for non-tax purposes, such as for compliance with a bond indenture or resolution.

The Commission also believes the interpretations of the statutory exclusions adopted today should reduce assessment costs. For example, the Commission has provided examples of activities outside the scope of serving as an underwriter of municipal securities for purposes of the underwriter exclusion.¹⁷⁴⁰ Similarly, the Commission has clarified the types of activities that would fall outside of the other statutory exclusions.¹⁷⁴¹

may be reduced.

¹⁷³⁸ Similarly, the Commission is including a reasonable inquiry qualification in the definition of “municipal escrow investments.” See Rule 15Ba1-1(h)(2). See also notes 383–384 and accompanying text.

¹⁷³⁹ See supra notes 361–362 and accompanying text.

¹⁷⁴⁰ See supra Section III.A.1.c.iv.

¹⁷⁴¹ For example, an investment adviser that provides advice concerning whether and how to issue municipal securities; advice concerning the structure, timing, and terms of issuances of municipal securities and other similar matters; advice concerning municipal derivatives; or a solicitation would need to register as a municipal advisor. See Rule 15Ba1-1(d)(2)(ii); supra Section III.A.1.c.v.

2. Definition of Municipal Advisor and Related Terms

a. Programmatic, Registration, and Recordkeeping Costs and Benefits

As discussed above, there are programmatic costs and benefits that flow from the statutory municipal advisor regulatory regime. Given the limitations on the Commission's ability to conduct a quantitative assessment of the programmatic costs and benefits associated with the definition of municipal advisor,¹⁷⁴² the Commission has considered these costs and benefits primarily in qualitative terms.¹⁷⁴³ In addition, as discussed below, the Commission has quantified many of the registration and recordkeeping costs that result from the final rules and forms. Relying on the programmatic, registration, and recordkeeping costs and benefits, the Commission believes it is possible to identify those persons that, because of the activities in which they engage, appear to be the types of persons for which the statutory requirements of Section 975 of the Dodd-Frank Act were created.¹⁷⁴⁴

As previously stated, the statutory definition of municipal advisor is broad and includes persons that traditionally have not been considered to be municipal financial advisors.¹⁷⁴⁵ The

¹⁷⁴² The Commission does not have the information necessary to provide a reasonable estimate for many of the programmatic costs and benefits, in particular when discussing increases in the willingness of municipal entities and obligated persons to utilize municipal advisors and improvements in investor protection. In general, secondary data regarding the municipal advisory market that would assist the Commission in producing quantitative analyses are largely unavailable. Other than the academic papers cited in the Proposal and this release, few studies on municipal securities have attempted to undertake the efforts to collect such secondary data.

¹⁷⁴³ While commenters criticized this qualitative approach, none provided or suggested sources of data that would facilitate a quantitative analysis.

¹⁷⁴⁴ As indicated throughout this release, and as discussed further below, the Commission is mindful of the programmatic, registration, and recordkeeping costs and has adopted a definition of municipal advisor intended to help minimize compliance burdens consistent with the statutory objectives.

¹⁷⁴⁵ See supra note 1662.

definition of municipal advisor the Commission is adopting today is designed to provide guidance that parties can use in determining whether registration as a municipal advisor is required. In determining the appropriate scope of the definition of municipal advisor, the Commission considered what types of persons should be regulated as municipal advisors in light of the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities, the overall regulatory framework, and information currently available. The Commission has therefore sought to adopt a definition of municipal advisor that would capture those persons without imposing programmatic, registration, and recordkeeping costs on persons for which regulation currently may not be justified in light of the purposes of the Dodd-Frank Act. The Commission believes that this approach should help maximize the benefits provided by the municipal advisor regulatory regime while minimizing costs imposed on market participants where consistent with investor protection. Further, because the definition of municipal advisor and related terms adopted today are consistent with the definitions in Section 15B(e) of the Exchange Act and the purposes of the Dodd-Frank Act,¹⁷⁴⁶ the Commission believes that those persons that currently meet the definition of municipal advisor under the final rules and for which a statutory exclusion is not available should already be registered with the Commission and the MSRB under the temporary registration regime.

As discussed in the PRA, the Commission estimates that approximately 910 municipal advisory firms, including sole proprietors, will register with the Commission under the permanent registration regime.¹⁷⁴⁷ In addition, the Commission anticipates that the exemption for persons providing advice with respect to investment strategies that are not plans or programs for the

¹⁷⁴⁶ With regard to terms that are not defined in Section 15B(e) of the Exchange Act, the Commission is defining those terms in a manner consistent with the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities. See 15 U.S.C. 78o-4(e).

¹⁷⁴⁷ See supra note 1446 and accompanying text.

investment of proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments¹⁷⁴⁸ could reduce the estimated number of initial Form MA applicants. Likewise, the Commission anticipates the additional exemptions adopted today could also reduce the estimated number of initial Form MA applicants.¹⁷⁴⁹

Because the Commission has interpreted the definition of municipal advisor consistent with the statute, it believes that any differences from the baseline with regard to the number of municipal advisors required to register with the Commission should be minimal as those persons should have already registered under the temporary registration regime. In addition, any differences from the baseline with regard to the programmatic costs and benefits related to the statutory requirements and MSRB rules that are currently operative should be minimal because they would have already been incurred under the temporary registration regime.¹⁷⁵⁰ Similarly, the definition of municipal advisor adopted today should not impact efficiency, competition, or capital formation relative to the baseline because those market participants required to register under the permanent registration regime should already be registered with the Commission and the MSRB under the temporary registration regime and complying with the requirements of Section 15B of the Exchange Act and MSRB rules.¹⁷⁵¹

As discussed above, a person that meets the statutory definition of municipal advisor, and for which a statutory exclusion is not available, is already required to register with the Commission

¹⁷⁴⁸ See Rule 15Ba1-1(d)(3)(vii).

¹⁷⁴⁹ See supra Section III.A.1.c.

¹⁷⁵⁰ To the extent that the final rules provide guidance to certain market participants that their activities do not cause them to be municipal advisors, those persons would not incur the programmatic costs that flow from the regulatory regime.

¹⁷⁵¹ See supra Section VIII.C.

on Form MA-T and is subject to a series of programmatic costs.¹⁷⁵² These programmatic costs include, among other things, those incurred to comply with applicable provisions of Section 15B of the Exchange Act and MSRB rules. Municipal advisors will continue to be subject to a fiduciary duty to any municipal entity client and be prohibited from engaging in any fraudulent, deceptive, or manipulative acts or practices when providing advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or when undertaking a solicitation of a municipal entity or obligated person.¹⁷⁵³ Municipal advisors will also continue to be subject to MSRB Rule G-17, which requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. In addition, municipal advisors will still need to register with the MSRB and pay a \$100 initial fee and a \$500 annual fee.¹⁷⁵⁴ Because the Commission is adopting a definition of municipal advisor that is consistent with Section 15B(e) of the Exchange Act,¹⁷⁵⁵ the Commission believes registered municipal advisors would have already incurred these costs under the temporary registration regime. The Commission recognizes, however, that municipal advisors may incur costs to meet standards of training, experience, competence, and other qualifications, as well as continuing education requirements, that the MSRB may establish in the future.¹⁷⁵⁶

¹⁷⁵² As discussed below, the Commission is providing exemptions from the definition of municipal advisor for persons engaged in certain activities.

¹⁷⁵³ See 15 U.S.C. 78o-4(c)(1). See also supra note 1666 and accompanying text.

¹⁷⁵⁴ See MSRB Rule A-12; and MSRB Rule A-14.

¹⁷⁵⁵ With regard to terms that are not defined in Section 15B(e) of the Exchange Act, the Commission is defining those terms in a manner consistent with the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities. See 15 U.S.C. 78o-4(e).

¹⁷⁵⁶ See supra note 1668. In addition, as discussed below, the final rules and forms will require every municipal advisor to register with the Commission and satisfy new recordkeeping requirements according to Rule 15Ba1-8.

The Commission believes the municipal advisor regulatory regime should continue to enhance municipal entity and obligated person protections and incentivize municipal advisors not to engage in misconduct.¹⁷⁵⁷ Municipal advisors will continue to be subject to Commission oversight, including periodic examinations, and may be subject to disciplinary action for misconduct.¹⁷⁵⁸ In addition, certain municipal advisors will now be subject to periodic examinations by FINRA to evaluate compliance with the Exchange Act, the rules and regulations thereunder, and MSRB rules.¹⁷⁵⁹

Market participants will need to interpret a number of related terms to determine whether they are municipal advisors. Market participants will need to determine whether they provide “advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products.”¹⁷⁶⁰ The term “municipal financial product” is defined as “municipal derivatives, guaranteed investment contracts, and investment strategies.”¹⁷⁶¹ As discussed below, although the Exchange Act defines the terms “guaranteed investment contract” and “investment strategies,” it does not define the term “municipal derivatives.” In addition, certain terms important to interpreting the term “investment strategies” are undefined (*i.e.*, proceeds of municipal securities and guaranteed investment contracts). As discussed below, the Commission is adopting definitions of these terms that are consistent with the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities. The Commission has adopted several definitions of other related terms that are effectively identical to the statute (*i.e.*, municipal entity, obligated person, and

¹⁷⁵⁷ See *infra* Section VIII.D.3.b.

¹⁷⁵⁸ See *supra* note 1680 and accompanying text.

¹⁷⁵⁹ See 15 U.S.C. 780-4(b)(2)(E); 15 U.S.C. 780-4(c)(7)(A)(iii). See also *supra* notes 1672–1673 and accompanying text.

¹⁷⁶⁰ See 15 U.S.C. 780-4(e)(4).

¹⁷⁶¹ See 15 U.S.C. 780-4(e)(5).

solicitation).¹⁷⁶²

The Commission is adopting a definition of guaranteed investment contract that applies only to contracts related to investments of proceeds of municipal securities or municipal escrow investments.¹⁷⁶³ The Commission believes that persons that provide advice concerning guaranteed investment contracts should have already registered with the Commission and the MSRB under the temporary registration regime.¹⁷⁶⁴ The Commission staff understands that most persons that provide advice about guaranteed investment contracts specialize in public finance issues and are unlikely to provide advice only about guaranteed investment contracts that do not relate to investments of proceeds of municipal securities or municipal escrow investments. In addition, a review of MA-T and MSRB data indicates that no municipal advisor registered with the Commission or the MSRB has indicated that it provides advice only about guaranteed investment contracts and not another service that would likely require registration with the Commission under the final rules and forms. Accordingly, the Commission does not believe that the definition of guaranteed investment contract adopted today will result in a significant change from the baseline (*i.e.*, the number of municipal advisors registered with the MSRB) in the number of municipal advisors that will register under the permanent registration regime. Similarly, the Commission does not believe there will be a significant change from the baseline with regard to the programmatic costs and benefits due to the definition of “guaranteed investment contract.”

¹⁷⁶² Because the definitions of municipal entity, obligated person, and solicitation are consistent with the statute, the Commission believes that these definitions will not result in a significant change from the baseline (*i.e.*, the number of municipal advisors registered with the MSRB) in the number of registered municipal advisors or in the programmatic costs or benefits. See *supra* text accompanying notes 1750–1751.

¹⁷⁶³ See Rule 15Ba1-1(a).

¹⁷⁶⁴ As of December 31, 2012, approximately 320 municipal advisors registered on Form MA-T and approximately 185 municipal advisors registered with the MSRB indicated that they provide advice concerning guaranteed investment contracts.

Although Section 15B of the Exchange Act does not define the term “municipal derivatives,” the Commission is adopting a definition that is consistent with the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities. As discussed above, with respect to municipal entities, the Commission has determined not to qualify the definition of municipal derivatives as being limited to those entered into in connection with, or pledged as security or a source of payment for, existing or contemplated municipal securities.¹⁷⁶⁵ Accordingly, the Commission does not believe that this definition of municipal derivatives will result in a significant change from the baseline (*i.e.*, the number of municipal advisors registered with the MSRB) of the number of municipal advisors that will register under the permanent registration regime.¹⁷⁶⁶ The Commission is clarifying the application of the definition of municipal derivatives with respect to obligated persons to advise that relates to derivatives entered into in connection with, or pledged as security or a source of payment for, existing or contemplated municipal securities or another municipal derivative. The Commission expects that any persons that provide advice about derivatives outside this context would not register with the Commission under the permanent registration regime. The Commission does not believe, however, that this clarification will result in fewer persons registering as municipal advisors because the clarification is limited to instances that would cause a person to be an obligated person as defined in Section 15B(e)(10) of the Exchange Act.¹⁷⁶⁷

¹⁷⁶⁵ See supra Section III.A.1.c.

¹⁷⁶⁶ The Commission believes that persons that provide advice about municipal derivatives to municipal entities should have already registered with the Commission and the MSRB under the temporary registration regime. As of December 31, 2012, more than 350 municipal advisors registered on Form MA-T and more than 230 municipal advisors registered with the MSRB indicated that they provide advice concerning the use of municipal derivatives. See also infra VIII.D.6 (discussing the exemption for swap dealers).

¹⁷⁶⁷ 15 U.S.C. 78o-4(e)(10).

The Commission recognizes that persons that are required to register as municipal advisors because they provide advice about municipal derivatives will incur the programmatic costs of the municipal advisor regulatory regime. However, the Commission believes that any differences from the baseline with regard to the programmatic costs and benefits due to the definition of “municipal derivatives” would be minimal since such advisors would have already incurred these costs under the temporary registration regime.¹⁷⁶⁸ The Commission believes that municipal entities and obligated persons that receive advice about municipal derivatives should receive the protections of the municipal advisor regulatory regime.¹⁷⁶⁹ As discussed above, the permanent registration regime will increase the amount of information available about municipal advisors.¹⁷⁷⁰ The Commission believes that the increased availability of information relative to the baseline about municipal advisors that provide advice about municipal derivatives, including disciplinary history and conflicts of interest, may lead to an improvement in the selection of municipal advisors that provide advice related to municipal derivatives because municipal entities and obligated persons will be able to consult registration information when choosing municipal advisors that specialize in municipal derivatives.¹⁷⁷¹ In addition, as discussed above, the Commission believes that the increased public availability of information about municipal advisors who engage in municipal advisory activities pertaining to municipal derivatives may reduce from the baseline instances of misconduct to the extent the increased amount of information disclosed on Form MA as compared to Form MA-T acts as a deterrent against misconduct related to derivatives.¹⁷⁷²

¹⁷⁶⁸ See supra text accompanying note 1766.

¹⁷⁶⁹ See supra notes 1752–1756 and accompanying text.

¹⁷⁷⁰ See infra Section VIII.D.1.a.

¹⁷⁷¹ See infra Section VIII.D.3.b.

¹⁷⁷² The Commission recognizes, however, that municipal entities and obligated persons will not have registration information for advisors to obligated persons that invest in derivative

The Commission has determined not to adopt a separate definition of “investment strategies,” which is defined in Section 15B(e)(3) of the Exchange Act to include “plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.”¹⁷⁷³ The Commission, however, is adopting definitions of proceeds of municipal securities and municipal escrow investments that are consistent with the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities. The Commission believes that persons that provide advice with regard to proceeds of municipal securities and municipal escrow investments should have already registered with the Commission and the MSRB under the temporary registration regime.¹⁷⁷⁴ In addition, the exemption in Rule 15Ba1-1(d)(3)(vii) for any person that provides advice to a municipal entity or obligated person with respect to municipal financial products to the extent that such person provides advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments will provide greater certainty regarding the types of persons who are required to register with the Commission. Accordingly, the Commission believes that the definitions of “proceeds of municipal securities” and “municipal escrow investments” will not result in a significant change from the baseline (i.e., the number of municipal advisors registered with the MSRB) with regard to the number of municipal advisors that register under the permanent registration regime.

transactions not connected with municipal securities or other municipal derivatives.

¹⁷⁷³ See 15 U.S.C. 78o-4(e)(3).

¹⁷⁷⁴ As of December 31, 2012, nearly 500 municipal advisors registered on Form MA-T indicated that they provide advice concerning the investment of the proceeds of municipal securities and 360 indicated that they provide advice regarding the recommendation and/or brokerage of municipal escrow investments. MSRB data does not separately identify municipal advisors that provide these activities.

In addition, the Commission believes that any differences from the baseline with regard to the programmatic costs due to the adoption of the definitions of “proceeds of municipal securities” and “municipal escrow investments” should be minimal since such costs would have been incurred under the temporary registration regime. The Commission believes that municipal entities and obligated persons that receive advice concerning proceeds of municipal securities and municipal escrow investments should receive the protections of the municipal advisor regulatory regime, and that the Commission’s approach tailors protection to those activities related to the investment of the proceeds of municipal securities and related escrow investments, which have been subject to widespread enforcement activity.¹⁷⁷⁵

The Commission also believes the increased public availability of information relative to the baseline about municipal advisors who engage in municipal advisory activities pertaining to proceeds of municipal securities and municipal escrow investments may reduce instances of misconduct to the extent the increased amount of information disclosed on Form MA as compared to Form MA-T acts as a deterrent against misconduct related to investment strategies.

Persons may incur costs to rely on the provisions regarding reasonable reliance on representations related to proceeds of municipal securities¹⁷⁷⁶ and municipal escrow investments.¹⁷⁷⁷ The Commission estimates that the PRA costs¹⁷⁷⁸ for persons to rely on Rule 15Ba1-1(m)(3) for reasonable reliance on representations related to proceeds of municipal securities will be \$733,885.¹⁷⁷⁹ In addition, the Commission estimates that the PRA costs for persons to rely on Rule

¹⁷⁷⁵ See supra note 287.

¹⁷⁷⁶ See Rule 15Ba1-1(m).

¹⁷⁷⁷ See Rule 15Ba1-1(h)(2).

¹⁷⁷⁸ See text accompanying infra note 1797.

¹⁷⁷⁹ (880 hours (estimated burden to draft a template to use in obtaining the written representation) × \$379 (hourly rate for an in-house attorney)) + (6,355 hours (estimated

15Ba1-1(h)(2) for reasonable reliance on representations related to municipal escrow investments will be \$401,065.¹⁷⁸⁰ The Commission notes that no entity is required to utilize Rule 15Ba1-1(m)(3) or Rule 15Ba1-1(h)(2) and that any efforts to do so are voluntary.

b. Alternatives

One alternative to the rules the Commission is adopting today relates to the types of monies covered under the final rules. The Commission considered whether the final rules should only apply to the proceeds of municipal securities or whether they should also apply to funds held by, or on behalf of, a municipal entity that do not constitute the proceeds of municipal securities. As discussed above, because the definition of “investment strategies” in Section 15B(e)(3) of the Exchange Act¹⁷⁸¹ provides that it “includes” plans or programs for the investment of the proceeds of municipal securities, the Commission proposed to interpret the term to mean that it includes, without limitation, the investment of proceeds of municipal securities, as well as plans, programs, or pools of assets that invest funds held by, or on behalf of, a municipal entity. Commenters generally opposed the proposed interpretation of investment strategies.¹⁷⁸²

burden to obtain the written representation) × \$63 (hourly rate for a Compliance Clerk)) = \$733,885. See supra notes 1622–1624 and accompanying text. Staff estimates that the average national hourly rate for an in-house attorney is \$379 based on data from SIFMA’s Management & Professional Earnings in the Securities Industry 2012 (modified by Commission staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead). The \$63-per-hour figure for a Compliance Clerk is from SIFMA’s Office Salaries in the Securities Industry 2012, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits, and overhead.

¹⁷⁸⁰ (700 hours (estimated burden to draft a template to use in obtaining the written representation) × \$379 (hourly rate for an attorney)) + (2,155 hours (estimated burden to obtain the written representation) × \$63 (hourly rate for a Compliance Clerk)) = \$401,065. See supra notes 1616–1618 and accompanying text. See supra note 1779 (calculating the hourly rate for an in-house attorney and a Compliance Clerk).

¹⁷⁸¹ 15 U.S.C. 78o-4(e)(3).

¹⁷⁸² See supra notes 300–324 and accompanying text.

As noted above, the Commission continues to believe that the term “includes” is not limiting, but is persuaded by commenters. Accordingly, the Commission has determined to adopt a definition of “investment strategies” that focuses more narrowly on the statutorily identified categories of “proceeds of municipal securities” and “municipal escrow investments.”¹⁷⁸³ The Commission believes this approach related to investment strategies focuses the protections of the municipal advisor regulatory regime on those activities related to the investment of the proceeds of municipal securities and related escrow investments, which have been subject to widespread enforcement activity.¹⁷⁸⁴ The Commission believes that a broader approach would likely result in a greater number of persons registering as municipal advisors, which may not be necessary or appropriate in the protection of investors at this time.¹⁷⁸⁵ In addition, because persons that provide advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments will not have to register as municipal advisors, the Commission recognizes that such persons will not be subject to the programmatic, registration, and recordkeeping costs of the permanent registration regime.

Another alternative to the rules the Commission is adopting today is for the Commission not

¹⁷⁸³ See Rule 15Ba1-1(b). The Commission is also persuaded by commenters that, at this time, it is appropriate to apply the definition of guaranteed investment contract more narrowly. This approach is consistent with the Commission’s decision to limit the application of “investment strategies” to plans or programs for the investment of proceeds of municipal securities. The Commission expects that most providers of guaranteed investment contracts will not be considered municipal advisors as long as they do not engage in municipal advisory activities.

¹⁷⁸⁴ See supra note 287.

¹⁷⁸⁵ The Commission is unable to estimate the number of persons who would otherwise need to register as municipal advisors under this alternative approach because it does not have the data necessary to conduct this analysis and the information is not otherwise publicly available.

to define further “municipal advisor” and related terms. The Commission did not estimate the assessment costs market participants would incur to determine whether registration is required under the temporary registration regime and initially believed that the direct costs for respondents to read and apply the definitions in proposed Rule 15Ba1-1(d) would be minimal.¹⁷⁸⁶ As discussed above, however, in light of comments received,¹⁷⁸⁷ the Commission now believes that persons may incur costs of up to \$25,500 to determine whether their activities require them to register as municipal advisors under the final rules. Nonetheless, the Commission believes that the assessment costs associated with determining whether a person would be required to register as a municipal advisor would be greater in the absence of the rules the Commission is adopting today.¹⁷⁸⁸ Without these rules, market participants would still need to analyze whether their activities fall within the definition of municipal advisor in Section 15B(e)(4) of the Exchange Act and would likely need to request no-action relief and other guidance from the Commission or Commission staff, or risk failing to register with the Commission as required.¹⁷⁸⁹ As discussed above, the Commission estimates that the costs associated with determining whether a market participant is a municipal advisor under Section 15B of the Exchange Act may range from \$379 to \$25,500, with the high end of the range reflecting the cost for entities with more complex business activities.¹⁷⁹⁰ Thus, the Commission believes the rules adopted today provide extensive guidance to market participants and

¹⁷⁸⁶ See Proposal, 76 FR at 873.

¹⁷⁸⁷ See supra note 1730.

¹⁷⁸⁸ For example, one commenter on the Proposal stated that it lacked a clear line between permissible and impermissible conduct that will drive up municipal advisory costs due to cautious efforts to “over-comply” and not risk an inadvertent violation. See American Council of Life Insurers Letter.

¹⁷⁸⁹ In addition, without this guidance, a greater number of market participants would likely decide to register as municipal advisors unnecessarily and thereby incur the programmatic, registration, and recordkeeping costs of the municipal advisor registration regime.

¹⁷⁹⁰ See supra note 1733 and accompanying text.

should reduce the number of requests for no-action relief and other guidance from the Commission or Commission staff, which, in turn, should lead to lower assessment costs for many firms.

3. Rules and Forms Related to Registration of Municipal Advisors

The final rules and forms will create a permanent registration regime for municipal advisors consisting of the following forms: Form MA, Form MA-I, Form MA-NR, and Form MA-W.¹⁷⁹¹

Under Rule 15Ba1-2(a), each person applying for registration with the Commission as a municipal advisor is required to complete Form MA and file the form electronically with the Commission. In addition, each person applying for registration or registered with the Commission as a municipal advisor must complete Form MA-I with respect to each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf and file the form electronically with the Commission.¹⁷⁹² Each Form MA shall be considered filed with the Commission upon submission of a completed Form MA, together with all additional required documents, including all required filings of Form MA-Is, to the Commission's EDGAR system.¹⁷⁹³ A sole proprietor will have to complete both Form MA and Form MA-I.¹⁷⁹⁴

Pursuant to Rule 15Ba1-5(a), a municipal advisory firm that registers on Form MA must

¹⁷⁹¹ The Commission is establishing additional requirements for non-resident municipal advisors. See supra Section III.A.6.

¹⁷⁹² See Rule 15Ba1-2(b)(1). As discussed above, natural person municipal advisors who are not sole proprietors no longer need to register with the Commission. However, the Commission is retaining Form MA-I to obtain information about individuals associated with municipal advisory firms engaged in municipal advisory activities on behalf of such firms, which will assist in the Commission's oversight functions. See supra Section VIII.D.1.a (discussing the benefits of the permanent registration regime to Commission oversight of municipal advisors). The Commission notes, moreover, that it is the municipal advisory firms, not the individuals, that will be required to file Form MA-I with the Commission.

¹⁷⁹³ See Rule 15Ba1-2(c).

¹⁷⁹⁴ See Rule 15Ba1-2(b)(2). The Commission has developed an online filing system to permit municipal advisors to file a completed Form MA and Form MA-I through the EDGAR system. The information filed will be publicly available once registration has been granted.

amend its Form MA at least annually, within 90 days of the end of the municipal advisor's fiscal year in the case of firms or within 90 days of the end of the calendar year for sole proprietors, and more frequently as required by the General Instructions. In addition, a registered municipal advisor must promptly amend Form MA-I whenever any information previously provided in Form MA-I becomes inaccurate for any reason.¹⁷⁹⁵ With respect to Form MA-I, all municipal advisory firms will be required to amend Form MA-I to indicate that an individual is no longer an associated person of the municipal advisory firm filing the form or no longer engages in municipal advisory activities on its behalf. Registered municipal advisors will also report successions of registration on Form MA.¹⁷⁹⁶

Pursuant to Rule 15Ba1-4, all registered municipal advisors are required to file Form MA-W to withdraw from registration with the Commission as a municipal advisor. As will be the case with both Form MA and Form MA-I, a municipal advisor must file Form MA-W electronically with the Commission.

In adopting these rules, the Commission sought to design a registration process that is similar to other registration processes administered by the Commission. The rules are based on rules applicable to broker-dealers and investment advisers; similarly, Form MA is based on Form ADV and Form BD, and Form MA-I is based on Form U4. To the extent market participants are familiar with these existing registration processes, the Commission believes that using similar processes to register municipal advisors will create efficiencies for market participants.

The Commission also has sought to ensure that the Commission staff has information sufficient to make a determination as to whether registration should be granted or denied. Thus, Form MA differs from Form ADV and Form BD because it requests information specific to the

¹⁷⁹⁵ See Rule 15Ba1-5(b).

¹⁷⁹⁶ See Rule 15Ba1-7.

municipal advisory business. The Commission also has sought to assure that the rules, forms, and process generally are as clear as possible so as to minimize confusion. In addition, the Commission has sought to minimize, to the extent possible, duplication and costs that the rules may impose on firms. Finally, burdens and costs that have been estimated for PRA purposes are included in the broader costs and benefits discussion that follows because the Commission believes, as the registration process would largely be forms-based, it is appropriate to include them.¹⁷⁹⁷

a. Registration Costs

The Commission acknowledges that the establishment of a permanent registration regime will impose costs on persons registering as municipal advisors on Form MA. As discussed above, persons meeting the statutory definition of municipal advisor and for whom a statutory exclusion is not available should currently be registered with the Commission on Form MA-T as well as with the MSRB. Thus, such persons would have incurred costs in connection with such registration.¹⁷⁹⁸ Because of this, the quantitative costs discussed below related to registration on Form MA represent additional costs separate from those incurred to register on Form MA-T. However, for the reasons discussed below, the Commission believes that municipal advisors that have already gathered relevant information to complete Form MA-T or to register with the Commission in another capacity may incur lower permanent registration costs than those that have not registered on Form MA-T (i.e., new entrants to the market) or that have not registered with the Commission in another capacity.

The Commission expects municipal advisors will incur one-time costs to familiarize themselves with the rules and the relevant forms. The paperwork burden of gathering information for the purpose of completing the forms will be reduced to the extent municipal advisors have

¹⁷⁹⁷ See supra Section VII.

¹⁷⁹⁸ See supra Section VIII.C.2.

already gathered some of the information required by the forms in order to register with the Commission on Form MA-T or in another capacity.¹⁷⁹⁹ In comparison, municipal advisors not otherwise registered with the Commission and solicitors that are not brokers, dealers, or investment advisers, to the extent they need to gather the required information for the first time, may incur higher one-time costs to familiarize themselves with the rules and relevant forms.¹⁸⁰⁰ In addition, some municipal advisors may incur one-time costs to establish new internal controls, such as procedures for obtaining the information required by the forms, as applicable. These potential one-time burdens are included in the Commission's estimate below.¹⁸⁰¹ The Commission believes that these costs will be limited for municipal advisors that are registered with the Commission as investment advisers and/or broker-dealers or that have voluntarily adopted such practices, but will likely be higher for municipal advisors not otherwise registered with the Commission and solicitors to the extent they have not voluntarily adopted such practices.¹⁸⁰²

The Commission received one comment letter that questioned the need for the proposed self-certification requirement.¹⁸⁰³ As discussed above, after careful consideration of comments received, the Commission is not requiring self-certification in Form MA.¹⁸⁰⁴

In the Proposal, the Commission estimated that the total initial cost for all municipal advisory firms and all natural person municipal advisors to register with the Commission would be

¹⁷⁹⁹ See supra Section VII.D.1.

¹⁸⁰⁰ See supra Section VII.D.1.

¹⁸⁰¹ See supra Section VII.D.1.

¹⁸⁰² Some unregulated entities that engage in municipal advisory activities have formed professional associations that have implemented their own voluntary best practices with respect to conflicts of interest, educational standards, and other disclosure of note to their clients. See, e.g., National Association of Independent Public Finance Advisors, <http://www.naipfa.com/>.

¹⁸⁰³ See, e.g., Costanzo Letter.

¹⁸⁰⁴ See supra Section III.A.2.b.

approximately \$12,623,000.¹⁸⁰⁵ Although the Commission received comments suggesting that the Proposal underestimated the hourly burden,¹⁸⁰⁶ the Commission is not changing its estimate of the time required to register with the Commission (other than to reflect its decision not to adopt a self-certification requirement).¹⁸⁰⁷ The Commission notes that commenters did not provide specific figures by which to recalculate the Commission's estimate.¹⁸⁰⁸ As discussed above,¹⁸⁰⁹ the

¹⁸⁰⁵ \$1,105,000 (estimated initial cost for all municipal advisory firms to complete Form MA) + \$11,118,000 (estimated initial cost for all natural person municipal advisors to complete Form MA-I) + \$400,000 (estimated cost for all municipal advisory firms to hire outside counsel) = \$12,623,000. See Proposal, 76 FR at 871, 875.

¹⁸⁰⁶ See Financial Services Roundtable Letter (asserting that "initial preparation of Form MA would require significantly greater hours and much higher costs"). See also supra Section VII.D.1 (discussing comments regarding the hourly burden estimate from the Proposal).

¹⁸⁰⁷ See supra notes 1486–1487 and accompanying text.

¹⁸⁰⁸ The Commission received several comment letters that specifically addressed the costs of registration on Form MA and Form MA-I. These commenters generally criticized the cost of municipal advisor registration with both the Commission and the MSRB, including the MSRB's \$100 initial fee and \$500 annual fee. See, e.g., Texas Bankers Association Letter; State of Texas Letter; John Sullivan Letter. The Commission notes that it does not charge municipal advisors a fee to register with the Commission. For purposes of the economic analysis, the fees imposed by the MSRB are part of the economic baseline. Although the Dodd-Frank Act permits the MSRB to require municipal advisors to pay such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the MSRB (see 15 U.S.C. 78o-4(b)(2)(J)), the Commission does not set or approve fees charged by the MSRB. Instead, the Exchange Act provides that certain designated SRO rules, including fees charged by the MSRB, take effect upon filing with the Commission and may thereafter be enforced by the SRO to the extent not inconsistent with the Exchange Act, the rules and regulations thereunder, and applicable Federal and State law. See 15 U.S.C. 78s(b)(3)(A), (C). The Commission has sixty days from the date of filing, however, during which it "summarily may temporarily suspend" the fees "if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act. See 15 U.S.C. 78s(b)(3)(C). If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved. See id. In addition, Section 19(c) of the Exchange Act authorizes the Commission, by rule, to abrogate, add to, and delete from the rules of an SRO (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the SRO, to conform its rules to requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78s(c).

Commission is making some revisions to clarify the questions asked in Form MA and Form MA-I and to elicit additional information. Because some revisions will increase the hourly burden for municipal advisors to complete the relevant forms, while others will decrease the burden, and because most of the changes to Form MA and Form MA-I are clarifications not requiring additional information, the Commission does not believe the additional information requirements will impose significant additional burdens on municipal advisors and is retaining its original hourly burden estimates as proposed. As discussed above, the Commission estimates that the total average initial burden to complete a single Form MA will be 3.5 hours per applicant,¹⁸¹⁰ while the average amount of time for a municipal advisory firm to complete Form MA-I with respect to a natural person municipal advisor will be 3.0 hours.¹⁸¹¹ The Commission now estimates that the total initial PRA cost for all municipal advisory firms to register with the Commission will be approximately \$6,910,975,¹⁸¹² for an average cost per firm of \$7,595.¹⁸¹³ The Commission believes that the

¹⁸⁰⁹ See supra Section VII.D.1.a–b.

¹⁸¹⁰ See supra Section VII.D.1.a.

¹⁸¹¹ See supra Section VII.D.1.b.

¹⁸¹² (36,935 hours (total estimated hourly burden under the rules for all municipal advisors to complete Form MA and required number of Form MA-I) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk)) + \$364,000 (estimated cost for all municipal advisors to hire outside counsel to assist in completing Form MA) + ((910 hours (estimated one-time burden for all municipal advisory firms to draft a template to use in obtaining the written consents to service of process) × \$379 (hourly rate for an attorney)) + (1,125 hours (estimated one-time burden for all municipal advisory firms to obtain the written consents to service of process) × \$63 (hourly rate for a Compliance Clerk))) = \$6,910,975. See supra note 1501 and accompanying text (calculating the total estimated hourly burden under the rules for all municipal advisors to complete Form MA and required number of Form MA-I); supra note 1567 and accompanying text (estimating the total cost for all municipal advisory firms to hire outside counsel to review their compliance with the final rules and forms); supra notes 1579–1581 and accompanying text (estimating the one-time burden to obtain written consents to service of process); supra note 1779 (calculating the hourly rate for an in-house attorney and the hourly rate for a Compliance Clerk). The Commission expects that completion of Form MA and Form MA-I will most likely be performed equally by compliance managers and compliance clerks. Dividing the hourly rate evenly between a

reduction in cost from the Proposal is primarily attributable to a reduction in the estimated number of municipal advisory firms that will initially register with the Commission; a reduction in the estimated number of natural person municipal advisors for which municipal advisory firms and sole proprietors will need to complete Form MA-I;¹⁸¹⁴ and the Commission's decision not to adopt a self-certification requirement. The Commission notes that this estimate represents the aggregate cost to the industry. The costs incurred by a specific municipal advisor to register with the Commission will depend on its size and the complexity of its business activity.

The Commission also anticipates that municipal advisors will incur ongoing annual costs to monitor and/or maintain the information required by the registration forms;¹⁸¹⁵ to provide updates to the registration forms; and to withdraw from registration with the Commission. In addition, municipal advisors that are new to the market will incur costs to register with the Commission. In the Proposal, the Commission estimated that these ongoing annual costs would be approximately \$5,292,100.¹⁸¹⁶

compliance manager (\$269 per hour) and a compliance clerk (\$63 per hour) results in a cost per hour of \$166. $(\$269 \times 0.5) + (\$63 \times 0.5) = \$166$. The \$269-per-hour figure for a Compliance Manager is from SIFMA's Management & Professional Earnings in the Securities Industry 2012, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. In the Proposal, the combined hourly rate was \$170. See Proposal, 76 FR at 875 n.398. The combined hourly rate for a Compliance Manager and Compliance Clerk is lower than in the Proposal because of a reduction in the rate for a Compliance Manager from \$273 per hour to \$269 per hour and a reduction in the rate for a Compliance Clerk from \$67 per hour to \$63 per hour.

¹⁸¹³ $\$6,910,975$ (estimated total initial labor cost for all municipal advisory firms to register with the Commission) \div 910 (estimated number of municipal advisors registered on Form MA) = \$7,594.48.

¹⁸¹⁴ See supra notes 1447–1464 and accompanying text.

¹⁸¹⁵ These costs are included in the Commission's estimate below.

¹⁸¹⁶ \$510,000 (estimated ongoing cost for all municipal advisory firms to amend Form MA and complete the annual self-certification) + \$3,519,000 (estimated ongoing cost for all natural person municipal advisors to amend Form MA-I and complete the annual self-certification)

Under the final rules and forms, municipal advisory firms will incur a number of ongoing costs. Municipal advisory firms that are new to the market will incur costs to register with the Commission. In addition, municipal advisory firms will incur costs to amend Form MA, amend Form MA-I, and withdraw from registration with the Commission. The Commission now estimates that municipal advisors will incur total ongoing annual PRA costs of approximately \$2,618,373.¹⁸¹⁷ The Commission notes that this estimate represents the aggregate cost to the industry. The ongoing costs incurred by a specific municipal advisor will depend on its size and the complexity of its business activity. The reduction in cost from the Proposal is primarily attributable to a reduction in

+ \$110,500 (estimated ongoing cost for all new municipal advisory firms to complete Form MA) + \$918,000 (estimated ongoing cost for all new natural person municipal advisors to complete Form MA-I) + \$5,100 (estimated ongoing annual labor cost for all municipal advisory firms to complete Form MA-W) + \$229,500 (estimated ongoing cost for all natural person municipal advisors to withdraw from Form MA-I registration) = \$5,292,100. See Proposal, 76 FR at 875-76.

¹⁸¹⁷ ((3,200 hours (total estimated hourly burden under the rules for new municipal advisors to complete an initial Form MA and required number of Form MA-I) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk)) + \$40,000 (estimated costs for new municipal advisors to hire outside counsel to assist in completing Form MA)) + (12,053 hours (total estimated hourly burden under the rules for all municipal advisors to complete amendments to Form MA and Form MA-I) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk)) + (15 hours (total estimated hourly burden under the rules for all municipal advisors to withdraw from Form MA registration) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk)) + ((100 hours (estimated ongoing burden for new municipal advisory firms to draft a template to use in obtaining the written consents to service of process) × \$379 (hourly rate for an attorney)) + (95 hours (estimated ongoing burden for municipal advisory firms to obtain the written consents to service of process) × \$63 (hourly rate for a Compliance Clerk))) = \$2,618,373. See *supra* note 1506 and accompanying text (calculating the total estimated hourly burden under the rules for new municipal advisors to complete an initial Form MA and required number of Form MA-I); *supra* note 1525 and accompanying text (calculating the total estimated hourly burden under the rules for all municipal advisors to complete amendments to Form MA and Form MA-I); *supra* note 1532 and accompanying text (calculating the total estimated hourly burden under the rules for all municipal advisors to withdraw from Form MA registration); *supra* notes 1584-1586 and accompanying text (estimating the ongoing burden to obtain written consents to service of process); *supra* note 1779 (calculating the hourly rate for an in-house attorney and the hourly rate for a Compliance Clerk); *supra* note 1812 (calculating the combined hourly rate).

the estimated number of municipal advisory firms that will register with the Commission;¹⁸¹⁸ a reduction in the estimated number of natural person municipal advisors for which municipal advisory firms and sole proprietors will need to amend Form MA-I;¹⁸¹⁹ a reduction in the estimated number of municipal advisory firms that will withdraw from registration; and the Commission's decision not to adopt a self-certification requirement.¹⁸²⁰

b. Registration Benefits

The Commission believes that the requirements that municipal advisors register with the Commission on Form MA, submit a Form MA-I for each of its natural person municipal advisors, and update the information provided at least annually (or more often as required by the rules) will provide a number of benefits. In addition to the benefits discussed above,¹⁸²¹ the final rules and forms could improve the process through which municipal entities and obligated persons select municipal advisors (referred to as the "municipal advisor selection process"), as the disclosures

¹⁸¹⁸ See supra notes 1442–1446 and accompanying text.

¹⁸¹⁹ See supra notes 1447–1464 and accompanying text. As discussed above, the Commission is not revising the estimated time to amend Form MA and Form MA-I. See supra Section VII.D.3.

¹⁸²⁰ See supra Section VII.D.4. Several commenters stated that the Commission did not address the potential liability costs associated with a permanent registration regime. See SIFMA Letter I (expressing concerns regarding the self-certification requirement); NAESCO Letter (expressing concerns regarding fiduciary liability). The Commission recognizes that some municipal advisors may incur litigation costs as a result of the final rules and forms, and that to the extent that there are such costs, some of them may be passed on to municipal entities and obligated persons in the form of increased fees. However, commenters did not provide estimates of potential liability costs, and the Commission does not have the information necessary to provide a reasonable estimate of the litigation costs a municipal advisory firm may face because the costs will depend on the facts and circumstances of each matter litigated. In addition, the Commission notes that any litigation costs incurred separate from the registration and recordkeeping requirements are included in the economic baseline as a function of the statutory municipal advisor regulatory regime. Further, the Commission believes the potential liability costs are outweighed by the benefits recognized by Congress in establishing the statutory municipal advisor regulatory regime.

¹⁸²¹ See supra Section VIII.D.1.a.

required under the permanent registration regime should allow municipal entities and obligated persons to become better informed about municipal advisors at a lower cost, which could increase the use of municipal advisors. Further, the final rules and forms could incentivize municipal advisors not to engage in misconduct. In addition, Form MA, Form MA-I, and Form MA-NR should enhance the ability of securities regulators to oversee municipal advisors, which could increase the willingness of municipal entities and obligated persons to utilize municipal advisors.¹⁸²²

The Commission believes that a significant benefit of the final rules and forms is that they could enhance the municipal advisor selection process by increasing the amount of publicly available information about municipal advisors. The rules and forms will allow municipal entities and obligated persons to become better informed about municipal advisors more efficiently, and thereby, at a lower cost.¹⁸²³ Municipal advisors will be required to submit, and municipal entities, obligated persons, the general public, and others will be able to access, information through the Commission's EDGAR system. In addition, because municipal advisors that are registered with the Commission as broker-dealers and/or investment advisers will be required to provide their CRD Number and IARD Number, respectively, on Form MA, interested parties will be able to access other publicly available information about the municipal advisor.¹⁸²⁴ As discussed in the

¹⁸²² See supra Section VIII.D.1.a.

¹⁸²³ The Commission is unable to estimate the amount of time and money municipal entities may save by reviewing Form MA and Form MA-I rather than engaging in an RFP process or searching for other regulatory documents. The Commission believes that the ability to access information, including disciplinary history and conflicts of interest, on municipal advisors in a single location benefits municipal entities by reducing the need to search for other regulatory documents of those municipal advisors that are registered, or have associated persons that are registered, in another capacity.

¹⁸²⁴ Although EDGAR will not automatically provide an electronic link to the information on the CRD and IARD systems, these systems are nevertheless readily accessible, and with the identifying numbers of the relevant filings provided, interested parties should be able to find the desired information easily.

Proposal,¹⁸²⁵ research has shown that most municipal entities do not utilize a formalized selection process when selecting municipal advisors.¹⁸²⁶ Because there is little publicly available information about many municipal advisors, municipal entities and obligated persons that do not use a formalized selection process might not have sufficient information when deciding among municipal advisors.¹⁸²⁷ As a result of the public availability of information disclosed in Form MA and Form MA-I, municipal entities and obligated persons may be able to more easily establish objective criteria to use in selecting municipal advisors. In addition, the availability of information required by Form MA and Form MA-I in a uniform, standardized format will likely reduce from the baseline the costs of collecting information and comparing it across municipal advisors. The ease of establishing and verifying compliance with such criteria may increase the likelihood that municipal advisors are hired because of their qualifications rather than for other reasons such as political or personal connections to decision-making officials. Further, to the extent that municipal entities and obligated persons have been deterred from engaging a municipal advisor because they were not familiar with the pool of municipal advisors, the permanent registration regime may increase the use of municipal advisors from the baseline.¹⁸²⁸ The reduced information search costs for municipal entities may have an incremental effect of increasing informational efficiency. In addition, an

¹⁸²⁵ See Proposal, 76 FR at 874.

¹⁸²⁶ According to Mark D. Robbins and Bill Simonsen, 2003, Financial Advisor Independence and the Choice of Municipal Bond Sale Type, Municipal Finance Journal 24: 42 (“Robbins and Simonsen”), an RFP had been used only 22.6% of the time by governments in selecting the financial advisor for their last bond sale. See also Allen and Dudney, supra note 38.

¹⁸²⁷ See supra Section VIII.D.1.a.

¹⁸²⁸ Moreover, public disclosure of the registration information of municipal advisors and their associated persons will make this information available not only to municipal entities and regulators, but also to the general public. Even if a municipal entity or obligated person does not otherwise seek to obtain this information as part of its selection process, the information will be available to interested persons (e.g., the press and concerned citizens) that might directly or indirectly influence the selection of the municipal advisor.

improved municipal advisor selection process may lead to fewer municipal defaults and an increased likelihood that municipal entities issue debt, which could improve efficiency and capital formation.¹⁸²⁹

With respect to the issuance of municipal securities, the increased likelihood of using a municipal advisor could lead to reduced issuance costs and better financing terms for municipal entity clients, which could improve capital formation and indirectly have a positive impact on taxpayers. As discussed in the Proposal, one empirical study suggests that the use of municipal advisors is associated with better borrowing terms, lower reoffering yields, and narrower underwriter gross spreads,¹⁸³⁰ particularly in instances where the advisors are of a higher quality.¹⁸³¹ Municipal advisors can play an important role in the issuance process by successfully negotiating to lower these costs. As these studies did not include advisory fees in calculating the cost savings, it is possible that some of these savings may be offset by the fees municipal entities and obligated persons pay to municipal advisors.¹⁸³² Therefore, the Commission believes that the final rules and forms could incentivize municipal entities and obligated persons to use municipal advisors, which could encourage municipal entities to issue debt (as opposed to pursuing other financial options),

¹⁸²⁹ See infra notes 1830–1832 and accompanying text. The final rules and forms could also increase investor willingness to invest in municipal bond offerings to the extent that the municipal entity issuing bonds used a municipal advisor and investors understand and consider the benefits of municipal advisor registration, including disclosure of conflicts of interest and disciplinary history.

¹⁸³⁰ See generally Vijayakumar and Daniels, supra note 34. See also Proposal, 76 FR at 874.

¹⁸³¹ See generally Allen and Dudney, supra note 38 (“For the \$16.8 million mean issue size in our sample, the present value benefits of choosing a high-quality advisor for negotiated issues are estimated to be \$63,193 to \$116,511 for 20-year term issues (\$40,136 to \$74,001 for ten-year term issues), depending on the measure of advisor quality used, and \$84,915 to \$171,805 for revenue issues (\$53,933 to \$109,121 for ten-year term issues).”). See also Proposal, 76 FR at 874.

¹⁸³² But see Allen and Dudney, supra note 38 (“[C]onversations with financial advisors lead us to believe that fee differences between low and high advisors would not be large enough to offset the interest savings from using a quality advisor.”).

thereby increasing capital formation.

c. Non-Resident Municipal Advisors

Rule 15Ba1-6 sets forth the general procedures for serving non-residents on Form MA-NR. Pursuant to Rule 15Ba1-6 and the instructions to Form MA-NR, each non-resident municipal advisor applying for registration, at the time of filing of the municipal advisor's application on Form MA, must file with the Commission a written irrevocable consent and power of attorney on Form MA-NR to appoint an agent in the United States upon whom may be served any process, pleadings, or other papers in any action brought against the non-resident person. In addition, each municipal advisor applying for registration shall, at the time of filing the relevant Form MA-I, file with the Commission a written irrevocable consent and power of attorney on Form MA-NR for each non-resident general partner, non-resident managing agent, and non-resident natural person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf.¹⁸³³ Rule 15Ba1-6(d) will require each non-resident municipal advisor to provide an opinion of counsel that the municipal advisor can, as a matter of law, provide the Commission with access to the books and records of the municipal advisor and submit to inspection and examination by the Commission.

Pursuant to Rule 15Ba1-6(b), any change to the name or address of each agent for service of process must be communicated promptly to the Commission by filing a new Form MA-NR. Rule 15Ba1-6(c) requires each non-resident municipal advisor, general partner and managing agent of a registered municipal advisor, and each natural person associated with a registered municipal advisor that engages in municipal advisory activities on its behalf to promptly appoint a successor agent for service of process and file a new Form MA-NR if the non-resident municipal advisor, general

¹⁸³³ See Rule 15Ba1-6(a)(2).

partner, managing agent, or associated person discharges its identified agent for service of process or if its agent for service of process is unwilling or unable to accept service on behalf of the non-resident municipal advisor, general partner, managing agent, or associated person. Rule 15Ba1-6(d) requires each non-resident municipal advisory firm to provide an opinion of counsel that the non-resident municipal advisory firm can, as a matter of law, provide the Commission with access to its books and records and can, as a matter of law, submit to inspection and examination by the Commission.

Non-resident municipal advisors will incur costs to complete Form MA-NR and obtain an opinion of counsel.¹⁸³⁴ Non-resident municipal advisory firms may incur one-time costs to establish new internal controls, such as procedures for obtaining the information required by Form MA-NR. These one-time costs are included in the estimates below. In the Proposal, the Commission estimated that the initial cost for non-resident municipal advisory firms, non-resident general partners, and non-resident managing agents to complete Form MA-NR and for non-resident municipal advisory firms to obtain an opinion of counsel that the municipal advisory firm can provide prompt access to its books and records and can be subject to onsite inspection and examination would be approximately \$8,300.¹⁸³⁵ The Commission did not receive any comments on this estimate. The Commission now estimates the initial PRA cost to complete Form MA-NR and obtain opinions of counsel will be approximately \$12,042.¹⁸³⁶ The anticipated costs are higher

¹⁸³⁴ See supra Section VII.D.5 (estimating the number of persons required to complete Form MA-NR).

¹⁸³⁵ \$5,100 (estimated cost for non-resident municipal advisory firms, non-resident general partners, and non-resident managing agents to complete Form MA-NR) + \$3,200 (estimated cost for non-resident municipal advisory firms to obtain an opinion of counsel) = \$8,300. See Proposal, 76 FR at 877.

¹⁸³⁶ (48 hours (estimated initial hourly burden under the rules for all respondents to complete a Form MA-NR) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk)) + ((6 hours (estimated initial hourly burden under the rules for all respondents to

than those estimated in the Proposal because Commission staff is including certain associated persons in this estimate.¹⁸³⁷

In addition, as discussed below, the Commission anticipates there will be ongoing costs related to filing Form MA-NR.¹⁸³⁸ In the Proposal, the Commission estimated that the ongoing annual costs for non-resident municipal advisory firms, non-resident general partners, and non-resident managing agents to complete Form MA-NR and for non-resident municipal advisory firms to obtain an opinion of counsel that the municipal advisory firm can provide prompt access to its books and records and can be subject to onsite inspection and examination would be approximately \$1,440.¹⁸³⁹ The Commission did not receive any comments on this estimate. The Commission now estimates that the ongoing annual PRA cost for non-resident municipal advisory firms to update Form MA-NR and/or file a new Form MA-NR and for non-resident municipal advisory firms to obtain new opinions of counsel, as described above, will be approximately \$2,369.¹⁸⁴⁰ The

obtain opinion of counsel) × \$379 (hourly rate for an in-house attorney)) + (2 (non-resident municipal advisory firms expected to provide opinion of counsel) × \$900 (average estimated cost to hire outside counsel for providing an opinion of counsel))) = \$12,042. See supra notes 1544–1548 and accompanying text (estimating the initial hourly burden under the rules for all respondents to complete a Form MA-NR and the initial hourly burden under the rules for all respondents to obtain opinion of counsel); supra note 1779 (discussing the hourly rate for an in-house attorney); supra note 1812 (calculating the combined hourly rate).

¹⁸³⁷ See supra Section III.A.6.a. The estimated costs are also higher due to an increase in the hourly rate of an in-house attorney and inclusion of the cost non-resident municipal advisory firms will incur to hire outside counsel to provide an opinion of counsel.

¹⁸³⁸ Non-resident municipal advisors will incur recurring costs to monitor and maintain the information required by Form MA-NR. These costs are included in the estimates below.

¹⁸³⁹ \$340 (estimated ongoing annual cost for non-resident municipal advisory firms, non-resident general partners, and non-resident managing agents to complete Form MA-NR) + \$1,100 (estimated ongoing annual cost for non-resident municipal advisory firms to obtain an opinion of counsel) = \$1,440. See Proposal, 76 FR at 877.

¹⁸⁴⁰ (2 hours (estimated ongoing annual hourly burden under the rules for respondents to complete a Form MA-NR) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk)) + ((3 hours (estimated ongoing annual hourly burden under the rules for

anticipated costs are higher than those estimated in the Proposal due to an increase in the hourly rate of an in-house attorney and inclusion of the cost non-resident municipal advisory firms will incur to hire outside counsel to provide an opinion of counsel.

d. Alternatives

One alternative to the rules and forms adopted today would be for the Commission to make the temporary registration regime permanent. In this alternative, municipal advisors currently registered under the temporary registration regime would not incur the new costs to register with the Commission.¹⁸⁴¹ Similarly, new entrants to the municipal advisor market would incur the comparatively lower costs to register under the temporary registration regime.¹⁸⁴² In establishing the temporary registration regime, however, the Commission intended to adopt a permanent registration regime that would, among other things, require municipal advisors to provide more information on Form MA than that required by Form MA-T, including information regarding conflicts of interest and increased information regarding disciplinary history. By requiring this additional information and requiring submission through the Commission's EDGAR system, Commission staff will be able to retrieve and analyze the data it needs more efficiently, which should enhance the Commission's ability to carry out its mission with respect to municipal advisory activities effectively. In addition, as discussed above, the permanent registration regime could

all respondents to obtain opinion of counsel) × \$379 (hourly rate for an in-house attorney)) + (1 (non-resident municipal advisory firms expected to provide opinion of counsel) × \$900 (average estimated cost to hire outside counsel for providing an opinion of counsel))) = \$2,369. See supra note 1556–1558 (estimating the ongoing annual hourly burden under the rules for respondents to complete a Form MA-NR and estimating the ongoing burden to provide an opinion of counsel); supra note 1779 (discussing the hourly rate for an in-house attorney); supra note 1812 (calculating the combined hourly rate). This estimate is lower than the estimate in the Proposal due to a reduction in the combined hourly rate. See supra note 1812 (discussing the reduction in the combined hourly rate).

¹⁸⁴¹ See supra Section VIII.D.3.b.

¹⁸⁴² See supra Section VIII.C.2.

improve the municipal advisor selection process and incentivize municipal advisors not to engage in misconduct.¹⁸⁴³

Similarly, the Commission believes that to make the temporary registration regime permanent rather than to establish the permanent registration regime adopted today may not enhance competition in the market. As discussed above, the Commission believes that requiring municipal advisors to disclose the information required by the final rules and forms will lead to a number of benefits beyond the temporary registration regime. For example, municipal entities, obligated persons, the general public, and others will be able to access information about municipal advisors electronically through the Commission's EDGAR system and easily cross-reference information submitted through IARD and CRD. Enhancing the ability of municipal entities and obligated persons to compare and consider municipal advisors in the municipal advisor selection process could result in increased quality-based competition relative to the baseline, which could, in turn, lead to reduced issuance costs and better financing terms.¹⁸⁴⁴

The Commission also considered whether to provide an alternative registration program for persons that are already registered with the Commission in another capacity. Some commenters indicated that Form MA is largely duplicative of other registration forms (e.g., Form BD, Form ADV) required for other persons (e.g., broker-dealers, investment advisers).¹⁸⁴⁵ One commenter suggested persons already registered with the Commission could check an additional box on their primary registration forms, or the Commission could provide a short-form registration process.¹⁸⁴⁶

As discussed above, the Commission has determined not to create a separate registration

¹⁸⁴³ See supra Section VIII.D.3.b.

¹⁸⁴⁴ See supra notes 1830–1832 and accompanying text.

¹⁸⁴⁵ See, e.g., SIFMA Letter I; Financial Services Roundtable Letter; NASAA Letter.

¹⁸⁴⁶ See SIFMA Letter I.

program for entities that are already registered with the Commission in another capacity. The Commission does not believe that such an approach would achieve the goal of creating a registration system specific to municipal advisors. Form MA, while modeled primarily on Form ADV and Form BD, is designed to capture information regarding the activities of municipal advisors and the markets that they serve that would not otherwise be captured in other forms. This information will permit the Commission to decide whether to grant or deny an application for registration; to manage the Commission's regulatory and examination programs; and to make such information available to the MSRB to better inform its regulation of municipal advisors. In addition, having information about municipal advisors in a single location could improve the municipal advisor selection process.¹⁸⁴⁷

Further, the Commission believes that, based on the expertise and experience of its enforcement and examinations staff, for purposes of regulation, it is appropriate to collect information regarding the financial industry and other activities of associated persons involved in the municipal securities market, including swap dealers, major swap participants, and engineers and engineering firms. The Commission believes that to allow investment advisers to register as municipal advisors using Form ADV would not provide comparable information about certain associated persons of municipal advisors.

In addition, requiring municipal advisors to file a registration form specifically tailored to their municipal advisory activities is consistent with the broader public interest to make available to the public information about municipal advisors. Absent a form specific to municipal advisors, a municipal entity or obligated person seeking information about a municipal advisor may not realize that the data was available on Form BD or Form ADV. The Commission believes that persons

¹⁸⁴⁷ See supra Section VIII.D.3.b.

seeking to compile, compare, and analyze data pertaining to the entire universe of registered municipal advisors, and regulators overseeing compliance with the rules and regulations applicable to municipal advisors, should be able to access relevant information easily within one system.¹⁸⁴⁸

As proposed and adopted, Form MA will permit municipal advisors, to the extent that the disclosures required on Form MA have been disclosed on Form ADV or BD, to incorporate such information by reference.¹⁸⁴⁹ Specifically, each of the DRPs of Form MA permits incorporation by reference to DRPs with similar disclosure requirements that are already on file with regulators. The disclosures required on the DRPs are generally the disclosures where the most significant amount of detail is requested on Form MA and on which applicants will likely need to expend the most time and effort.¹⁸⁵⁰ The Commission believes allowing incorporation by reference is appropriate because it will reduce redundancy and costs that some municipal advisors will incur in completing Form MA.¹⁸⁵¹

Another alternative to the rules and forms adopted today would be to require, as the

¹⁸⁴⁸ The ability to incorporate by reference any required information about the disciplinary history of an applicant or associated person from a DRP or other disclosure that already has been filed relieves the regulatory burden on applicants who can do so. However, the Commission recognizes that such incorporation by reference may make it somewhat more difficult for regulators and other market participants to compile, compare, and analyze data regarding municipal advisors within one system.

¹⁸⁴⁹ See supra Section III.A.2.

¹⁸⁵⁰ See supra Section III.A.2.b.

¹⁸⁵¹ As discussed above, the Commission's estimates of the time required to complete Form MA and Form MA-I represent averages. The Commission emphasizes that, depending on the specific circumstances of the municipal advisory firm, the initial burden to complete Form MA and Form MA-I will vary greatly from respondent to respondent given uncertainty about the number of municipal advisors that will incorporate by reference and the extent of information that will be incorporated by reference. Accordingly, although Form MA and Form MA-I generally allow incorporation by reference of certain information, the Commission does not have the information necessary to provide a reasonable estimate of the extent to which the ability to incorporate by reference will reduce the burden estimates for Form MA and MA-I for a particular firm.

Commission proposed, each natural person municipal advisor to register with the Commission on Form MA-I separately. The Commission received several comments objecting to this requirement. Some commenters argued that there was no statutory justification to register natural persons as municipal advisors separately.¹⁸⁵² Commenters also stated that registering individuals would be excessively burdensome,¹⁸⁵³ including on small municipal advisors.¹⁸⁵⁴ Another commenter stated that dual reporting on Form MA and Form MA-I could lead to confusion and inadvertent inconsistencies in the information.¹⁸⁵⁵ As discussed above, the Commission has decided not to require natural person municipal advisors (other than sole proprietors) to register as municipal advisors (although such persons will be subject to the other requirements of the municipal advisor regulatory regime).¹⁸⁵⁶ Had the Commission required natural person municipal advisors to register with the Commission, these persons would have incurred aggregate costs of approximately \$5,602,500.¹⁸⁵⁷ The Commission recognizes, however, that municipal advisory firms will now bear this cost to submit Form MA-I for natural person municipal advisors, which as discussed above will be \$5,602,500.¹⁸⁵⁸

4. Books and Records to Be Made and Maintained by Municipal Advisors (Rule 15Ba1-8)

As part of the permanent registration regime mandated by the Dodd-Frank Act, Rule 15Ba1-

¹⁸⁵² See, e.g., SIFMA Letter I; MSRB Letter.

¹⁸⁵³ See, e.g., SIFMA Letter I; Deloitte Letter.

¹⁸⁵⁴ See, e.g., Acacia Financial Group Letter.

¹⁸⁵⁵ See Deloitte Letter.

¹⁸⁵⁶ See *supra* Section III.A.2.a.

¹⁸⁵⁷ 33,750 (estimated initial burden for completion and submission of Form MA-I during the first year) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk) = \$5,602,500. See *supra* note 1495 and accompanying text; *supra* note 1812 (calculating the combined hourly rate).

¹⁸⁵⁸ See *supra* note 1857 and accompanying text.

8 sets forth requirements for books and records relating to the business of municipal advisors. Among other things, the rule requires that municipal advisory firms maintain and preserve all books and records required to be made and kept under the rule for a period of not less than five years, the first two years in an easily accessible place.¹⁸⁵⁹

a. Recordkeeping Costs and Benefits

Municipal advisors are likely to incur a number of costs in connection with the recordkeeping requirements, including recurring costs related to the maintenance and storage of books and records, as required by the rule. Municipal advisory firms will also need to provide applicable training to ensure compliance with the recordkeeping requirements. In the Proposal, the Commission estimated that the ongoing annual labor cost for all municipal advisory firms to comply with the recordkeeping requirement would be approximately \$9,050,000.¹⁸⁶⁰ The Commission now estimates that the annual labor cost for all municipal advisory firms to comply with the recordkeeping requirement will be approximately \$8,777,860.¹⁸⁶¹

Municipal advisors should already maintain books and records as part of their day-to-day operations. The recordkeeping requirement, however, provides specific parameters relating to the retention and maintenance of certain books and records that may be more extensive than current

¹⁸⁵⁹ See supra Section III.C.

¹⁸⁶⁰ See Proposal, 76 FR at 878.

¹⁸⁶¹ 910 (number of Form MA applicants) \times 182 hours (estimated average hourly burden for municipal advisory firms to comply with the books and records requirement) \times $\$53$ (hourly rate for a General Clerk) = $\$8,777,860$. See supra notes 1688–1691 and accompanying text. The $\$53$ per hour figure for a General Clerk is from the SIFMA’s Office Salaries in the Securities Industry 2012, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits, and overhead. The Commission is updating the hourly rate for a General Clerk from $\$50$ to $\$53$ to conform to SIFMA’s Office Salaries in the Securities Industry 2012. This estimate is lower than the estimate in the Proposal because the Commission estimates there will be fewer initial Form MA applicants than was estimated in the Proposal. See supra notes 1442–1446 and accompanying text.

market practices. Nevertheless, the Commission does not believe that currently operating municipal advisory firms that already keep business records similar to those required by the rule will be subject to significant additional recordkeeping costs as a result of the rule. For example, municipal advisors already registered with the Commission as broker-dealers and/or investment advisers likely already retain this type of information.

As noted above, the Commission recognizes that these costs may impact those municipal advisory firms that are not already registered under another regulatory regime to a greater degree than they would impact municipal advisory firms that have previously registered as investment advisers or brokers-dealers. With respect to the books and records requirements of Rule 15Ba1-8, the Commission currently anticipates that municipal advisory firms may incur one-time costs in establishing the new internal controls and systems necessary to comply with the recordkeeping requirements of the rule. The Commission believes that the costs to establish new internal controls will be less for municipal advisory firms that are currently regulated with respect to their other activities because the final rule allows some records to be maintained in compliance with those other regulations.¹⁸⁶² The Commission does not have the information necessary to provide a reasonable estimate of the difference in costs for firms that already have internal controls and systems because these internal controls and systems vary from firm to firm. The Commission believes that these costs may also be reduced for municipal advisory firms that have voluntarily adopted similar recordkeeping practices.¹⁸⁶³ The Commission anticipates, however, that these costs

¹⁸⁶² See Rule 15Ba1-8(e)(1). The Commission's estimated average burden to comply with the recordkeeping requirements includes the costs to establish new internal controls and systems necessary to comply with the recordkeeping requirements. However, the Commission recognizes that those firms should realize reduced costs by leveraging the existing internal controls and systems, as well as familiarity with books and records requirements under other regulatory regimes.

¹⁸⁶³ The Commission does not have the information necessary to provide a reasonable estimate

may be higher for solicitors and for other municipal advisory firms that are not otherwise regulated or have not voluntarily adopted similar recordkeeping practices.

The Commission has made two substantive modifications to the recordkeeping requirements since the Proposal. As discussed above, Rule 15Ba1-8(a)(2) will require municipal advisors to maintain general ledgers, a requirement that was inadvertently left out of proposed Rule 15Ba1-7.¹⁸⁶⁴ In addition, as discussed above, Rule 15Ba1-8(a)(8) will require each municipal advisory firm to retain written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such registered municipal advisor.¹⁸⁶⁵ In light of these changes, the Commission now estimates that the average annual burden for a municipal advisory firm to comply with the recordkeeping requirements will be approximately 182 hours.

One commenter argued that the information technology and storage facilities required for all e-mail or similar electronic communications is expensive. The commenter believed that, regardless of whether a firm were to develop a technology solution in-house or hire an IT professional, the cost would be significant to firms, especially those with limited revenue.¹⁸⁶⁶ This commenter, however, did not provide specific figures by which to recalculate the Commission's estimate, making it difficult to evaluate these assertions.

of the difference in costs for firms that already have voluntarily adopted similar recordkeeping practices because these recordkeeping practices vary from firm to firm. However, the Commission recognizes that to the extent these recordkeeping practices are already in place, certain municipal advisors should incur lower costs to comply than those that do not have recordkeeping practices in place.

¹⁸⁶⁴ See supra notes 1359–1360 and accompanying text.

¹⁸⁶⁵ See supra Section VII.D.7.

¹⁸⁶⁶ See NAIPFA Letter.

As stated above, the books and records estimate, as proposed, was meant to include storage costs and any needed technology refinements or upgrades. The Commission staff understands based on discussions with market participants that, although larger financial institutions may generally need to invest in more expensive technology solutions to manage their recordkeeping, smaller municipal advisory firms with smaller clienteles may not require significant expenditures on storage and technology to the extent they retain most of their records in their existing e-mail systems.¹⁸⁶⁷ Furthermore, the Commission staff understands that many of the smallest municipal advisory firms and sole proprietors may use third-party electronic mail systems that offer free and effectively unlimited cloud storage and would be less likely to incur significant storage costs. For these reasons, the Commission believes that the variety of technology and storage solutions, and their resulting costs, are properly accounted for in the cost estimates.

Another commenter asserted that the Commission used an hourly rate for the books and records cost that was too low for small entity municipal advisors. The commenter argued, “[t]he figure [of 181 hours] was based on record keeping by ‘General Clerks’ at \$50 per hour. If similar rules are imposed on Small Entity Municipal Advisors (many of whom are solo practitioners) that do not typically have ‘General Clerks,’ the correct hourly rate should be \$170 per hour (a figure frequently used by the Commission in the Release), which would equate to \$30,770 per advisor.”¹⁸⁶⁸

While the Commission acknowledges that small municipal advisors do not typically employ General Clerks and that, in many cases, the municipal advisory professional himself may be responsible for maintaining the books and records of the firm, the Commission does not believe that

¹⁸⁶⁷ Larger firms that already have technology solutions in place would likely incur lower costs than those that need to develop new technology solutions.

¹⁸⁶⁸ See Joy Howard WM Financial Strategies Letter.

it should use a higher hourly rate to estimate the recordkeeping burden for small municipal advisors for several reasons. The 182-hour estimate is an average annual hourly burden across all firms regardless of their size, and is based on the Commission's experience with other regulatory regimes. The Commission anticipates that larger municipal advisory firms that offer a variety of services to municipal entities and have significantly greater volumes of books and records will incur an annual burden greater than 182 hours, while smaller municipal advisory firms that have significantly lower volumes of books and records will incur an annual burden lower than 182 hours. Similarly, the \$53 figure is an average hourly rate across all firms regardless of their size and is inclusive of the variability of costs across municipal advisors. The Commission does not have the information necessary to provide reasonable estimates of the differences in hourly burden among firms of various sizes, a separate average hourly burden for small entity municipal advisors, or the differences in hourly rates among firms of various sizes. The Commission is also unaware of any such data being publicly available. The Commission staff also understands that some small municipal advisors employ part-time staff to perform certain business and clerical functions and that the costs of such employees are less likely to reflect the costs for compliance personnel at larger municipal advisory firms or the hourly rate suggested by the commenter. The Commission assumes that municipal advisors will use the most cost-effective approach available, depending on their size and specific circumstances, to comply with the recordkeeping requirement. Accordingly, the Commission does not believe that it should use a higher hourly rate to estimate the recordkeeping burden for small municipal advisors.

However, as stated above, the Commission believes that small municipal advisory firms will likely incur lower annual costs for maintaining books and records than larger firms. The Commission recognizes that, although small municipal advisory firms and solo practitioners may

maintain their books and records without a general clerk or additional staff assistance, such activity would not be costless. The Commission believes that it is appropriate to assume that, because small firms will utilize the most cost-effective approach available, per-hour costs attributable to the books and records requirements will be, at most, equivalent to the hourly rate for a General Clerk. Therefore, the Commission uses the hourly rate for a General Clerk to estimate the average cost across all municipal advisory firms, regardless of size. The Commission also addresses the burden for smaller municipal advisory firms in the Final Regulatory Flexibility Analysis below.¹⁸⁶⁹

Despite these costs, as discussed above, the recordkeeping requirements will benefit the municipal securities market by enhancing the Commission's ability to oversee municipal advisors.¹⁸⁷⁰ Recordkeeping requirements are a familiar and important element of the Commission's approach to investment adviser and broker-dealer regulation, and are designed to maintain the efficiency and effectiveness of the Commission's examination program for regulated entities, which facilitates the Commission's review of their compliance with statutory mandates and with Commission rules.

b. Alternatives

As an alternative to the recordkeeping requirement adopted today, the Commission considered creating a unique recordkeeping requirement for municipal advisors different from the standard recordkeeping practices under federal securities law. The Commission has determined not to create a unique recordkeeping requirement because it expects that many entities already registered with the Commission in another capacity, such as investment advisers and broker-dealers, would likely incur higher, and in many ways redundant, costs to comply with this type of regime. As discussed above, the Commission estimates that the average hourly burden for municipal

¹⁸⁶⁹ See infra Section IX.

¹⁸⁷⁰ See supra Section VIII.D.1.a.

advisory firms to comply with the books and records requirement will be approximately 182 hours per year.¹⁸⁷¹ The Commission anticipates that the average hourly burden estimate would be higher to the extent the alternative recordkeeping requirement did not allow entities to maintain books and records in a manner consistent with other regulations under the securities laws. As discussed above, with respect to the recordkeeping requirement adopted today, the Commission believes costs may be reduced for firms that are currently registered with the Commission with respect to their other activities (because the final rule allows some records to be maintained in compliance with those other regulations) and for firms that have voluntarily adopted similar recordkeeping practices.¹⁸⁷² If the Commission established a unique recordkeeping requirement for municipal advisors, the Commission believes that many municipal advisors would incur higher costs due to the inability to leverage experience, systems, and practices developed to comply with the similar recordkeeping practices under federal securities law.

5. Exclusions from the Definition of Municipal Advisor

a. Programmatic, Registration, and Recordkeeping Costs and Benefits

As discussed above,¹⁸⁷³ the Dodd-Frank Act included a number of statutory exclusions from the definition of municipal advisor.¹⁸⁷⁴ The Commission is adopting interpretations of these

¹⁸⁷¹ See supra Section VII.D.8.

¹⁸⁷² See supra note 1862–1863 and accompanying text.

¹⁸⁷³ See supra Section III.A.1.c.

¹⁸⁷⁴ Section 15B(e)(4)(C) of the Exchange Act provides that the term municipal advisor does not include (1) a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in Section 2(a)(11) of the Securities Act); (2) any investment adviser registered under the Investment Advisers Act, or persons associated with such investment advisers who are providing investment advice; (3) any commodity trading advisor registered under the CEA or persons associated with a commodity trading advisor who are providing advice related to swaps; (4) attorneys offering legal advice or providing services that are of a traditional legal nature; or (5) engineers providing engineering advice. See 15 U.S.C. 780-

statutory exclusions that are consistent with the Commission's understanding of Congress's intent not to provide blanket exclusions from the municipal advisor regulatory regime for underwriters, registered investment advisers, commodity trading advisors, attorneys, and engineers, regardless of the activities in which they are engaged. In adopting these interpretations, the Commission has considered the programmatic, registration, and recordkeeping costs that these persons would incur absent an exclusion from the definition of municipal advisor.

Given the limitations on the Commission's ability to conduct a quantitative assessment of the programmatic costs and benefits associated with interpreting the statutory exclusions,¹⁸⁷⁵ the Commission has considered the programmatic costs and benefits primarily in qualitative terms. In addition, the Commission has quantified many of the registration and recordkeeping costs that result from the final rules and forms. Relying primarily on the programmatic, registration, and recordkeeping costs and benefits, the Commission believes it is possible to identify those persons that, because of the activities in which they engage, appear to be the types of persons for which the other statutory requirements of Section 975 of the Dodd-Frank Act were not intended.

As discussed above, persons subject to the municipal advisor regulatory regime are subject to programmatic, registration, and recordkeeping costs. As indicated throughout this release, and as discussed further below, the Commission is mindful of these costs and has interpreted the statutory exclusions in a manner that is consistent with the purposes of Section 15B of the Exchange Act to regulate persons that engage in municipal advisory activities and that is intended to help minimize compliance burdens. The Commission's interpretations of the statutory exclusions are designed to reduce redundant regulation of entities engaged in activities related to municipal entities that are appropriately regulated under another regime. Accordingly, the Commission is adopting an

4(e)(4)(C).

¹⁸⁷⁵ See supra note 1742.

interpretation of the statutory exclusion for underwriters that applies only to those underwriters that engage in municipal advisory activities that are within the scope of an underwriting.¹⁸⁷⁶ The Commission is also adopting an interpretation of the statutory investment adviser exclusion that would permit a registered investment adviser to provide advice concerning the investment of proceeds of municipal securities, but not advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person, without registering as a municipal advisor.¹⁸⁷⁷ Similarly, the Commission is adopting an interpretation of the statutory commodity trading advisor exclusion that is limited to registered commodity trading advisors and associated persons thereof providing advice related to swaps in the capacity as a registered commodity trading advisor that is subject to the Commodity Exchange Act.¹⁸⁷⁸ The interpretations of the statutory attorney exclusion and the statutory engineering exclusion the Commission is adopting today are designed to permit attorneys to offer legal advice or provide services that are of a traditional legal nature¹⁸⁷⁹ and engineers to provide engineering advice¹⁸⁸⁰ without having to register with the Commission as a municipal advisor. The Commission does not believe that imposing an additional layer of regulation, including the fiduciary duty imposed upon municipal advisors when advising municipal entities, on the persons described above would provide benefits that would justify the burden (i.e., the

¹⁸⁷⁶ See Rule 15Ba1-1(d)(2)(i). In response to comments, the Commission is also providing lists of activities that the Commission would consider to be within or outside the scope of an underwriting. See *supra* Section III.A.1.c.iv.

¹⁸⁷⁷ See Rule 15Ba1-1(d)(2)(ii).

¹⁸⁷⁸ See Rule 15Ba1-1(d)(2)(iii). Under this exclusion, a registered commodity trading advisor could provide advice relating to swaps without registering as a municipal advisor.

¹⁸⁷⁹ See Rule 15Ba1-1(d)(2)(iv).

¹⁸⁸⁰ See Rule 15Ba1-1(d)(2)(v).

programmatic, registration, and recordkeeping costs discussed throughout the economic analysis) of municipal advisor regulation.

Because the Commission's interpretations of the statutory exclusions are consistent with Section 15B(e) of the Exchange Act, the Commission believes that those persons that do not currently qualify for a statutory exclusion should already be registered with the Commission and the MSRB under the temporary registration regime. Accordingly, because the Commission has interpreted the statutory exclusions consistent with the statute, the number of persons for which a statutory exclusion is available should not change significantly and any differences from the baseline with regard to the number of municipal advisors required to register with the Commission and the MSRB should be minimal. The Commission also believes that any differences from the baseline with regard to the programmatic costs and benefits related to the statutory requirements and MSRB rules that are currently operative should be minimal because they would have already been incurred under the temporary registration regime. In addition, there should be no significant impact on efficiency, competition, and capital formation relative to the baseline because those market participants for which an exclusion is not available should have already registered with the Commission and the MSRB under the temporary registration regime and be complying with the requirements of Section 15B of the Exchange Act and MSRB rules.

Those persons who provide municipal advisory services and are not excluded from the definition of municipal advisor as described above, however, will incur the programmatic, registration, and recordkeeping costs of the municipal advisor regulatory regime. Accordingly, underwriters that engage in municipal advisory activities outside the scope of underwriting an issuance of municipal securities; investment advisers that provide advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of issuances of

municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation; commodity trading advisors that are not a registered commodity trading advisor or that provide advice with respect to an issuance of municipal securities or any municipal financial product other than a swap; attorneys that represent themselves as financial advisors or financial experts in connection with the issuance of municipal securities or municipal financial products and engage in municipal advisory activities; and engineers that provide municipal advisory activities beyond engineering advice, will incur the programmatic, registration, and recordkeeping costs discussed throughout this release.

The Commission believes such persons should continue to be subject to the municipal advisor regulatory regime, including a fiduciary duty to municipal entity clients and the standards of conduct, training, and testing as may be required by the Commission or the MSRB, and other requirements as may be imposed by the MSRB.¹⁸⁸¹ As discussed above, the Commission believes that the municipal advisor regulatory regime could incentivize municipal advisors not to engage in misconduct relative to the baseline because of the enhanced disclosure requirements of the permanent registration regime.¹⁸⁸² Municipal advisors will continue to be subject to Commission oversight, including periodic examinations, and may be subject to disciplinary action for misconduct.¹⁸⁸³ In addition, certain municipal advisors will now be subject to periodic examinations by FINRA to evaluate compliance with the Exchange Act, the rules and regulations

¹⁸⁸¹ While the underwriting activities of brokers, dealers, and municipal securities dealers in connection with an issuance of municipal securities are currently subject to MSRB rules, those rules generally do not apply to municipal advisory activities that are outside the scope of an underwriting.

¹⁸⁸² See supra Section VIII.D.1.a.

¹⁸⁸³ See supra note 1680 and accompanying text.

thereunder, and MSRB rules.¹⁸⁸⁴

b. Alternatives

One alternative to the rules adopted today would be for the Commission not to engage in additional rulemaking, and thus, not to further clarify the statutory exclusions from the definition of municipal advisor. As discussed above,¹⁸⁸⁵ the Commission believes that the assessment costs associated with determining whether a person would be required to register as a municipal advisor would be greater in the absence of the rules the Commission is adopting today. Without these rules, market participants would still need to analyze whether their activities fall within a statutory exclusion and would likely need to seek no-action relief and other guidance from the Commission or Commission staff, or risk failing to register with the Commission as required.¹⁸⁸⁶ The Commission believes that the final rules provide extensive guidance to market participants that should reduce the number of requests for no-action relief and other guidance from the Commission or Commission staff, which, in turn, should lead to lower assessment costs for many firms.¹⁸⁸⁷

The Commission also considered whether to interpret the statutory exclusions using a status-based approach, as suggested by commenters, rather than an activity-based approach. For example, some commenters called for an exclusion for broker-dealers that would exclude broker-dealers based on their status as a regulated entity.¹⁸⁸⁸ Similarly, some commenters argued that the statute

¹⁸⁸⁴ See 15 U.S.C. 78o-4(b)(2)(E); 15 U.S.C. 78o-4(c)(7)(A)(iii).

¹⁸⁸⁵ See supra Section VIII.D.1.c.

¹⁸⁸⁶ In addition, without this guidance, a greater number of market participants would likely decide to register as municipal advisors unnecessarily and thereby incur the programmatic, registration, and recordkeeping costs of the municipal advisor regulatory regime.

¹⁸⁸⁷ See supra Section VIII.D.1.c.

¹⁸⁸⁸ See supra note 580 and accompanying text.

excludes any registered investment adviser, without limitation.¹⁸⁸⁹

Although persons excluded under a status-based approach would not incur the programmatic, registration, and recordkeeping costs of the regulatory regime, the Commission has determined that to provide status-based exclusions would be inconsistent with the purposes of the Dodd-Frank Act to regulate persons that engage in municipal advisory activities. The Commission believes that a status-based approach would permit many persons to provide municipal advisory services without being subject to the regulatory regime, which could cause municipal entities and obligated persons to receive municipal advice without the protections of the regime and limit the Commission's ability to oversee the municipal advisory activities of those excluded persons. The Commission believes these other regimes are not designed to address directly municipal advisory activities and may not provide similar protections to municipal entities and obligated persons. In addition, persons excluded under a status-based approach would not be required to register with the Commission, which would reduce any benefits of the permanent registration regime to the municipal advisor selection process.¹⁸⁹⁰ The Commission is also concerned that interpreting the exclusions using a status-based approach could create inappropriate competitive advantages for covered categories of market participants.

Another alternative the Commission considered was to interpret some of the statutory exclusions in a manner that would allow otherwise regulated persons to engage in municipal advisory activities that are solely incidental to their regulated activities. Some commenters stated that the Commission should exclude from registration broker-dealers that provide advice that is solely incidental to a transaction, similar to the broker-dealer exclusion under Section 202(a)(11)(C)

¹⁸⁸⁹ See, e.g., Vanguard Letter; IAA Letter; ICI Letter.

¹⁸⁹⁰ See supra Section VIII.D.3.b.

of the Investment Advisers Act.¹⁸⁹¹ Another commenter expressed concern that commodity trading advisers that provide ancillary services in connection with advice related to swaps would need to register as municipal advisors if the ancillary services fall within the scope of municipal advisory activities and are not deemed to be the type of advice described in the commodity trading advisor exclusion.¹⁸⁹²

The Commission does not believe it is necessary to interpret the statutory exclusions in a manner that would permit municipal advisory activities that are solely incidental to other regulated activities, and believes that the result would be substantially similar to a status-based approach.¹⁸⁹³ Interpreting the statutory exclusions in this manner could result in a difficult facts-and-circumstances analysis to determine whether the exclusions apply, which is unlikely to result in any assessment savings. In addition, the Commission has provided additional exemptions that would limit the circumstances under which a person could be considered a municipal advisor and the range of municipal financial products to which duplicative regulation could apply.¹⁸⁹⁴

¹⁸⁹¹ See supra note 580 and accompanying text.

¹⁸⁹² See MFA Letter.

¹⁸⁹³ See supra notes 1888–1890 and accompanying text.

¹⁸⁹⁴ For example, the Commission is providing an exemption for any person engaging in municipal advisory activities in a circumstance in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor. See Rule 15Ba1-1(d)(3)(vi). In addition, the Commission is exempting from the definition of municipal advisor persons that provide advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. See Rule 15Ba1-1(d)(3)(vii).

6. Exemptions from the Definition of Municipal Advisor

a. Programmatic, Registration, and Recordkeeping Costs and Benefits

As discussed above,¹⁸⁹⁵ the Dodd-Frank Act granted the Commission authority to conditionally or unconditionally exempt, by rule or order, upon its own motion or upon application, any municipal advisor or class of municipal advisors from any provision of Section 15B of the Exchange Act or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 15B.¹⁸⁹⁶ The final rules provide exemptions from the definition of municipal advisor, subject to specified conditions, for (1) public officials and employees of municipal entities and obligated persons; (2) banks; (3) swap dealers; (4) accountants; (5) persons engaging in municipal advisory activities with a municipal entity or obligated person that is represented by an independent registered municipal advisor; and (6) persons responding to RFPs or RFQs. As discussed below, the Commission believes that these exemptions are consistent with the public interest, the protection of investors, and the purposes of Section 15B. In providing these exemptions, the Commission has considered the programmatic, registration, and recordkeeping costs, which are discussed throughout the economic analysis, that these persons would incur absent an exemption from the definition of municipal advisor. The Commission has designed these exemptions to provide that municipal entities and obligated persons receive municipal advisory services with the protections of the municipal advisor regulatory regime.

Given the limitations on the Commission's ability to conduct a quantitative assessment of

¹⁸⁹⁵ See supra Section III.A.1.c.

¹⁸⁹⁶ See 15 U.S.C. 78o-4(a)(4).

the programmatic costs and benefits associated with providing these exemptions,¹⁸⁹⁷ the Commission has considered these costs and benefits primarily in qualitative terms. In addition, the Commission has quantified many of the registration and recordkeeping costs that result from the final rules and forms. Relying primarily on the programmatic, registration, and recordkeeping costs and benefits, the Commission believes it is possible to identify those persons that, because of the activities in which they engage, appear to be the types of persons for which the other statutory requirements of Section 975 of the Dodd-Frank Act were not intended.

The Commission is exempting from the definition of municipal advisor: (1) any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person to the extent that such person is acting within the scope of such person's official capacity; and (2) any employee of a municipal entity or obligated person to the extent that such person is acting within the scope of such person's employment.¹⁸⁹⁸ The Commission believes that this exemption will significantly reduce the number of individuals who would otherwise have needed to register as municipal advisors. Some commenters asserted that, as proposed, thousands of board members would be required to register as municipal advisors.¹⁸⁹⁹

The Commission believes the programmatic, registration, and recordkeeping costs such board members would incur would not justify the benefits of registration for a number of reasons. The Commission believes that individuals who engage in deliberative and decision-making

¹⁸⁹⁷ See supra note 1742.

¹⁸⁹⁸ See Rule 15Ba1-1(d)(3)(ii). See also supra note 507 and accompanying text (discussing the Commission's interpretation of the statutory exclusion from the definition of "municipal advisor" for employees of municipal entities by exempting such employees "to the extent that such person is acting within the scope of such person's employment").

¹⁸⁹⁹ See, e.g., Bachus Letter; Marchant Letter.

functions with respect to municipal financial products or the issuance of municipal securities as part of their duties as members of a governing body should not have to register as municipal advisors because they are agents of the municipal entity that is the intended recipient of the protections of the municipal advisor regulatory regime. Board members and other officials (appointed and elected alike, as well as their duly appointed designees) may be subject to state and local law, including fiduciary duties and ethics laws, and the statutory qualifications for such members' board position may be significant to the mission of the municipal entity. In addition, as noted by commenters, there would be costs to municipal entities as the requirement to register as a municipal advisor could reduce the number of persons willing to volunteer for boards or could limit what volunteers would say. The Commission believes this exemption appropriately balances consideration of the need to protect municipal entities with the preservation of volunteer services by not requiring board members to register as municipal advisors.

The Commission is also providing exemptions from the definition of municipal advisor for certain market participants: banks, accountants, and swap dealers. As discussed above, persons subject to the municipal advisory regulatory regime are subject to a series of programmatic, registration, and recordkeeping costs. The Commission is exempting from the definition of municipal advisor banks engaging in certain municipal activities,¹⁹⁰⁰ certain swap dealers, and certain accountants.¹⁹⁰¹ These exemptions are designed to reduce redundant regulation of entities

¹⁹⁰⁰ See Rule 15Ba1-1(d)(3)(iii). Because the Commission is exempting from the definition of municipal advisor persons that provide advice with respect to "investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments" (see Rule 15a1-1(d)(2)(vii)), the Commission believes that the performance of many of the bank activities and services about which commenters were concerned will not require banks to register as municipal advisors.

¹⁹⁰¹ The Commission is exempting from the definition of municipal advisor any accountant to the extent that the accountant is providing audit or other attest services, preparing financial

engaged in activities related to municipal entities that are appropriately regulated under another regime. The Commission does not have the information necessary to provide a reasonable estimate of the number of persons who will rely on these exemptions because Form MA-T does not collect data on banks, swap dealers, or accountants. To the extent these entities are not required to register as municipal advisors because of an exemption, they will not incur the programmatic, registration, and recordkeeping costs discussed throughout the economic analysis, and thus, will realize cost savings.

The Commission does not believe that imposing an additional layer of regulation, including the fiduciary duty imposed upon municipal advisors when advising municipal entities, on these persons would provide benefits that would justify the burden (i.e., the programmatic, registration, and recordkeeping costs discussed throughout the economic analysis) of municipal advisor regulation.¹⁹⁰² Those persons that provide municipal advisory services beyond the activities described above, and thus, that do not qualify for one of the exemptions, however, will incur the programmatic, registration, and recordkeeping costs of the municipal advisor regulatory regime. The Commission believes that the exemption for banks will help ensure that parties engaging in key municipal advisory activities are registered, while permitting banks to continue to provide banking services to municipal entities and obligated persons for which they are currently subject to regulation.¹⁹⁰³ Similarly, the final rule provides exemptions for registered swap dealers that are

statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person. See Rule 15Ba1-1(d)(3)(i).

¹⁹⁰² The Commission received a number of comments about the costs that would be imposed on banks under the Proposal. See, e.g., Old Point Bank Letter; Union Bank Letter; Texas Bankers Association Letter; American Bankers Association Letter II. These comment letters are discussed extensively earlier in this release.

¹⁹⁰³ To the extent a bank provides advice with respect to a municipal derivative or engages in any other non-exempted municipal advisory activity through a SID, Rule 15Ba1-1(d)(4) will permit the SID to register as a municipal advisor rather than the bank itself. The

consistent with the exemptions promulgated under Title VII of the Dodd-Frank Act.¹⁹⁰⁴ The Commission believes it is appropriate to provide an accountant exemption that includes accountants providing audit or other attest services since both audit and other attest services are generally subject to regulation and professional standards (including independence requirements)¹⁹⁰⁵ – requirements that could potentially conflict with a municipal advisor’s fiduciary duty to its municipal entity clients.¹⁹⁰⁶

The Commission is also exempting from the definition of municipal advisor any persons engaging in municipal advisory activities in a circumstance in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor¹⁹⁰⁷ with respect to

Commission believes that permitting SIDs to register instead is in the public interest in that it will ensure that municipal entities and obligated persons receive the regulatory protection intended by the statute while not imposing the burdens of the municipal advisor regulatory regime (*i.e.*, the programmatic, registration, and recordkeeping costs discussed throughout the economic analysis) on the bank as a whole.

¹⁹⁰⁴ The final rule exempts any registered swap dealer to the extent that such dealer recommends a municipal derivative or a trading strategy that involves a municipal derivative for sale by such dealer or an affiliated registered swap to a municipal entity or obligated person, provided that the dealer meets any applicable safe harbor requirements for parties to such transactions under the CFTC’s regulatory regime. *See supra* Section III.A.1.c.vi. The Commission notes that swap dealers will incur costs to qualify for the exemption under the applicable regulatory regime, and that these costs will likely be lower than the programmatic, registration, and recordkeeping costs of the municipal advisor regulatory regime.

¹⁹⁰⁵ *See* AICPA Code of Professional Conduct ET 201.01, 202.01. *See also* AICPA Attestation Standards AT §101.06 (providing that “[a]ny professional service resulting in the expression of assurance must be performed under AICPA professional standards that provide for the expression of such assurance”).

¹⁹⁰⁶ *See* AICPA Attestation Standards AT §101.35, 101.36. Accountants providing attest services are also required to meet general standards related to adequate technical training and proficiency; adequate knowledge of subject matter; suitability and availability of criteria; and the exercise of due professional care. *See* AICPA Attestation Standards AT §101.19 to 101.41.

¹⁹⁰⁷ The term “independent registered municipal advisor” means a municipal advisor registered pursuant to Section 15B of the Exchange Act (15 U.S.C. 78o-4) and the rules and regulations thereunder, and that is not, and within the past two years was not, associated

the same aspects of a municipal financial product or an issuance of municipal securities, subject to certain requirements.¹⁹⁰⁸ As long as a municipal entity is represented by an independent registered municipal advisor, the Commission believes it is desirable to allow municipal entities to receive as much advice and information as possible from a variety of sources, even if the providers of such advice are not subject to a fiduciary duty, because such advice could lead to better decision making where the municipal entity or obligated person also receives the advice of an independent registered municipal advisor.¹⁹⁰⁹ The Commission, therefore, does not believe at this time that imposing an additional layer of regulation, including the fiduciary duty imposed upon municipal advisors when advising municipal entities, on persons providing advice to a municipal entity that is otherwise represented by an independent municipal advisor would provide benefits that justify the burden (i.e., the programmatic, registration, and recordkeeping costs discussed throughout the economic analysis) of registration.

As discussed above, the Commission believes that underwriters in negotiated deals are the persons most likely to rely on this exemption.¹⁹¹⁰ The Commission estimates the total initial PRA burden to rely on this exemption in the first year will be \$297,339.¹⁹¹¹ The Commission estimates

with the person seeking to rely on Rule 15Ba1-1(d)(3)(vi). See Rule 15Ba1-1(d)(3)(vi)(A).

¹⁹⁰⁸ See Rule 15Ba1-1(d)(3)(vi). See also supra notes 564–572 and accompanying text (discussing the requirements for the exemption).

¹⁹⁰⁹ The Commission staff understands based on discussions with market participants that market participants and others, including underwriters, often are aware of important facts and are in a position to offer valuable advice and information to municipal entities and obligated persons. The Commission does not want to curtail the receipt of such advice and information so long as the municipal entities and obligated persons are represented by independent registered municipal advisors who are subject to a fiduciary and other duties and who can help the municipal entities and obligated persons evaluate the advice and identify potential conflicts of interest.

¹⁹¹⁰ See supra Section VII.D.9.

¹⁹¹¹ ((210 hours (estimated burden to draft the written representation) + 210 hours (estimated burden to draft the required disclosure) × \$379 (hourly rate for an in-house attorney)) +

that the ongoing PRA burden to rely on this exemption in each year after the first will be \$138,159.¹⁹¹² In comparison to the registration and recordkeeping costs, estimated above, the Commission believes that these costs will be minimal, and that persons relying on this exemption will realize cost savings by not being subject to the municipal advisor regulatory regime.

The Commission is also exempting from the definition of municipal advisor any person providing a response in writing or orally to an RFP or RFQ from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities, provided that such person does not receive separate direct or indirect compensation for advice provided as part of such a response.¹⁹¹³ The Commission believes that responses to RFPs and RFQs by themselves do not constitute municipal advisory activities, and thus, that imposing an additional layer of regulation, including the fiduciary duty imposed upon municipal advisors when advising municipal entities, on persons responding to RFPs and RFQs would provide benefits that justify the burden (i.e., the programmatic, registration, and recordkeeping costs discussed throughout the economic analysis) of registration. The Commission does not have the information necessary to provide a reasonable estimate of the number of persons who may rely on this exemption because the Commission does not have data regarding the number of persons who respond to RFPs and RFQs, and is unaware of such data being publicly available. The Commission staff understands based on discussions with market participants, however, that a significant number of persons respond to RFPs and RFQs, some of which would be registered municipal advisors;

(2,193 hours (estimated burden to obtain the written representation) × \$63 (hourly rate for a Compliance Clerk)) = \$297,339. See supra note 1611 and accompanying text; supra note 1779 (calculating the hourly rates for an in-house attorney and for a Compliance Clerk).

¹⁹¹² 2,193 hours (estimated initial burden to rely on exemption) × \$63 (hourly rate for a Compliance Clerk) = \$138,159. See supra note 1612 and accompanying text; supra note 1779 (calculating the hourly rate for a Compliance Clerk).

¹⁹¹³ See Rule 15Ba1-1(d)(3)(iv).

others may be already-regulated entities, such as Commission-registered investment advisers and broker-dealers, whose responses may be subject to fair dealing, suitability, fiduciary, or other standards.

The exemptions adopted today could allow for more-efficient use of resources by persons that are no longer required to register with the Commission as a municipal advisor pursuant to one of the exemptions in the final rules because such persons will now be able to put to use the resources that would otherwise have been spent registering. However, to the extent that such persons were registered under the temporary registration regime, the absence of current information about such persons on Form MA and increased difficulty in finding information about such persons could reduce informational efficiency relative to the baseline. The exemptions could also improve competition relative to the baseline among exempted persons engaging in those activities that are consistent with the relevant exemption to the extent they remain in their respective industry as a result of an exemption.¹⁹¹⁴

b. Alternatives

One alternative to the rules adopted today would be for the Commission not to engage in additional rulemaking, and thus, not to provide any exemptions from the definition of municipal advisor. As discussed above, the Commission does not believe that the benefits that would accrue if the Commission did not provide the exemptions would justify the costs that would accrue from subjecting certain market participants to potentially conflicting and redundant obligations under the municipal advisor regulatory regime. In addition, the Commission believes the exemptions provide greater clarity to market participants by delineating the types of activities that are not subject to the

¹⁹¹⁴ For example, if swap dealers were required to register as municipal advisors, some might determine to no longer sell swaps to municipal entities and obligated persons. The exemption may incentivize such swap dealers to stay in the market and compete with each other.

municipal advisor regulatory regime. To the extent that a person can determine that registration as a municipal advisor is not required based solely on the availability of an exemption, the Commission believes the exemptions adopted today should lead to lower assessment costs for many firms. For example, board members should be able to determine relatively easily whether registration as a municipal advisor is required. Absent these rules, it is likely that market participants would need to seek no-action relief and other guidance from the Commission or Commission staff, or risk failing to register with the Commission, if required. The Commission believes the final rules provide greater clarity to market participants that should allow them to make determinations without requesting interpretations from the Commission or Commission staff, which, in turn, should lead to lower assessment costs for many firms.

The Commission also considered whether to provide exemptions using a status-based approach rather than an activity-based approach. For example, some commenters called for a blanket exemption for swap dealers, arguing that registration as a municipal advisor would be duplicative.¹⁹¹⁵ Similarly, some commenters recommended that municipal advisor regulation should not apply to banks since they are already regulated.¹⁹¹⁶

Although persons exempt under a status-based approach would not incur the programmatic, registration, and recordkeeping costs of the regulatory regime, the Commission believes that to provide status-based exemptions would be inconsistent with Congress's intent to regulate persons that engage in municipal advisory activities. The Commission believes that since the exclusions for regulated entities in Section 975 of the Dodd-Frank Act are limited in scope to certain regulated

¹⁹¹⁵ See supra note 748 and accompanying text. Commenters also requested an exemption for security-based swap dealers. The Commission is not adopting an exemption for security-based swap dealers at this time. See supra notes 763–765 and accompanying text.

¹⁹¹⁶ See supra notes 875–878 and accompanying text. Although the Commission is providing exemptions for certain banking activities, it has determined not to exempt banks entirely solely because of their status as otherwise regulated entities.

activity, any exemptions the Commission provides should be similarly limited. For example, the Commission believes that a bank that provides advice with respect to municipal derivatives or the issuance of municipal securities should not be exempt unless the bank qualifies for another exclusion or exemption. Similarly, the Commission believes that a registered swap dealer should be exempt only if it meets the requirements of Rule 15Ba1-1(d)(3)(v). The Commission believes that a status-based approach would permit many persons to provide municipal advisory services without being subject to the regulatory regime, which could cause municipal entities and obligated persons to receive municipal advice without the investor protections of the regime. The Commission also believes such an approach could limit the Commission's ability to oversee the municipal advisory activities of those exempt persons. The Commission believes these other regimes are not designed to address directly municipal advisory activities and may not provide similar protections to municipal entities and obligated persons. In addition, persons exempt under a status-based approach would not be required to register with the Commission, which would reduce any benefits of the regime to the municipal advisor selection process.¹⁹¹⁷ The Commission is also concerned that providing status-based exemptions could create inappropriate competitive advantages for covered categories of market participants.

IX. FINAL REGULATORY FLEXIBILITY ANALYSIS

The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA") in accordance with Section 4(a) of the Regulatory Flexibility Act ("RFA").¹⁹¹⁸ This FRFA relates to Rules 240.15Ba1-1 through 240.15Ba1-8 under the Exchange Act, which set forth the requirements for municipal advisors to register with the Commission and the books and records that registered municipal advisory firms must make and keep. The Commission prepared an Initial

¹⁹¹⁷ See supra notes 1823–1832 and accompanying text.

¹⁹¹⁸ 5 U.S.C. 604(a).

Regulatory Flexibility Analysis (“IFRA”) in conjunction with the Proposal.¹⁹¹⁹

A. Need for and Objectives of the Rules

The final rules and forms establish a permanent registration regime for municipal advisors in accordance with Section 975 of the Dodd-Frank Act. Section 15B of the Exchange Act, as amended by the Dodd-Frank Act, is intended generally to strengthen oversight of the municipal securities markets and to broaden current municipal securities market protections to cover, among other things, previously unregulated market activity. The rules and forms are designed to meet this mandate by requiring each municipal advisor to provide basic identifying information, a description of its activities, and facts regarding disciplinary history and conflicts of interest, if any.

The Commission believes that the information provided pursuant to these rules and forms will aid municipal entities, obligated persons, and others in choosing municipal advisors or engaging in transactions with municipal advisors, including participating in transactions of municipal securities offerings in which a municipal advisor provided municipal advisory services. In addition, the information disclosed pursuant to the rules and forms will provide significant value to the Commission in its oversight of municipal advisors and their activities in the municipal securities markets.

B. Significant Issues Raised by Public Comment

In the Proposal, the Commission solicited comment on the IRFA. In particular, the Commission sought comment on the number of small entities that would be subject to the proposed rules and forms; compliance burdens and how they would affect small entities; and whether the proposed rules and forms would have any effects that have not been discussed.¹⁹²⁰ In addition, the Commission requested that commenters describe the nature of any effects on small entities subject

¹⁹¹⁹ See Proposal, 76 FR at 878–81.

¹⁹²⁰ See *id.* at 881.

to the rule and provide empirical data to support the nature and extent of such effects.¹⁹²¹

The Commission received approximately ten comment letters that provided specific evaluative comments about the IRFA and the potential effect of the rules on small businesses. Most of the commenters were concerned that the requirements of the permanent registration regime would be too costly and burdensome for small entity municipal advisors.¹⁹²² Several commenters emphasized in particular that the Small Business Act (“SBA”) threshold of \$7 million in revenues that the Commission estimated for small businesses was too high.¹⁹²³

Many commenters recommended that the Commission create exemptions for small independent advisors.¹⁹²⁴ Two commenters suggested exempting from registration municipal advisors involved in transactions below a debt financing limit.¹⁹²⁵ One commenter suggested the Commission allow small municipal advisors to convert their temporary registration to permanent status by agreeing to observe a fiduciary duty to clients and filing Form ADV (Part 1) with

¹⁹²¹ See *id.*

¹⁹²² See, e.g., Fieldman Rolapp Letter; MSRB Letter; NAIPFA Letter; Public FA Letter; Ranson Financial Consultants Letter; Tamalpais Advisors Letter.

¹⁹²³ See, e.g., Chancellor Financial Associates Letter; Fieldman Rolapp Letter; NAIPFA Letter; Public FA Letter; Ranson Financial Consultants Letter; Tamalpais Advisors Letter; Joy Howard WM Financial Strategies Letter (“[B]y establishing a threshold of \$7 million in annual receipts, the Commission is likely to determine that there are few, if any, rules that would ‘impose a regulatory burden on small entities.’ Such a conclusion would likely be true for firms that have millions of dollars in annual receipts; however, most independent financial advisor firms have significantly lower revenues.”).

¹⁹²⁴ See, e.g., Bradley Payne Letter; Chancellor Financial Associates Letter; Ranson Financial Associates Letter; Specialized Public Finance Letter; Sullivan Letter; Tamalpais Advisors Letter.

¹⁹²⁵ See Chancellor Financial Associates Letter (suggesting “a limit predicated on the Internal Revenue Code’s \$10 million limit (during a calendar year) in order for an issuer’s bonds to be bank-qualified”); Ranson Financial Associates Letter (suggesting “that if a debt financing does not exceed a certain size or is of a certain nature, that a firm would not have to register”).

FINRA.¹⁹²⁶ Another commenter recommended small firms be allowed to pay lower registration fees to the MSRB.¹⁹²⁷ The Commission addresses these comments below.¹⁹²⁸

The Commission recognizes that small municipal advisors are concerned with the potential burdens that the permanent registration regime may impose. The Commission recognizes that some municipal advisory firms, including some smaller municipal advisory firms and sole proprietors, may exit the market for various reasons, including the costs related to the registration and recordkeeping requirements in the final rules and forms. The requirements under the final rules and forms were designed to impose only those burdens necessary to accomplish the objectives of the Dodd-Frank Act. The Commission continues to believe that the costs associated with municipal advisor registration generally will not be overly burdensome for small firms, and notes that small municipal advisory firms and sole proprietors may exit the market for a number of reasons, including business reasons separate from the costs incurred with respect to the permanent registration regime.

C. Small Entities Subject to the Rule

In developing the final rules and forms, the Commission has considered their potential impact on small entities to which they will apply. The final rules and forms will affect municipal advisors required to register with the Commission, including small municipal advisors. Under Section 601(3) of the RFA, the term “small business” is defined as having “the same meaning as the term ‘small business concern’ under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are

¹⁹²⁶ See Specialized Public Finance Letter.

¹⁹²⁷ See Sullivan Letter.

¹⁹²⁸ See *infra* Section IX.C.3.

appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”¹⁹²⁹ The Commission’s rules do not define “small business” or “small organization” for purposes of municipal advisors. The SBA defines “small business,” for purposes of entities that provide financial investments and related activities, as a business that had annual receipts of less than \$7 million during the preceding fiscal year and is not affiliated with any person that is not a small business or small organization.¹⁹³⁰

As stated above, several commenters emphasized in particular that the SBA threshold of \$7 million in revenues that the Commission used for purposes of estimating the number of small businesses was too high.¹⁹³¹ For example, one commenter countered that the median annual revenue of a four-person financial advisory firm was closer to \$800,000, and thus, that the majority of such small advisory firms would earn annual revenue far below the \$7 million threshold.¹⁹³² This commenter and two others recommended a \$1 million threshold for annual revenue as a more realistic number for small municipal advisors.¹⁹³³ Another commenter argued that, as a sole proprietorship, his firm has never generated more than \$1 million in total revenue in any given year, and that for the past two years, his firm’s gross revenue has never been over \$350,000.¹⁹³⁴ This commenter suggested that, as an alternative to using the SBA threshold of \$7 million, municipal advisors involved in transactions below a debt financing limit should be exempt from municipal advisor regulation.¹⁹³⁵

¹⁹²⁹ 5 U.S.C. 601(3).

¹⁹³⁰ See 13 CFR 121.201.

¹⁹³¹ See supra note 1923.

¹⁹³² See NAIPFA Letter.

¹⁹³³ See id.; Tamalpais Advisors Letter; Fieldman Rolapp Letter.

¹⁹³⁴ See Chancellor Financial Associates Letter.

¹⁹³⁵ See supra note 1925.

The Commission has considered all public comments relating to the IRFA included in the Proposal. After considering these comments, the Commission has determined to continue to use the SBA threshold of \$7 million in revenues to denote small businesses. The Commission did not have sufficient data regarding municipal advisors to propose a definition of “small business” or “small entity” for purposes of the municipal advisor regulatory regime. The Commission believes that it will benefit from analyzing data submitted on Form MA over time, as well as data others may collect once the permanent registration regime is in place, before deciding whether to establish a separate definition of “small business” or “small organization” in Rule 0-10 under the Exchange Act¹⁹³⁶ for purposes of municipal advisors.¹⁹³⁷ As the Commission obtains additional information about municipal advisory firms after the commencement of the permanent registration regime, the Commission may reevaluate the appropriateness of the annual receipt threshold. The Commission may then determine, if appropriate, to promulgate a definition of “small business” or “small entity” for purposes of municipal advisors, as it has done in other contexts.¹⁹³⁸

In the Proposal, the Commission estimated that approximately 1,000 municipal advisory firms, including sole proprietors, would be required to complete Form MA.¹⁹³⁹ For purposes of the IRFA, the Commission believed that the proportion of small municipal advisory firms subject to the proposed rules compared to all Form MA applicants would be similar to the proportion of small

¹⁹³⁶ 17 CFR 240.0-10.

¹⁹³⁷ Form MA, Item 10, will ask municipal advisors to indicate whether they meet the definition of “small business” or “small organization.” In addition, the Commission will leverage data collected by others (e.g., the MSRB) to determine whether it should re-assess its determination of who is a small municipal advisor. As a result, in the future the Commission will have information it can use to reevaluate estimates of the number of small municipal advisors subject to its rules.

¹⁹³⁸ See 17 CFR 240.0-10.

¹⁹³⁹ See Proposal, 76 FR at 864–65.

registered broker-dealers compared to all registered broker-dealers.¹⁹⁴⁰ The Commission had previously estimated that approximately 17% of all broker-dealers are “small” for the purposes of the RFA.¹⁹⁴¹ Thus, the Commission estimated that approximately 170 municipal advisory firms that would be required to register with the Commission would be small entities subject to the rules.¹⁹⁴²

In connection with the Proposal, commenters did not provide estimates of how many municipal advisory firms would be small businesses or small organizations. One commenter asserted that “the large majority of [independent public finance advisory firms] would fall within the definition of ‘small business’ that the SEC has proposed it adopt; indeed, a high percentage of [independent public finance advisory] firms likely generate revenue in amounts substantially less than \$7 million per year.”¹⁹⁴³ Other commenters, as noted above, also argued that most independent financial advisory firms earn annual revenues far less than \$7 million.¹⁹⁴⁴

With respect to municipal advisors registered with the Commission as investment advisers and/or broker-dealers, commenters did not provide, and the Commission is not aware of, any alternative reliable estimates for the percentage of small entities. The Commission continues to believe that the percentage of “small” broker-dealers (i.e., 17%) is a reasonable estimate of the number of small entity municipal advisors that are registered with the Commission as investment advisers and/or broker-dealers. As discussed above, the Commission estimates that approximately 273 Form MA registrants will be municipal advisors registered with the Commission as investment

¹⁹⁴⁰ See *id.* at 879.

¹⁹⁴¹ See Securities Exchange Act Release No. 61908 (April 14, 2010), 75 FR 21456, 21483 (April 23, 2010). See also Proposal, 76 FR at 879.

¹⁹⁴² $1,000$ (estimated number of municipal advisors subject to the Rule) \times 0.17 (Proposal’s estimated percentage of municipal advisors that are small entities) = 170 small entity municipal advisors. See Proposal, 76 FR at 879.

¹⁹⁴³ See NAIPFA Letter I.

¹⁹⁴⁴ See *supra* notes 1931–1934 and accompanying text.

advisers and/or broker-dealers.¹⁹⁴⁵ Thus, the Commission estimates that approximately 46 municipal advisors registered with the Commission as investment advisers and/or broker-dealers will be small entities.¹⁹⁴⁶

The Commission recognizes, however, as suggested by commenters, that a significant majority of municipal advisors not otherwise registered with the Commission and solicitors that will be required to register with the Commission may be small entities subject to the final rules and forms. Therefore, the Commission is revising its estimate to reflect its belief that approximately 90% of municipal advisors not otherwise registered with the Commission and solicitors earn annual revenue less than \$7 million.¹⁹⁴⁷

As discussed above, the Commission estimates that approximately 491 Form MA registrants will be municipal advisors not otherwise registered with the Commission¹⁹⁴⁸ and 146 will be solicitors.¹⁹⁴⁹ Thus, the Commission estimates that 573 municipal advisors not otherwise registered

¹⁹⁴⁵ See supra note 1456 and accompanying text.

¹⁹⁴⁶ 273 (estimated number of municipal advisors registered with the Commission as investment advisers and/or broker-dealers) \times 0.17 (estimated percentage of municipal advisors registered with the Commission as investment advisers and/or broker-dealers that are small entities) = 46.41 small entity municipal advisors registered with the Commission as investment advisers and/or broker-dealers.

¹⁹⁴⁷ See, e.g., NAIPFA Letter I (indicating that smaller financial advisory firms' average revenue of approximately \$200,000 per natural person municipal advisor). As discussed above, the Commission estimates that firms not otherwise registered with the Commission and solicitors will have, respectively, an average of ten and five natural person employees who engage in municipal advisory activities on the firm's behalf. See supra text accompanying notes 1458 and 1461. Assuming average revenues of \$200,000 per natural person municipal advisor, such entities would likely have revenues far below \$7 million. However, the Commission believes a small number of such firms are likely to have revenues in excess of \$7 million. For these reasons, the Commission estimates that approximately 90% of municipal advisors not otherwise registered with the Commission and solicitors earn annual revenue less than \$7 million.

¹⁹⁴⁸ See supra note 1459 and accompanying text.

¹⁹⁴⁹ See supra note 1463 and accompanying text.

with the Commission and solicitors will be small entities.¹⁹⁵⁰ In total, the Commission estimates that approximately 619 municipal advisory firms will be small entities.¹⁹⁵¹

In the Proposal, the Commission also estimated that, with respect to Form MA-I, only those that are sole proprietors and meet the annual receipts threshold would be considered small entities subject to the proposed rules.¹⁹⁵² The Commission stated in the Proposal that, because all sole proprietors would be required to complete Form MA in addition to Form MA-I, sole proprietors that would be small entities subject to the proposed rules (*i.e.*, that are under the “small entities” annual receipts threshold) were already counted among the original estimate of 170 small entities calculated in the Proposal.¹⁹⁵³

Although, as discussed above, the Commission is revising its estimate of the total number of municipal advisory firms that will be considered to be small entities, the Commission did not receive comment regarding, and is not revising its approach regarding, the estimate of the number of small entities with respect to Form MA-I. The Commission continues to believe that, because all sole proprietors must complete both Form MA and Form MA-I, those sole proprietors that will be considered small entities are already counted among the new estimate of 619 small entities. Thus,

¹⁹⁵⁰ 637 (estimated number of municipal advisors not otherwise registered with the Commission and solicitors) \times 0.90 (estimated percentage of municipal advisors not otherwise registered with the Commission and solicitors that are small entities) = 573.3 small entity municipal advisors not otherwise registered with the Commission and small entity solicitors.

¹⁹⁵¹ 573 small entity municipal advisors not otherwise registered with the Commission and small entity solicitors + 46 small entity municipal advisors registered with the Commission as investment advisers and/or broker-dealers = 619 small entity municipal advisory firms.

¹⁹⁵² In the proposal, the Commission noted that individuals who are not sole proprietors (*i.e.*, employees of municipal advisors) and must register on Form MA-I do not fall within the definitions of “small business” or “small organization” because only those businesses and organizations that are “independently owned” may qualify as small entities pursuant to the definitions contained in the RFA. See 5 U.S.C. 601(4) and 15 U.S.C. 632(a)(1). See also Proposal, 76 FR at 879. As discussed in this release, such individuals will no longer be required to register as a municipal advisor.

¹⁹⁵³ See Proposal, 76 FR at 879.

the Commission maintains that it will not be necessary to further estimate the number of small entities with respect to Form MA-I.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The final rules and forms establish a permanent registration regime for municipal advisors, including small municipal advisors, which consists of Form MA, Form MA-I, Form MA-W, and Form MA-NR. The final rules also establish recordkeeping requirements for registered municipal advisors, including small municipal advisors.¹⁹⁵⁴ These requirements and the burdens on small municipal advisors are discussed below. The Commission received several comment letters that addressed the Commission's burden estimates.¹⁹⁵⁵

Rule 15Ba1-2 imposes costs on all municipal advisors, including small municipal advisors, by requiring each person applying for registration with the Commission as a municipal advisor to complete Form MA and file the form electronically with the Commission. In addition, a person applying for registration as a municipal advisor must complete Form MA-I with respect to each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf and file each Form MA-I electronically with the Commission.¹⁹⁵⁶ Each Form MA will be considered filed with the Commission upon acceptance of Form MA, together with all additional required documents, including all required Form MA-Is, by the Commission's EDGAR system.¹⁹⁵⁷

In the Proposal, the Commission estimated that the average initial cost per applicant to

¹⁹⁵⁴ See Rule 15Ba1-8.

¹⁹⁵⁵ See, e.g., Ranson Financial Consultants Letter; Joy Howard WM Financial Strategies Letter; NAIPFA Letter I; Specialized Public Finance Letter.

¹⁹⁵⁶ See Rule 15Ba1-2(b)(1).

¹⁹⁵⁷ See Rule 15Ba1-2(c).

complete Form MA and the initial self-certification would be approximately \$1,110,¹⁹⁵⁸ and the average initial cost per applicant to complete Form MA-I and the initial self-certification would be approximately \$510.¹⁹⁵⁹ The Commission received comment letters that addressed the Commission's burden estimates for Form MA¹⁹⁶⁰ and Form MA-I.¹⁹⁶¹ The Commission now estimates that the average initial PRA cost per applicant to complete Form MA will be approximately \$581.¹⁹⁶² The Commission also estimates that the average initial PRA cost for a municipal advisory firm to complete Form MA-I with respect to each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities on its behalf will be approximately \$498.¹⁹⁶³ The total initial cost incurred by a municipal advisor to register with the Commission as a municipal advisor will depend on a number of factors, including the size of the municipal advisory firm; the complexity of its business activities; the amount and type of information to be included on Form MA and Form MA-I; and the number of natural persons municipal advisors for whom the municipal advisory firm will need to submit Form MA-I. The Commission estimates that the average initial registration burden across all firms will be

¹⁹⁵⁸ See Proposal, 76 FR at 880 n. 426 and accompanying text.

¹⁹⁵⁹ See *id.* at 880 n. 427 and accompanying text.

¹⁹⁶⁰ See *supra* notes 1483–1485 and accompanying text.

¹⁹⁶¹ See *supra* notes 1496–1498 and accompanying text.

¹⁹⁶² 3.5 hours (estimated hourly burden for one municipal advisor to complete a Form MA) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk) = \$581. This estimate is lower than the estimate in the Proposal due to the Commission's decision not to adopt a self-certification requirement and a reduction in the combined hourly rate for a Compliance Manager and Compliance Clerk from \$170 to \$166. See *supra* note 1812 (calculating the combined hourly rate).

¹⁹⁶³ 3.0 hours (estimated time required to complete Form MA-I) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk) = \$498. This estimate is lower than the estimate in the Proposal due to a reduction in the combined hourly rate for a Compliance Manager and Compliance Clerk from \$170 to \$166. See *supra* note 1812 (calculating the combined hourly rate).

approximately \$7,595 per applicant.¹⁹⁶⁴

The Commission notes that the estimated \$166 hourly rate for compliance personnel that the Commission uses to estimate calculations with respect to certain figures¹⁹⁶⁵ will be less likely to apply to small entities and solo practitioners because they will be less likely than larger firms to employ highly compensated compliance professionals. In the case of such entities, the Commission's per-applicant cost estimates represent the upper range of potential registration costs, and the Commission expects that the actual registration costs for small entities will be significantly lower.

In addition, municipal advisors will use Form MA and Form MA-I to amend information previously reported to the Commission.¹⁹⁶⁶ Under Rule 15Ba1-5 and the General Instructions, a registered municipal advisor must amend Form MA at least annually and whenever a material event has occurred that changes the information provided in the form.¹⁹⁶⁷ As a result of certain changes to the final rule, a registered municipal advisor must also promptly amend the information contained in Form MA-I by filing an amended Form MA-I whenever the information contained in the form becomes inaccurate for any reason.¹⁹⁶⁸ Municipal advisors will also need to submit an amendment to Form MA-I to indicate that an individual is no longer an associated person of the municipal advisory firm filing the form or no longer engaged in municipal advisory activities on its behalf.¹⁹⁶⁹

In the Proposal, the Commission estimated that the average ongoing annual cost per

¹⁹⁶⁴ See supra note 1813.

¹⁹⁶⁵ See supra note 1812 (calculating the combined hourly rate).

¹⁹⁶⁶ See Rule 15Ba1-5.

¹⁹⁶⁷ Municipal advisors will also report successions of registration on Form MA. See Rule 15Ba1-6.

¹⁹⁶⁸ See Rule 15Ba1-5(b).

¹⁹⁶⁹ See Instructions to Form MA-I.

applicant to amend Form MA and complete a self-certification would be approximately \$510,¹⁹⁷⁰ and the average ongoing annual cost per applicant to amend Form MA-I and complete a self-certification would be approximately \$160.¹⁹⁷¹ The Commission received one comment letter that addressed the Commission's burden estimates for amendments to Form MA and Form MA-I.¹⁹⁷² The Commission now estimates that the average annual PRA cost per registered municipal advisor to amend Form MA will be approximately \$332.¹⁹⁷³ The Commission also now estimates that the average annual PRA cost per registered municipal advisor to prepare updating amendments to Form MA-I for each of its natural person municipal advisors will be approximately \$141,¹⁹⁷⁴ and that the average PRA cost per registered municipal advisor to amend Form MA-I to indicate that an individual is no longer an associated person of the municipal advisory firm filing the form or no longer engaged in municipal advisory activities on its behalf will be approximately \$83.¹⁹⁷⁵

¹⁹⁷⁰ See Proposal, 76 FR at 880 n. 428 and accompanying text.

¹⁹⁷¹ See *id.* at 880 n. 429 and accompanying text.

¹⁹⁷² See *supra* notes 1523–1524 and accompanying text.

¹⁹⁷³ $((1.5 \text{ hours (average estimated time to prepare an annual amendment to Form MA)} \times 1.0 \text{ hours (number of annual amendments per year)}) + (0.5 \text{ hours (average estimated time to prepare an interim updating amendment to Form MA)} \times 1.0 \text{ (number of interim updating amendments per year)})) \times \$166 \text{ (combined hourly rate for a Compliance Manager and Compliance Clerk)} = \332 . This estimate is lower than the estimate in the Proposal due to the Commission's decision not to adopt a self-certification requirement and a reduction in the combined hourly rate for a Compliance Manager and Compliance Clerk from \$170 to \$166. See *supra* note 1812 (calculating the combined hourly rate).

¹⁹⁷⁴ $(0.5 \text{ hours (average estimated time to prepare an updating amendment to Form MA-I)} \times 1.7 \text{ hours (average number of amendments per year)}) \times \$166 \text{ (combined hourly rate for a Compliance Manager and Compliance Clerk)} = \141.10 . This estimate is lower than the estimate in the Proposal because natural person municipal advisors are not required to complete a self-certification under the final rules and the combined hourly rate for a Compliance Manager and Compliance Clerk has been reduced from \$170 to \$166. See *supra* note 1812 (calculating the combined hourly rate).

¹⁹⁷⁵ $0.5 \text{ hours (average estimated time to prepare an updating amendment to Form MA-I)} \times \$166 \text{ (combined hourly rate for a Compliance Manager and Compliance Clerk)} = \83 . See *supra* note 1812 (calculating the combined hourly rate).

Municipal advisors will also file a notice of withdrawal from registration as a municipal advisor on Form MA-W.¹⁹⁷⁶ In the Proposal, the Commission estimated that the average cost per registrant to complete Form MA-W would be approximately \$85.¹⁹⁷⁷ The Commission now estimates that the average PRA cost per registered municipal advisor to complete Form MA-W will be approximately \$83.¹⁹⁷⁸

Non-resident municipal advisors will incur costs to complete Form MA-NR and provide an opinion of counsel. In the Proposal, the Commission estimated that the average cost per filer to complete Form MA-NR would be approximately \$255¹⁹⁷⁹ and that the average cost per non-resident municipal advisory firm to obtain an opinion of counsel, including the cost to hire outside counsel, would be approximately \$1,960.¹⁹⁸⁰ The Commission now estimates the average PRA cost to complete a single Form MA-NR will be approximately \$249.¹⁹⁸¹ The Commission also estimates that the average PRA cost per non-resident municipal advisor to obtain an opinion of counsel, including the cost to hire outside counsel, will be approximately \$2,037.¹⁹⁸²

¹⁹⁷⁶ See Rule 15Ba1-4.

¹⁹⁷⁷ See Proposal, 76 FR at 880 n. 430 and accompanying text.

¹⁹⁷⁸ 0.5 hours (average estimated time to complete Form MA-W) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk) = \$83. This estimate is lower than the estimate in the Proposal due to a reduction in the combined hourly rate for a Compliance Manager and Compliance Clerk from \$170 to \$166. See *supra* note 1812 (calculating the combined hourly rate).

¹⁹⁷⁹ See Proposal, 76 FR at 880 n. 431 and accompanying text.

¹⁹⁸⁰ See *id.* at 880 n. 432 and accompanying text.

¹⁹⁸¹ 1.5 hours (average estimated time to complete Form MA-NR) × \$166 (combined hourly rate for a Compliance Manager and Compliance Clerk) = \$249. This estimate is lower than the estimate in the Proposal due to a reduction in the combined hourly rate for a Compliance Manager and Compliance Clerk from \$170 to \$166. See *supra* note 1812 (calculating the combined hourly rate).

¹⁹⁸² 3.0 hours (average estimated time to obtain an opinion of counsel) × \$379 (hourly rate for an internal attorney) = \$1,137. See *supra* note 1779 (calculating the hourly rate for an in-house attorney). \$900 = average estimated cost to hire outside counsel to provide opinion of

The Commission also believes that some municipal advisory firms will incur costs associated with hiring outside counsel to help them comply with the requirements of the final rules and to complete Form MA. In the Proposal, the Commission estimated that the average cost per municipal advisory firm to hire outside counsel would be approximately \$400.¹⁹⁸³ The Commission continues to estimate that the average cost per municipal advisory firm to hire outside counsel will be approximately \$400.¹⁹⁸⁴

Rule 15Ba1-8 will require all registered municipal advisors to maintain true, accurate, and current books and records relating to their municipal advisory activities. Generally, Rule 15Ba1-8 will require such books and records to be maintained and preserved for a period of not less than five years, the first two years in an easily accessible place. In the Proposal, the Commission estimated that the average cost per municipal advisory firm to comply with the proposed recordkeeping requirement would be approximately \$9,050.¹⁹⁸⁵

The Commission estimates that, on average, the annual hourly burden for each municipal advisory firm to comply with the recordkeeping requirements will be 182 hours.¹⁹⁸⁶ Thus, the Commission estimates that the average PRA cost per municipal advisory firm to comply with the recordkeeping requirements will be approximately \$9,646 each year.¹⁹⁸⁷ In addition, the

counsel. $\$1,137 + \$900 = \$2,037$. This estimate is higher than the estimate in the Proposal due to an increase in the hourly rate for an internal attorney from \$354 to \$379. See supra note 1538 (explaining the outside counsel cost estimate).

¹⁹⁸³ See Proposal, 76 FR at 880 n. 433 and accompanying text.

¹⁹⁸⁴ 1.0 hour (average estimated time spent by outside counsel to help a municipal advisory firm comply with the rule) \times \$400 (hourly rate for an outside attorney) = \$400. See supra note 1538 (explaining the outside counsel cost estimate).

¹⁹⁸⁵ See Proposal, 76 FR at 88 n. 434 and accompanying text.

¹⁹⁸⁶ See supra Section VII.D.8.

¹⁹⁸⁷ 182 hours (estimated time spent by municipal advisors to ensure annual compliance with the books and records requirement) \times \$53 (hourly rate for a General Clerk) = \$9,646. See supra

Commission continues to believe that it is appropriate to assume that, for small firms, the per-hour costs attributable to the recordkeeping requirements will be, at most, equivalent to the hourly rate for a General Clerk.¹⁹⁸⁸ Thus, the Commission estimates that the average PRA cost per small entity municipal advisory firm to comply with the recordkeeping requirements will be approximately \$9,646 each year.¹⁹⁸⁹ The Commission believes that for many small entity municipal advisory firms the actual cost will likely be lower for a number of reasons, including differences in the variety of services offered to municipal entities and the number of municipal entity clients, but is using a conservative estimate of such costs.

As discussed above, one commenter asserted that the Commission used an hourly rate for the books and records estimate that was too low for small entity municipal advisors since they often do not employ General Clerks.¹⁹⁹⁰ While the Commission acknowledges that small municipal advisors do not typically employ General Clerks and that, in many cases, the municipal advisory professional himself may be responsible for maintaining the books and records of the firm, the Commission does not agree that it should use a higher hourly rate to estimate the recordkeeping burden for small municipal advisors for several reasons. The 182-hour estimate is an average annual hourly burden across all firms regardless of their size, and is based on the Commission's experience with other regulatory regimes. The Commission anticipates that larger municipal advisory firms that offer a variety of services to municipal entities and have significantly greater volumes of books and records will incur an annual burden greater than 182 hours, while smaller

note 1861 (calculating the hourly rate for a General Clerk). This estimate is higher than in the Proposal because of an increase in the hourly rate for a General Clerk from \$50 per hour to \$53 per hour.

¹⁹⁸⁸ See supra note 1861 (calculating the hourly rate for a General Clerk).

¹⁹⁸⁹ See supra note 1987 and accompanying text.

¹⁹⁹⁰ See Joy Howard WM Financial Strategies Letter. See also supra text accompanying note 1867.

municipal advisory firms that have significantly lower volumes of books and records will incur an annual burden lower than 182 hours. Similarly, the \$53 figure is an average hourly rate across all firms regardless of their size and is inclusive of the variability of costs across municipal advisors. The Commission does not have the information necessary to provide reasonable estimates of the differences in hourly burden among firms of various sizes, a separate average hourly burden for small entity municipal advisors, or the differences in hourly rates among firms of various sizes. The Commission is also unaware of any such data being publicly available. The Commission staff also understands that some small municipal advisors employ part-time staff to perform certain business and clerical functions and that the costs of such employees are less likely to reflect the costs for compliance personnel at larger municipal advisory firms or the hourly rate suggested by the commenter. The Commission assumes that municipal advisors will use the most cost-effective approach available, depending on their size and specific circumstances, to comply with the recordkeeping requirement. Accordingly, the Commission does not believe that it should use a higher hourly rate to estimate the recordkeeping burden for small municipal advisors.

Further, as stated above, the Commission believes that small municipal advisory firms will likely incur lower annual costs for maintaining books and records than larger firms. The Commission recognizes that, although small municipal advisory firms and solo practitioners may maintain their books and records without a general clerk or additional staff assistance, such activity would not be costless. The Commission believes that it is appropriate to assume that, because small firms will utilize the most cost-effective approach available, per-hour costs attributable to the books and records requirements will be, at most, equivalent to the hourly rate for a General Clerk.

Therefore, the Commission uses the hourly rate for a General Clerk to estimate the average cost across all municipal advisory firms, regardless of size.

The Commission recognizes that such compliance burdens and expenses may cause some smaller municipal advisory firms and sole proprietors to exit the market or consolidate with other municipal advisory firms. The Commission estimates that, at the upper range of annual costs, a small entity municipal advisory firm will incur approximately \$17,241 in PRA costs during the first year¹⁹⁹¹ and \$11,721 each subsequent year to maintain its registration and books and records.¹⁹⁹² The Commission estimates that sole proprietors will incur a lower PRA cost of approximately \$11,125 during the first year¹⁹⁹³ and \$10,119 each subsequent year.¹⁹⁹⁴

One sole proprietor has asserted that his annual revenue during the past two years has not exceeded \$350,000,¹⁹⁹⁵ while another commenter estimated that the median annual revenue for a four-person municipal advisory firm was \$800,000.¹⁹⁹⁶ Such comments indicate that registration costs could comprise approximately 2% of a sole proprietor's¹⁹⁹⁷ or a four-person municipal

¹⁹⁹¹ \$7,595 (estimated average initial registration burden for a single municipal advisory firm) + \$9,646 (estimated cost to maintain books and records) = \$17,241. See supra note 1813 (calculating the estimated average initial registration burden for a single municipal advisory firm).

¹⁹⁹² \$332 (estimated annual cost for one municipal advisor to amend Form MA) + ((11,250 (estimated number of individuals for whom municipal advisory firms will need to complete a Form MA-I) ÷ 910 (estimated number of municipal advisors registered on Form MA)) × \$141 (estimated annual cost to complete updating amendments to Form MA-I for each natural person municipal advisor)) + \$9,646 (estimated cost to maintain books and records) = \$11,721.13.

¹⁹⁹³ \$581 (estimated initial cost for one municipal advisor to complete a Form MA) + (1.0 (sole proprietor required to complete a Form MA-I) × \$498 (estimated initial cost to complete a Form MA-I)) + \$400 (estimated cost to hire outside counsel) + \$9,646 (estimated cost to maintain books and records) = \$11,125.

¹⁹⁹⁴ \$332 (estimated annual cost for one municipal advisor to amend Form MA) + (1.0 (sole proprietor required to complete a Form MA-I) × \$141 (estimated annual cost to complete updating amendments to Form MA-I for each natural person municipal advisor)) + \$9,646 (estimated cost to maintain books and records) = \$10,119.

¹⁹⁹⁵ See supra note 1934 and accompanying text.

¹⁹⁹⁶ See supra note 1932 and accompanying text.

¹⁹⁹⁷ \$6,877 (estimated registration cost for a sole proprietor during the first year) ÷ \$350,000

advisory firm's¹⁹⁹⁸ annual revenue. Nevertheless, the Commission acknowledges that some small firms and sole proprietors will not consider the annual cost to be trivial and may discontinue providing municipal advisory services or consolidate with other municipal advisory firms as a result. The requirements under the final rules and forms were designed to impose only those burdens necessary to accomplish the objectives of the Dodd-Frank Act.

E. Agency Action to Minimize Effects on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small advisors.¹⁹⁹⁹ In considering whether to adopt the final rules and forms, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small municipal advisors; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small advisors; (iii) the use of performance rather than design standards;²⁰⁰⁰ and (iv) an exemption from coverage of the rules, or any part thereof, for such small advisors.

The Commission received several comments recommending that the Commission create exemptions for small independent advisors.²⁰⁰¹ Two commenters suggested exempting from

(estimated annual revenue for a sole proprietor) = 1.96%.

¹⁹⁹⁸ \$16,598 (estimated registration cost for a municipal advisor registered with the Commission as an investment adviser and/or broker-dealer during the first year) ÷ \$800,000 (estimated annual revenue for a four-person municipal advisory firm) = 2.07%.

¹⁹⁹⁹ See 5 U.S.C. 603(c).

²⁰⁰⁰ The Commission does not consider using performance rather than design standards to be consistent with the Commission's understanding of Congress's intent to have the Commission register municipal advisors and oversee their activities or with other registration regimes under Commission rules.

²⁰⁰¹ See, e.g., Bradley Payne Letter; Chancellor Financial Associates Letter; Ranson Financial Associates Letter; Specialized Public Finance Letter; Sullivan Letter; Tamalpais Advisors Letter.

registration municipal advisors involved in transactions below a debt financing limit.²⁰⁰²

The Commission does not believe differing compliance or reporting requirements or an exemption from coverage of the final rules and forms, or any part thereof, for small municipal advisors (*i.e.*, the first and fourth alternatives) would be appropriate or consistent with investor protection or with the Commission's understanding of Congress's intent to have the Commission register municipal advisors and oversee their activities. Because the Commission believes the protections of Section 15B of the Exchange Act, as amended by Section 975 of the Dodd-Frank Act, are intended to apply equally to clients of both large and small municipal advisory firms, the Commission believes it would be inconsistent with the purposes of the Exchange Act to specify different requirements for small municipal advisors under the final rules and forms. In addition, the requirements under the final rules and forms are designed to impose only those burdens necessary to accomplish the objectives of the Dodd-Frank Act.

As discussed above, the Commission believes that the requirement that municipal advisors register with the Commission on Form MA and update the information provided at least annually (or more often as required by the rules) will provide a number of benefits.²⁰⁰³ For example, the final rules and forms should allow municipal entities and obligated persons to become better informed about municipal advisors at a lower cost, which could increase the use of municipal advisors. In addition, the permanent registration regime and recordkeeping requirements should enhance the ability of Commission and other securities regulators to oversee municipal advisors and monitor compliance with the requirements of the Exchange Act and MSRB rules. The Commission

²⁰⁰² See Chancellor Financial Associates Letter (suggesting "a limit predicated on the Internal Revenue Code's \$10 million limit (during a calendar year) in order for an issuer's bonds to be bank-qualified"); Ranson Financial Associates Letter (suggesting "that if a debt financing does not exceed a certain size or is of a certain nature, that a firm would not have to register").

²⁰⁰³ See *supra* Section VIII.D.3.b.

believes that requiring less information about small municipal advisors would be insufficient for these purposes.

Regarding the second alternative, the Commission does not believe it is necessary to clarify, consolidate, or simplify the registration or recordkeeping requirements for small municipal advisors. In developing the rules and forms, the Commission considered requiring additional information from municipal advisors and using different submission mechanisms. The Commission decided that the information in the forms and the submission requirements are simple and straightforward, and that they take into account the resources available to all municipal advisors, including small municipal advisors. The Commission believes that small advisors will incur less cost to complete Form MA than larger municipal advisory firms with more complex businesses because certain disclosures, for example disclosures related to Item 6 and the number of DRPs required, will be less complicated and require less time to complete.

One commenter suggested the Commission allow small municipal advisors to convert their temporary registration to permanent status by agreeing to observe a fiduciary duty to clients and filing Form ADV (Part 1) with FINRA.²⁰⁰⁴ The Commission acknowledges that this approach would expedite the registration process for those municipal advisors that currently file Form ADV, but also notes that this approach would result in a registration process with multiple formats that may become difficult to track over time. In addition, the information required to be disclosed on Form ADV would not provide comparable information about municipal advisory activities. The Commission continues to believe that the collection of information in a uniform, standardized format from all municipal advisors will facilitate consistent public disclosure of municipal advisor registration information to municipal advisors, municipal entities, obligated persons, the

²⁰⁰⁴ See Specialized Public Finance Letter.

Commission, and other interested persons.

Another commenter recommended small firms be allowed to pay lower registration fees to the MSRB.²⁰⁰⁵ As discussed above,²⁰⁰⁶ the Commission does not charge municipal advisors a fee to register with the Commission. Although the Dodd-Frank Act permits the MSRB to require municipal advisors to pay such reasonable fees and charges as may be necessary or appropriate to defray the costs and expenses of operating and administering the MSRB,²⁰⁰⁷ the Commission does not set or approve fees charged by the MSRB. Instead, the Exchange Act provides that certain designated SRO rules, including fees charged by the MSRB, take effect upon filing with the Commission²⁰⁰⁸ and may thereafter be enforced by the SRO to the extent not inconsistent with the Exchange Act, the rules and regulations thereunder, and applicable Federal and State law.²⁰⁰⁹ The Commission notes, however, that the MSRB is required to consider the effects of its rules on small municipal advisors.²⁰¹⁰

²⁰⁰⁵ See Sullivan Letter.

²⁰⁰⁶ See *supra* note 1808.

²⁰⁰⁷ See 15 U.S.C. 78o-4(b)(2)(J).

²⁰⁰⁸ See 15 U.S.C. 78s(b)(3)(A).

²⁰⁰⁹ See 15 U.S.C. 78s(b)(3)(C). The Commission has sixty days from the date of filing, however, during which it “summarily may temporarily suspend” the fees “if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of” the Exchange Act. See *id.* If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved. See *id.* In addition, Section 19(c) of the Exchange Act authorizes the Commission, by rule, to abrogate, add to, and delete from the rules of an SRO (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the SRO, to conform its rules to requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78s(c).

²⁰¹⁰ See 15 U.S.C. 78o-4(b)(2)(L)(iv) (providing that an MSRB rule may “not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons,

One commenter suggested that the Commission could provide meaningful relief by waiving small firms from the requirement to provide audited financial reports.²⁰¹¹ The Commission notes that the final rules and forms do not require audited or other financial reports as part of the recordkeeping requirement. The preparation of audited financial reports is at the discretion of the municipal advisor, and the Commission expects that municipal advisors will generally utilize the most cost-effective solution to comply with the requirements of the permanent registration regime.

X. STATUTORY BASIS AND TEXT OF AMENDMENTS

Pursuant to the Exchange Act, and particularly Sections 15B, 17, and 36 (15 U.S.C. 78q-4, 78q, and 78mm, respectively), the Commission is adopting § 200.19d, § 200.30-3a, §§ 240.15Ba1-1 through 240.15Ba1-8, § 240.15Bc4-1, and §§ 249.1400 through 249.1430 (Form MA, Form MA-I, Form MA-W, and Form MA-NR), and the Commission is amending §§ 200.19c and 200.30-18.

List of Subjects in 17 CFR Part 200

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

List of Subjects in 17 CFR Parts 240 and 249

Reporting and record-keeping requirement, Municipal advisors, Registration requirements.

Text of Rules and Forms

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

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

1. The general authority citation for part 200 is amended to read in part as follows:

provided that there is robust protection of investors against fraud”).

²⁰¹¹ See Tamalpais Advisors Letter.

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d-1, 78d-2, 78o-4, 78w, 78ll(d), 78mm, 80a-37, 80b-11, 7202, and 7211 et seq., unless otherwise noted.

* * * * *

2. Section 200.19c is amended to read as follows:

§ 200.19c Director of the Office of Compliance Inspections and Examinations.

The Director of the Office of Compliance Inspections and Examinations (“OCIE”) is responsible for the compliance inspections and examinations relating to the regulation of exchanges, national securities associations, clearing agencies, securities information processors, the Municipal Securities Rulemaking Board, brokers and dealers, municipal securities dealers, municipal advisors, transfer agents, investment companies, and investment advisers, under Sections 15B, 15C(d)(1) and 17(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-4, 78o-5(d)(1) and 78q(b)), Section 31(b) of the Investment Company Act of 1940 (15 U.S.C. 80a-30(b)), and Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-4).

3. Section 200.19d is added to read as follows:

§ 200.19d Director of the Office of Municipal Securities.

The Director of the Office of Municipal Securities is responsible to the Commission for the administration and execution of the Commission’s programs under the Securities Exchange Act of 1934 relating to the registration and regulation of municipal advisors. The functions involved in the regulation of such entities include recommending the adoption and amendment of Commission rules, and responding to interpretive and no-action requests.

* * * * *

4. Section 200.30-3a is added to read as follows:

§200.30-3a Delegation of authority to Director of the Office of Municipal Securities.

Pursuant to the provisions of Pub. L. 100-181, 101 Stat. 1254, 1255 (15 U.S.C. 78d-1, 78d-2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Office of Municipal Securities to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.):

(1) Pursuant to section 15B of the Act (15 U.S.C. 78o-4):

(i) To authorize the issuance of orders granting registration of municipal advisors within 45 days of the filing of an application for registration as a municipal advisor (or within such longer period as to which the applicant consents); and

(ii) To authorize the issuance of orders canceling the registration of a municipal advisor, if such municipal advisor is no longer in existence or has ceased to do business as a municipal advisor.

(b) Notwithstanding anything in the foregoing, in any case in which the Director of the Office of Municipal Securities believes it appropriate, he may submit the matter to the Commission.

* * * * *

5. Section 200.30-18 is amended by adding paragraphs (j)(7) and (j)(8) to read as follows:

§200.30-18 Delegation of authority to Director of the Office of Compliance Inspections and Examinations.

* * * * *

(j) * * *

(7) Under section 15B(a) of the Act (15 U.S.C. 78o-4(a)):

(i) To authorize the issuance of orders granting registration of municipal advisors within 45 days of the filing of an application for registration as a municipal advisor (or within such longer period as to which the applicant consents); and

(ii) To grant registration of municipal advisors sooner than 45 days after the filing of an application for registration.

(8) Under section 15B(c) of the Act (15 U.S.C. 78o-4(c)):

(i) To authorize the issuance of orders canceling the registration of a municipal advisor, if such municipal advisor is no longer in existence or has ceased to do business as a municipal advisor; and

(ii) To determine whether notices of withdrawal from registration on Form MA-W shall become effective sooner than the 60-day waiting period.

* * * * *

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

6. The general authority citation for part 240 is amended, and subauthorities for Sections 240.15Ba1-1 through 240.15Ba1-8 and Section 240.15Bc4-1 are added, to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3) unless otherwise noted.

* * * * *

Sections 240.15Ba1-1 through 240.15Ba1-8 are also issued under Pub. L. No. 111-203, § 975, 124 Stat. 1376 (2010).

Section 240.15Bc4-1 is also issued under Pub. L. No. 111-203, § 975, 124 Stat. 1376 (2010).

* * * * *

7. Sections 240.15Ba1-1 through 240.15Ba1-8 are added to read as follows:

Sec.

* * * * *

240.15Ba1-1 Definitions.

240.15Ba1-2 Registration of municipal advisors and information regarding certain natural persons.

240.15Ba1-3 Exemption of certain natural persons from registration under section 15B(a)(1)(B) of the Act.

240.15Ba1-4 Withdrawal from municipal advisor registration.

240.15Ba1-5 Amendments to Form MA and Form MA-I.

240.15Ba1-6 Consent to service of process to be filed by non-resident municipal advisors; legal opinion to be provided by non-resident municipal advisors.

240.15Ba1-7 Registration of successor to municipal advisor.

240.15Ba1-8 Books and records to be made and maintained by municipal advisors.

§ 240.15Ba1-1 Definitions.

As used in the rules and regulations prescribed by the Commission pursuant to section 15B of the Act (15 U.S.C. 78o-4):

(a) Guaranteed investment contract has the same meaning as in section 15B(e)(2) of the Act (15 U.S.C. 78o-4(e)(2)); provided, however, that the contract relates to investments of proceeds of municipal securities or municipal escrow investments.

(b) Investment strategies has the same meaning as in section 15B(e)(3) of the Act (15 U.S.C. 78o-4(e)(3)), and includes plans or programs for the investment of proceeds of municipal securities that are not municipal derivatives or guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments.

(c) Managing agent means any person, including a trustee, who directs or manages, or who participates in directing or managing, the affairs of any unincorporated organization or association other than a partnership.

(d)(1) Municipal advisor

(i) In general. Except as otherwise provided in paragraphs (d)(2) and (d)(3) of this section, the term municipal advisor has the same meaning as in section 15B(e)(4) of the Act (15 U.S.C. 78o-4(e)(4)). Under section 15B(e)(4)(A) of the Act (15 U.S.C. 78o-4(e)(4)(A)), the term municipal advisor means a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or an obligated person. Under section 15B(e)(4)(C) of the Act (15 U.S.C. 78o-4(e)(4)(C)) and paragraph (d)(2) of this section, a municipal advisor does not include a person that engages in specified excluded activities.

(ii) Advice standard. For purposes of the municipal advisor definition under paragraph (d)(1)(i) of this section, advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues).

(iii) Certain types of municipal advisors. Under section 15B(e)(4)(B) of the Act (15 U.S.C. 78o-4(e)(4)(B)), municipal advisors include, without limitation, financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors, to the extent that such persons otherwise meet the requirements of the municipal advisor definition in this paragraph (d)(1).

(2) Exclusions from municipal advisor definition. Pursuant to section 15B(e)(4)(C) of the Act (15 U.S.C. 78o-4(e)(4)(C)), the term municipal advisor excludes the following persons with respect to the specified excluded activities:

(i) Serving as an underwriter. A broker, dealer, or municipal securities dealer serving as an underwriter of a particular issuance of municipal securities to the extent that the broker, dealer, or municipal securities dealer engages in activities that are within the scope of an underwriting of such issuance of municipal securities.

(ii) Registered investment advisers—In general. Any investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or any person associated with such registered investment adviser to the extent that such registered investment adviser or such person is providing investment advice in such capacity. Solely for purposes of this paragraph (d)(2)(ii), investment advice does not include advice concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person.

(iii) Registered commodity trading advisors. Any commodity trading advisor registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.), or person associated with a registered commodity trading advisor, to the extent that such registered commodity trading advisor or such

person is providing advice that is related to swaps (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)), and any rules and regulations thereunder).

(iv) Attorneys. Any attorney to the extent that the attorney is offering legal advice or providing services that are of a traditional legal nature with respect to the issuance of municipal securities or municipal financial products to a client of such attorney that is a municipal entity, obligated person, or other participant in the transaction. To the extent an attorney represents himself or herself as a financial advisor or financial expert regarding the issuance of municipal securities or municipal financial products, however, the attorney is not excluded with respect to such financial activities under this paragraph (d)(2)(iv).

(v) Engineers. Any engineer to the extent that the engineer is providing engineering advice.

(3) Exemptions from municipal advisor definition. The Commission exempts the following persons from the definition of municipal advisor to the extent they are engaging in the specified activities:

(i) Accountants. Any accountant to the extent that the accountant is providing audit or other attest services, preparing financial statements, or issuing letters for underwriters for, or on behalf of, a municipal entity or obligated person.

(ii) Public officials and employees. (A) Any person serving as a member of a governing body, an advisory board, or a committee of, or acting in a similar official capacity with respect to, or as an official of, a municipal entity or obligated person to the extent that such person is acting within the scope of such person's official capacity.

(B) Any employee of a municipal entity or obligated person to the extent that such person is

acting within the scope of such person's employment.

(iii) Banks. Any bank, as defined in section 3(a)(6) of the Act (15 U.S.C. 78c(a)(6)), to the extent the bank provides advice with respect to the following:

(A) Any investments that are held in a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank;

(B) Any extension of credit by a bank to a municipal entity or obligated person, including the issuance of a letter of credit, the making of a direct loan, or the purchase of a municipal security by the bank for its own account;

(C) Any funds held in a sweep account that meets the requirements of section 3(a)(4)(B)(v) of the Act (15 U.S.C. 78c(a)(4)(B)(v)); or

(D) Any investment made by a bank acting in the capacity of an indenture trustee or similar capacity.

(iv) Responses to requests for proposals or qualifications. Any person providing a response in writing or orally to a request for proposals or qualifications from a municipal entity or obligated person for services in connection with a municipal financial product or the issuance of municipal securities; provided, however, that such person does not receive separate direct or indirect compensation for advice provided as part of such response.

(v) Swap dealers.

(A) A swap dealer (as defined in Section 1a(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)) and the rules and regulations thereunder) registered under the Commodity Exchange Act or associated person of the swap dealer recommending a municipal derivative or a trading strategy that involves a municipal derivative, so long as the registered swap dealer or associated person is not acting as an advisor to the municipal entity or obligated person with respect to the municipal

derivative or trading strategy pursuant to Section 4s(h)(4) of the Commodity Exchange Act and the rules and regulations thereunder.

(B) For purposes of determining whether a swap dealer is acting as an advisor in this section (v), the municipal entity or obligated person involved in the transaction will be treated as a special entity under Section 4s(h)(2) of the Commodity Exchange Act and the rules and regulations thereunder (even if such municipal entity or obligated person does not satisfy the definition of special entity under those provisions).

(vi) Participation by an independent registered municipal advisor. Any person engaging in municipal advisory activities in a circumstance in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities, provided that the following requirements are met:

(A) Independent registered municipal advisor. An independent registered municipal advisor is providing advice with respect to the same aspects of the municipal financial product or issuance of municipal securities. For purposes of paragraph (d)(3)(vi) of this section, the term independent registered municipal advisor means a municipal advisor registered pursuant to section 15B of the Act (15 U.S.C. 78o-4) and the rules and regulations thereunder and that is not, and within at least the past two years was not, associated (as defined in section 15B(e)(7) (15 U.S.C. 78o-4(e)(7)) of the Act) with the person seeking to rely on this paragraph (d)(3)(vi).

(B) Required representation. A person seeking to rely on this paragraph (d)(3)(vi) receives from the municipal entity or obligated person a representation in writing that it is represented by, and will rely on the advice of, an independent registered municipal advisor, provided that the person receiving such representation has a reasonable basis for relying on the representation.

(C) Required disclosures.

(1) With respect to a municipal entity, such person discloses in writing to the municipal entity that, by obtaining such representation from the municipal entity, such person is not a municipal advisor and is not subject to the fiduciary duty set forth in section 15B(c)(1) of the Act (15 U.S.C. 78o-4(c)(1)) with respect to the municipal financial product or issuance of municipal securities, and provides a copy of such disclosure to the independent registered municipal advisor.

(2) With respect to an obligated person, such person discloses in writing to the obligated person that, by obtaining such representation from the obligated person, such person is not a municipal advisor with respect to the municipal financial product or issuance of municipal securities, and provides a copy of such disclosure to the independent registered municipal advisor.

(3) Each such disclosure must be made at a time and in a manner reasonably designed to allow the municipal entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities.

(vii) Persons that provide advice on certain investment strategies. A person that provides advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.

(viii) Certain solicitations. A person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products that are investment strategies to the extent that those investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.

(4) Special rule for separately identifiable departments or divisions of banks for municipal advisory purposes. If a bank engages in municipal advisory activities through a separately identifiable department or division that meets the requirements of this paragraph (d)(4), the determination of whether those municipal advisory activities cause any person to be a municipal advisor may be made separately for such department or division. In such event, that department or division, rather than the bank itself, shall be deemed to be the municipal advisor.

(i) Separately identifiable department or division. For purposes of this paragraph (d)(4), a separately identifiable department or division of a bank is that unit of the bank which conducts all of the municipal advisory activities of the bank, provided that the following requirements are met:

(A) Supervision. Such unit is under the direct supervision of an officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's municipal advisory activities, including the supervision of all bank employees engaged in the performance of such activities.

(B) Separate records. All of the records relating to the bank's municipal advisory activities are separately maintained in, or extractable from, such unit's own facilities or the facilities of the bank, and such records are so maintained or otherwise accessible as to permit independent examination thereof and enforcement of applicable provisions of the Act, the rules and regulations thereunder, and the rules of the Municipal Securities Rulemaking Board relating to municipal advisors.

(e) Municipal advisory activities means the following activities specified in section 15B(e)(4)(A) of the Act (15 U.S.C. 78o-4(e)(4)(A)) and paragraph (d)(1) of this section that, absent the availability of an exclusion under paragraph (d)(2) of this section or an exemption under paragraph (d)(3) of this section, would cause a person to be a municipal advisor:

(1) Providing advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or

(2) Solicitation of a municipal entity or an obligated person.

(f) Municipal derivatives means any swap (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder) or security-based swap (as defined in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)), including any rules and regulations thereunder) to which:

(1) A municipal entity is a counterparty; or

(2) An obligated person, acting in such capacity, is a counterparty.

(g) Municipal entity means any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including:

(1) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;

(2) Any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and

(3) Any other issuer of municipal securities.

(h) Municipal escrow investments.

(1) In general. Except as otherwise provided in paragraph (h)(2) of this section, municipal escrow investments means proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium, if any, and interest

on one or more issues of municipal securities.

(2) Reasonable reliance on representations. In determining whether or not funds to be invested or reinvested constitute municipal escrow investments for purposes of this section, a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested or reinvested regarding the nature of such investments, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.

(i) Municipal financial product has the same meaning as in section 15B(e)(5) of the Act (15 U.S.C. 78o-4(e)(5)).

(j) Non-resident means:

(1) In the case of an individual, one who resides in or has his principal office and place of business in any place not subject to the jurisdiction of the United States;

(2) In the case of a corporation, one incorporated in or having its principal office and place of business in any place not subject to the jurisdiction of the United States; or

(3) In the case of a partnership or other unincorporated organization or association, one having its principal office and place of business in any place not subject to the jurisdiction of the United States.

(k) Obligated person has the same meaning as in section 15B(e)(10) of the Act (15 U.S.C. 78o-4(e)(10)); provided, however, that the term obligated person shall not include: (1) a person who provides municipal bond insurance, letters of credit, or other liquidity facilities; (2) a person whose financial information or operating data is not material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement; or (3) the federal government.

(l) Principal office and place of business means the executive office of the municipal advisor from which the officers, partners, or managers of the municipal advisor direct, control, and coordinate the activities of the municipal advisor.

(m)(1) Proceeds of municipal securities—In general. Except as otherwise provided in paragraphs (m)(2) and (m)(3) of this section, proceeds of municipal securities means monies derived by a municipal entity from the sale of municipal securities, investment income derived from the investment or reinvestment of such monies, and any monies of a municipal entity or obligated person held in funds under legal documents for the municipal securities that are reasonably expected to be used as security or a source of payment for the payment of the debt service on the municipal securities, including reserves, sinking funds, and pledged funds created for such purpose, and the investment income derived from the investment or reinvestment of monies in such funds. When such monies are spent to carry out the authorized purposes of municipal securities, they cease to be proceeds of municipal securities.

(2) Exception for Section 529 college savings plans. Solely for purposes of this paragraph (m), monies derived from a municipal security issued by an education trust established by a State under Section 529(b) of the Internal Revenue Code (26 U.S.C. 529(b)) are not proceeds of municipal securities.

(3) Reasonable reliance on representations. In determining whether or not funds to be invested constitute proceeds of municipal securities for purposes of this section, a person may rely on representations in writing made by a knowledgeable official of the municipal entity or obligated person whose funds are to be invested regarding the nature of such funds, provided that the person seeking to rely on such representations has a reasonable basis for such reliance.

(n) Solicitation of a municipal entity or obligated person has the same meaning as in section

15B(e)(9) of the Act (15 U.S.C. 78o-4(e)(9)); provided, however, that a solicitation does not include:

(1) Advertising by a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser; or

(2) Solicitation of an obligated person, if such obligated person is not acting in the capacity of an obligated person or the solicitation of the obligated person is not in connection with the issuance of municipal securities or with respect to municipal financial products.

240.15Ba1-2 Registration of municipal advisors and information regarding certain natural persons.

(a) Form MA. A person applying for registration with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4) must complete Form MA (17 CFR 249.1400) in accordance with the instructions in the Form and file the Form electronically with the Commission.

(b) Form MA-I. (1) A person applying for registration or registered with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4) must complete Form MA-I (17 CFR 249.1410) with respect to each natural person who is a person associated with the municipal advisor (as defined in section 15B(e)(7) of the Act (15 U.S.C. 78o-4(e)(7))) and engaged in municipal advisory activities on its behalf in accordance with the instructions in the Form and file the Form electronically with the Commission.

(2) A natural person applying for registration with the Commission as a municipal advisor pursuant to section 15B of the Act (15 U.S.C. 78o-4), in addition to completing and filing Form MA pursuant to paragraph (a), must complete Form MA-I (17 CFR 249.1410) in accordance with the instructions in the Form and file the Form electronically with the Commission.

(c) When filed. Each Form MA (17 CFR 249.1400) shall be considered filed with the

Commission upon submission of a completed Form MA, together with all additional required documents, including all required filings of Form MA-I (17 CFR 249.1410), to the Commission's Electronic Data Gathering, Analysis, and Retrieval system.

(d) Form MA and Form MA-I are reports. Each Form MA (17 CFR 249.1400) and Form MA-I (17 CFR 249.1410) required to be filed under this section shall constitute a report within the meaning of sections 15B(c), 17(a), 18(a), 32(a) of the Act (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Act.

§ 240.15Ba1-3 Exemption of certain natural persons from registration under section 15B(a)(1)(B) of the Act.

A natural person municipal advisor shall be exempt from section 15B(a)(1)(B) of the Act (15 U.S.C. 78o-4(a)(1)(B)) if he or she:

- (a) Is an associated person of an advisor that is registered with the Commission pursuant to section 15B(a)(2) of the Act (15 U.S.C. 78o-4(a)(2)) and the rules and regulations thereunder; and
- (b) Engages in municipal advisory activities solely on behalf of a registered municipal advisor.

§ 240.15Ba1-4 Withdrawal from municipal advisor registration.

(a) Form MA-W. Notice of withdrawal from registration as a municipal advisor shall be filed on Form MA-W (17 CFR 249.1420) in accordance with the instructions to the Form.

(b) Electronic filing. Any notice of withdrawal on Form MA-W (17 CFR 249.1420) must be filed electronically.

(c) Effective date. A notice of withdrawal from registration shall become effective for all matters on the 60th day after the filing thereof, within such longer period of time as to which the municipal advisor consents or which the Commission by order may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of

time as the Commission may determine. If a notice of withdrawal from registration is filed at any time subsequent to the date of the issuance of a Commission order instituting proceedings pursuant to section 15B(c) of the Act (15 U.S.C. 78o-4(c)) to censure, place limitations on the activities, functions or operations of, or suspend or revoke the registration of, the municipal advisor, or if prior to the effective date of the notice of withdrawal pursuant to this paragraph (c), the Commission institutes such a proceeding or a proceeding to impose terms or conditions upon such withdrawal, the notice of withdrawal shall not become effective pursuant to this paragraph (c) except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(d) Form MA-W is a report. Each Form MA-W (17 CFR 249.1420) required to be filed under this section shall constitute a report within the meaning of sections 15B(c), 17(a), 18(a), 32(a) of the Act (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Act.

§ 240.15Ba1-5 Amendments to Form MA and Form MA-I.

(a) When amendment is required – Form MA. A registered municipal advisor shall promptly amend the information contained in its Form MA (17 CFR 249.1400):

(1) At least annually, within 90 days of the end of a municipal advisor's fiscal year, or of the end of the calendar year for a sole proprietor; and

(2) More frequently, if required by the General Instructions (17 CFR 249.1400), as applicable.

(b) When amendment is required – Form MA-I. A registered municipal advisor shall promptly amend the information contained in Form MA-I (17 CFR 249.1410) by filing an amended Form MA-I whenever the information contained in the Form MA-I becomes inaccurate for any reason.

(c) Electronic filing of amendments. A registered municipal advisor shall file all amendments to Form MA (17 CFR 249.1400) and Form MA-I (17 CFR 249.1410) electronically.

(d) Amendments to Form MA and Form MA-I are reports. Each amendment required to be filed under this section shall constitute a report within the meaning of sections 15B(c), 17(a), 18(a), 32(a) of the Act (15 U.S.C. 78o-4(c), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Act.

§ 240.15Ba1-6 Consent to service of process to be filed by non-resident municipal advisors; legal opinion to be provided by non-resident municipal advisors.

(a)(1) Each non-resident municipal advisor applying for registration pursuant to section 15B(a) of the Act (15 U.S.C. 78o-4(a)) shall, at the time of filing of the municipal advisor's application on Form MA (17 CFR 249.1400), file with the Commission a written irrevocable consent and power of attorney on Form MA-NR (17 CFR 249.1430) to appoint an agent in the United States, other than a Commission member, official, or employee, upon whom may be served any process, pleadings, or other papers in any action brought against the non-resident municipal advisor to enforce this Title.

(2) Each municipal advisor applying for registration pursuant to or registered under section 15B of the Act (15 U.S.C. 78o-4) shall, at the time of filing the relevant Form MA (17 CFR 249.1400) or Form MA-I (17 CFR 249.1410), file with the Commission a written irrevocable consent and power of attorney on Form MA-NR (17 CFR 249.1430) to appoint an agent in the United States, other than a Commission member, official, or employee, upon whom may be served any process, pleadings, or other papers in any action brought against the municipal advisor's non-resident general partner or non-resident managing agent, or non-resident natural persons who are persons associated with the municipal advisor (as defined in section 15B(e)(7) of the Act (15 U.S.C. 78o-4(e)(7))) and engaged in municipal advisory activities on its behalf, to enforce this Title.

(b) The registered municipal advisor shall communicate promptly to the Commission by filing a new Form MA-NR (17 CFR 249.1430) any change to the name or address of the agent for service of process of each such non-resident municipal advisor, general partner, managing agent, or natural persons who are persons associated with the municipal advisor (as defined in section 15B(e)(7) of the Act (15 U.S.C. 78o-4(e)(7))) and engaged in municipal advisory activities on its behalf.

(c)(1) Each registered non-resident municipal advisor must promptly appoint a successor agent for service of process and file a new Form MA-NR (17 CFR 249.1430) if the non-resident municipal advisor discharges its identified agent for service of process or if its agent for service of process is unwilling or unable to accept service on behalf of the non-resident municipal advisor.

(2) Each registered municipal advisor must require each of its non-resident general partners or non-resident managing agents, or non-resident natural persons who are persons associated with the municipal advisor (as defined in section 15B(e)(7) of the Act (15 U.S.C. 78o-4(e)(7))) and engaged in municipal advisory activities on its behalf, to promptly appoint a successor agent for service of process and the registered municipal advisor must file a new Form MA-NR (17 CFR 249.1430) if such non-resident general partner, managing agent, or associated person discharges the identified agent for service of process or if the agent for service of process is unwilling or unable to accept service on behalf such person.

(d) Each non-resident municipal advisor applying for registration pursuant to section 15B(a) of the Act (15 U.S.C. 78o-4(a)) shall provide an opinion of counsel on Form MA (17 CFR 249.1400) that the municipal advisor can, as a matter of law, provide the Commission with access to the books and records of the municipal advisor as required by law and that the municipal advisor can, as a matter of law, submit to inspection and examination by the Commission.

(e) Form MA-NR (17 CFR 249.1430) must be filed electronically.

§ 240.15Ba1-7 Registration of successor to municipal advisor.

(a) In the event that a municipal advisor succeeds to and continues the business of a municipal advisor registered pursuant to section 15B(a) of the Act (15 U.S.C. 78o-4(a)), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within 30 days after the succession, files an application for registration on Form MA (17 CFR 249.1400), and the predecessor files a notice of withdrawal from registration on Form MA-W (17 CFR 249.1420); provided, however, that the registration of the predecessor municipal advisor will cease to be effective as the registration of the successor municipal advisor 45 days after the application for registration on Form MA is filed by the successor.

(b) Notwithstanding paragraph (a) of this section, if a municipal advisor succeeds to and continues the business of a registered predecessor municipal advisor, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor municipal advisor on Form MA (17 CFR 249.1400) to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor.

§ 240.15Ba1-8 Books and records to be made and maintained by municipal advisors.

(a) Every person registered or required to be registered under section 15B of the Act (15 U.S.C. 78o-4) and the rules and regulations thereunder shall make and keep true, accurate, and current the following books and records relating to its municipal advisory activities:

(1) Originals or copies of all written communications received, and originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such

communications;

(2) All check books, bank statements, general ledgers, cancelled checks and cash reconciliations of the municipal advisor;

(3) A copy of each version of the municipal advisor's policies and procedures, if any, that:

(i) Are in effect; or

(ii) At any time within the last five years were in effect, not including those in effect prior to [insert date that is 60 days after publication in the Federal Register];

(4) A copy of any document created by the municipal advisor that was material to making a recommendation to a municipal entity or obligated person or that memorializes the basis for that recommendation;

(5) All written agreements (or copies thereof) entered into by the municipal advisor with any municipal entity, employee of a municipal entity, or an obligated person or otherwise relating to the business of such municipal advisor as such;

(6) A record of the names of persons who are currently, or within the past five years were, associated with the municipal advisor, not including persons associated with the municipal advisor prior to [insert date that is 60 days after publication in the Federal Register];

(7) Books and records containing a list or other record of:

(i) The names, titles, and business and residence addresses of all persons associated with the municipal advisor;

(ii) All municipal entities or obligated persons with which the municipal advisor is engaging or has engaged in municipal advisory activities in the past five years, not including those prior to [insert date that is 60 days after publication in the Federal Register];

(iii) The name and business address of each person to whom the municipal advisor provides

or agrees to provide, directly or indirectly, payment to solicit a municipal entity, an employee of a municipal entity, or an obligated person on its behalf; and

(iv) The name and business address of each person that provides or agrees to provide, directly or indirectly, payment to the municipal advisor to solicit a municipal entity, an employee of a municipal entity, or an obligated person on its behalf; and

(8) Written consents to service of process from each natural person who is a person associated with the municipal advisor and engages in municipal advisory activities solely on behalf of such municipal advisor.

(b)(1) All books and records required to be made under this section shall be maintained and preserved for a period of not less than five years, the first two years in an easily accessible place.

(2) Partnership articles and any amendments thereto, articles of incorporation, charters, minute books, and stock certificate books of the municipal advisor and of any predecessor, excluding those that were only in effect prior to [insert date that is 60 days after publication in the Federal Register], shall be maintained in the principal office of the municipal advisor and preserved until at least three years after termination of the business or withdrawal from registration as a municipal advisor.

(c) A municipal advisor subject to paragraph (a) of this section, before ceasing to conduct or discontinuing business as a municipal advisor, shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the Commission in writing, at its principal office in Washington, DC, of the exact address where such books and records will be maintained during such period.

(d) Electronic storage permitted.

(1) General. The records required to be maintained and preserved pursuant to this part may be maintained and preserved for the required time on:

(i) Electronic storage media, including any digital storage medium or system that meets the terms of this section; or

(ii) Paper documents.

(2) General requirements. The municipal advisor must:

(i) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;

(ii) Provide promptly any of the following that the Commission (by its staff or other representatives) may request:

(A) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(B) A legible, true, and complete printout of the record; and

(C) Means to access, view, and print the records; and

(iii) Separately store, for the time required for preservation of the record, a duplicate copy of the record on any medium allowed by this section.

(3) Special requirements for electronic storage media. In the case of records on electronic storage media, the municipal advisor must establish and maintain procedures:

(i) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;

(ii) To limit access to the records to properly authorized personnel and the Commission (including its staff and other representatives); and

(iii) To reasonably ensure that any reproduction of a non-electronic record on electronic

storage media is complete, true, and legible when retrieved.

(e)(1) Any book or other record made, kept, maintained, and preserved in compliance with §§ 240.17a-3 and 240.17a-4 of this chapter, rules of the Municipal Securities Rulemaking Board, or § 275.204-2 under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.), which is substantially the same as a book or other record required to be made, kept, maintained, and preserved under this section, shall satisfy the requirements of this section.

(2) A record made and kept pursuant to any provision of paragraph (a) of this section that contains all the information required under any other provision of paragraph (a) of this section, need not be maintained in duplicate in order to meet the requirements of the other provisions of paragraph (a) of this section.

(f)(1) Except as provided in paragraph (f)(3) of this section, each non-resident municipal advisor registered or applying for registration pursuant to section 15B of the Act (15 U.S.C. 78o-4) and the rules and regulations thereunder shall keep, maintain, and preserve, at a place within the United States designated in a notice from such municipal advisor as provided in paragraph (f)(2) of this section, true, correct, complete, and current copies of books and records that such municipal advisor is required to make, keep current, maintain or preserve pursuant to any provisions of any rule or regulation of the Commission adopted under the Act.

(2) Except as provided in paragraph (f)(3) of this section, each non-resident municipal advisor subject to paragraph (f)(1) of this section shall furnish to the Commission a written notice specifying the address of the place within the United States where the copies of the books and records required to be kept, maintained, and preserved by such municipal advisor pursuant to paragraph (f)(1) of this section are located. Each non-resident municipal advisor registered or applying for registration when this paragraph becomes effective shall file such notice within 30

calendar days after this paragraph becomes effective. Each non-resident municipal advisor that files an application for registration after this paragraph becomes effective shall file such notice with such application for registration.

(3) Notwithstanding the provisions of paragraphs (f)(1) and (2) of this section, a non-resident municipal advisor need not keep, maintain, or preserve within the United States copies of the books and records referred to in paragraphs (f)(1) and (2) of this section, if:

(i) Such non-resident municipal advisor files with the Commission, at the time or within the period provided by paragraph (f)(2) of this section, a written undertaking, in a form acceptable to the Commission and signed by a duly authorized person, to furnish to the Commission, upon demand, at the Commission's principal office in Washington, DC, or at any Regional Office of the Commission designated in such demand, true, correct, complete, and current copies of any or all of the books and records which such municipal advisor is required to make, keep current, maintain, or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records that may be specified in such demand. Such undertaking shall be in substantially the following form:

The undersigned hereby undertakes to furnish at its own expense to the Securities and Exchange Commission at the Commission's principal office in Washington, DC or at any Regional Office of the Commission specified in a demand for copies of books and records made by or on behalf of the Commission, true, correct, complete, and current copies of any or all, or any part, of the books and records that the undersigned is required to make, keep current, maintain, or preserve pursuant to any provision of any rule or regulation of the Securities and Exchange Commission under the Securities Exchange Act of 1934. This undertaking shall be suspended during any period when the undersigned is making, keeping current, maintaining, and preserving copies of all of said

books and records at a place within the United States in compliance with 17 CFR 240.15Ba1-7(f)(1) and (2). This undertaking shall be binding upon the undersigned and the heirs, successors and assigns of the undersigned, and the written irrevocable consents and powers of attorney of the undersigned, its general partners, and managing agents filed with the Securities and Exchange Commission shall extend to and cover any action to enforce the same.

and

(ii) Such non-resident municipal advisor furnishes to the Commission, at such municipal advisor's own expense 14 calendar days after written demand therefor forwarded to such municipal advisor by registered mail at such municipal advisor's last address of record filed with the Commission and signed by the Secretary of the Commission or such person as the Commission may authorize to act in its behalf, true, correct, complete, and current copies of any or all books and records which such municipal advisor is required to make, keep current, maintain, or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records that may be specified in said written demand. Such copies shall be furnished to the Commission at the Commission's principal office in Washington, DC, or at any Regional Office of the Commission which may be specified in said written demand.

* * * * *

8. Section 240.15Bc4-1 is added to read as follows:

§ 240.15Bc4-1 Persons associated with municipal advisors.

A person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a municipal advisor, shall be subject to a Commission order that (1) censures or places limitations on the activities or functions of such person, or (2) suspends for a period not exceeding twelve months or bars such person from being

associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 15(b) of the Act (15 U.S.C. 78o(b)(4)(A), 78o(b)(4)(D), 78o(b)(4)(E), 78o(b)(4)(H), 78o(b)(4)(G)), has been convicted of any offense specified in subparagraph (B) of such paragraph (4) (15 U.S.C. 78o(b)(4)(B)) within 10 years of the commencement of the proceedings under section 15B(c)(4) (15 U.S.C. 78o-4(c)(4)), or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4) (15 U.S.C. 78o(b)(4)(C)). It shall be unlawful for any person as to whom an order entered pursuant to section 15B(c)(4) of the Act (15 U.S.C. 78o-4(c)(4)) or section 15B(c)(5) of the Act (15 U.S.C. 78o-4(c)(5)) suspending or barring him from being associated with a municipal advisor is in effect willfully to become, or to be, associated with a municipal advisor without the consent of the Commission, and it shall be unlawful for any municipal advisor to permit such a person to become, or remain, a person associated with it without the consent of the Commission, if such municipal advisor knew, or, in the exercise of reasonable care should have known, of such order.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

9. The general authority citation for part 249 is amended by adding the following citation in numerical order to read as follows:

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

* * * * *

Sections 249.1400, 1410, 1420 and 1430 are also issued under Pub. L. No. 111-203, § 975, 124 Stat. 1376 (2010).

* * * * *

10. Subpart N is amended by removing § 249.1300T and adding §§ 249.1400, 249.1410, 249.1420, and 249.1430 to read as follows:

Subpart N – Forms for Registration of Municipal Advisors and for Providing Information regarding Certain Natural Persons.

Disclosure Sec.

249.1400 Form MA, for registration as a municipal advisor, and for amendments to registration.

249.1410 Form MA-I, for providing information regarding natural person municipal advisors, and for amendments to such information.

249.1420 Form MA-W, for withdrawal from registration as a municipal advisor.

249.1430 Form MA-NR, for appointment of agent for service of process by non-resident municipal advisor, non-resident general partner or managing agent of a municipal advisor, and non-resident natural person associated with a municipal advisor.

§ 249.1400 Form MA, for registration as a municipal advisor, and for amendments to registration.

The form shall be used for registration as a municipal advisor pursuant to section 15B of the Securities Exchange Act of 1934 (15 U.S.C. 78o-4) and for amendments to registrations.

§ 249.1410 Form MA-I, for providing information regarding natural person municipal advisors, and for amendments to such information.

The form shall be used for providing information regarding natural person municipal advisors, and for amendments to such information.

§ 249.1420 Form MA-W, for withdrawal from registration as a municipal advisor.

The form shall be used for filing a notice of withdrawal from registration as a municipal advisor pursuant to section 15B of the Securities Exchange Act of 1934 (15 U.S.C. 78o-4).

§ 249.1430 Form MA-NR, for appointment of agent for service of process by non-resident municipal advisor, non-resident general partner or managing agent of a municipal advisor, and non-resident natural person associated with a municipal advisor.

The form shall be used to furnish information pertaining to the appointment of agent for service of process by a non-resident municipal advisor and by registered municipal advisors to furnish the same for each of its non-resident general partner or managing agent, or non-resident natural person associated with a municipal advisor pursuant to section 15B of the Securities Exchange Act of 1934 (15 U.S.C. 78o-4).

[Note: The following Forms will not appear in the Code of Federal Regulations.]

Instructions for the Form MA Series

Form MA: Application for Municipal Advisor Registration

Form MA-I: Information Regarding Natural Persons Who Engage in Municipal Advisory Activities

Form MA-NR: Designation of U.S. Agent for Service of Process for Non-Residents

Form MA-W: Notice of Withdrawal from Registration as a Municipal Advisor

General Instructions

Read these General Instructions carefully before filing Form MA, Form MA-I, Form MA-NR, or Form MA-W. Specific instructions for certain items in Forms MA and MA-I, and General Instructions to Form MA-NR appear after these General Instructions. Failure to follow instructions or properly complete any of the forms may result in your registration being delayed or your application rejected.

Italicized terms are defined or described in the Glossary of Terms appended at the end of these instructions.

1. Where can an applicant obtain more information on Form MA, Form MA-I, Form MA-NR, Form MA-W, and electronic filing of these forms with the SEC?

The *Commission* provides information about its rules with respect to *municipal advisors* and the Securities Exchange Act of 1934, as well as the submission of these forms, on its website at: <http://www.sec.gov/info/municipal.shtml>. A comprehensive explanation of the requirements in these forms is provided in the release issued by the *Commission* on _____, 2013, in adopting the rules relating to *municipal advisor* registration, which can be viewed at <http://www.sec.gov>.

2. Who should file these forms?

a. Form MA

A partnership, corporation, trust, limited liability company, limited liability partnership, sole proprietorship, or other organized entity that engages in *municipal advisory activities* (i.e., a *municipal advisory firm*) must register with the *Commission* on Form MA. The same form is also used to amend a previously submitted Form MA, and to file the required *annual update* described in General Instruction 8 below.

b. Form MA-I

A *municipal advisory firm* must complete and file Form MA-I with respect to each natural person associated with the firm and engaged in *municipal advisory activities* on the firm's behalf, including *employees* of the firm. Independent contractors are included in the definition of "employee" for these purposes. The same form is also used to amend a previously submitted Form MA-I. A natural person doing business as a sole proprietor

must complete and file Form MA-I in addition to Form MA and must amend each form whenever applicable, as described below.

c. Form MA-NR

Every *municipal advisory firm* that is a *non-resident* of the United States must file a completed and executed Form MA-NR together with its initial application for registration on Form MA and submit a new Form MA-NR when required by filing an amendment to Form MA with the new Form MA-NR attached. See “General Instructions to Form MA-NR,” Instruction 4, below. A sole proprietor should file Form MA-NR as an attachment to his or her Form MA.

In addition, a *municipal advisory firm* must file a separately completed and executed Form MA-NR for (i) every general partner and/or *managing agent* of the firm that is a *non-resident*, and (ii) every *non-resident* natural person associated with the firm and engaged in *municipal advisory activities* on the firm’s behalf. Form MA-NR must be completed and executed by these *persons* regardless of whether the firm itself is domiciled in the United States or is a *non-resident* filing a Form MA-NR on its own behalf. Form MA-NR for general partners and/or *managing agents* is filed by the firm together with the firm’s Form MA. Form MA-NR for natural persons associated with the firm and engaged in *municipal advisory activities* on the firm’s behalf is filed by the firm together with the Form MA-I relating to the natural person associated with the firm.

Unlike the other forms in the Form MA series, which are completed online and signed electronically, Form MA-NR must be printed out and signed manually by both the *non-resident* and the *person* designated as agent for service of process. Each of the signatures must be separately notarized, and a scanned copy of the signed and notarized form must then be attached as a PDF file to the Form MA or Form MA-I being submitted. However, it is the obligation of the *municipal advisory firm*, not the obligation of the general partner, *managing agent*, or natural person associated with the firm, to file the executed Form MA-NR with the *Commission* as an attachment to Form MA or Form MA-I, as applicable.

Failure to attach a signed and notarized Form MA-NR, where required, for a non-resident municipal advisor or for any non-resident general partner or managing agent of a municipal advisory firm or non-resident natural person associated with the municipal advisory firm and engaged in municipal advisory activities on behalf of the firm, may delay SEC consideration of the municipal advisor’s application for registration.

d. Form MA-W

A business entity (including a sole proprietorship) that is registered as a *municipal advisor* but is no longer required to be registered must file Form MA-W to withdraw its registration. Specific instructions for completing Form MA-W are included on the form. (When a natural person with respect to whom a *municipal advisory firm* filed Form MA-I

is no longer associated with the firm or no longer engaged in *municipal advisory activities* on behalf of the firm, the firm must file an amendment to the Form MA-I to indicate this change.)

3. How is Form MA organized?

The main body of Form MA asks a number of questions about the *municipal advisor*, the *municipal advisor's* business practices, the *persons* who own and control the *municipal advisor*, and the *persons* who engage in *municipal advisory activities* on behalf of the *municipal advisor*. All items must be completed except where otherwise indicated.

Form MA also contains several supplemental schedules that must be completed where applicable:

- Schedule A asks for information about the *municipal advisor's* direct owners and executive officers.
- Schedule B asks for information about the *municipal advisor's* indirect owners.
- Schedule C is used to amend information on either Schedule A or Schedule B.
- Schedule D asks for additional information on certain items and provides space for explanations.

Form MA also contains Disclosure Reporting Pages (“DRPs”), which require further details about events and *proceedings involving* the *municipal advisor* and/or the *municipal advisor's associated persons* that the applicant was required to report on the main body of the form. These include Criminal Action DRPs, Regulatory Action DRPs, and Civil Judicial Action DRPs.

Form MA also includes an “Execution Page” where the form is signed. More detail on the Execution Page is provided below.

4. How is Form MA-I organized?

The main body of Form MA-I asks a number of questions about a sole proprietor and natural person associated with a *municipal advisory firm* and engaged in *municipal advisory activities* on the firm's behalf, including the residential history and employment history, and other businesses in which such *person* is engaged. All items must be completed except where otherwise indicated.

Form MA-I also contains DRPs that require further details of events and *proceedings involving* the sole proprietor and natural person associated with a *municipal advisory firm* and engaged in *municipal advisory activities* on the firm's behalf that the filer was required to report on the main body of the form. These include DRPs for reportable instances of Criminal Action, Regulatory Action, *Investigations*, Terminations,

Judgments/Liens, Civil Judicial Action, and Customer Complaint/Arbitration/Civil Litigation.

5. Who must sign Form MA or MA-I?

The individual who signs the form depends upon the *municipal advisor's* form of organization:

- For a sole proprietorship, the sole proprietor (both forms);
- For a partnership, a general partner;
- For a corporation, an authorized principal officer; or
- For all others, an authorized individual who participates in managing or directing the *municipal advisor's* affairs.

For purposes of these electronic forms, the signature is a typed name.

6. Where does an applicant sign Form MA?

The *municipal advisor* must sign the appropriate Execution Page – either the:

- Domestic Municipal Advisor Execution Page, if the *municipal advisory firm* (including a sole proprietor) is a resident of the United States; or
- Non-Resident Municipal Advisor Execution Page, if the *municipal advisory firm* (including a sole proprietor) is not a resident of the United States. *Non-Resident municipal advisors* must also file Form MA-NR as specified in General Instruction 2.c. above.

7. Where does a *municipal advisory firm* sign Form MA-I?

The *municipal advisory firm* must sign Form MA-I in Item 7 of the form.

8. When does Form MA need to be updated or amended?

Every *municipal advisory firm* must renew Form MA each year by filing an *annual update* within 90 days after the end of its fiscal year (calendar year for sole proprietors).

In addition to the *annual update*, a *municipal advisor* must promptly file an amendment to its Form MA whenever a material event has occurred that changes the information provided in the form.

Each time a firm accesses its Form MA after its initial filing of the form, the information from the firm's most recent previous filing will appear. Only the information that has changed will need to be amended; the applicant will not need to complete the entire form again.

For purposes of Form MA, a material event will be deemed to have occurred if:

- Information provided in response to Item 1 (Identifying Information), Item 2 (Form of Organization), or Item 9 (Disclosure Information) becomes inaccurate in any way; or
- Information provided in response to Item 3 (Successions), Item 7 (Participation or Interest of Applicant or *Associated Persons* of Applicant in *Municipal Advisory Client* or *Solicitee* Transactions), or Item 8 (Owners, Officers, and Other *Control Persons*) becomes materially inaccurate.

Note: If submitting an amendment between *annual updates*, a *municipal advisor* is not required to update the responses to Item 4 (Information About Applicant's Business), Item 5 (Other Business Activities), Item 6 (Financial Industry and Other Related *Affiliations* of *Associated Persons*), or Item 10 (Small Businesses) even if the responses to those items have become inaccurate.

A *non-resident municipal advisory firm* must promptly file an amendment to Form MA to attach an updated opinion of counsel – see General Instruction 13 below – after any changes in the legal or regulatory framework or the firm's physical facilities that would impact the ability of the *municipal advisory firm*, as a matter of law, to provide the *Commission* with access to its books and records or to inspect and examine the *municipal advisory firm*.

Failure to amend or update Form MA as required by this instruction is a violation of SEC rule 15Ba1-5 and could lead to the revocation of registration. See Securities Exchange Act of 1934 section 15B(c)(2), 15 U.S.C. 78a-4(c)(2).

9. When does Form MA-I need to be updated or amended?

Form MA-I must promptly be amended whenever any information previously provided on Form MA-I becomes inaccurate.

10. How does a *municipal advisor* file a Form MA, MA-I, MA-NR, or MA-W?

A *municipal advisor* must complete and submit the relevant form, including any required attachments, electronically. Form MA is considered "filed" with the *Commission* upon submission of a completed Form MA, together with all required additional documents, including required filings of Form MA-I, to the *Commission's* Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. See more at General Instruction 14 below.

When a *municipal advisor's* submitted Form MA is accepted by the *Commission*, the *municipal advisor* will receive an SEC file number with an 867- prefix. As used in the forms, the terms "MA Registration Number" and "*Municipal Advisor* Registration Number" refer to this same SEC file number.

Form MA-NR, which must be printed out, signed, and notarized before being filed, is submitted in PDF format as an attachment to Form MA or Form MA-I, as applicable.

11. How does an applicant start the process of filing electronically?

Each form of the Form MA series, to be filed, must be submitted electronically to EDGAR. General information about EDGAR is available at <http://www.sec.gov/info/edgar.shtml>, where the EDGAR Filer Manual can also be accessed. We recommend that applicants read this filer manual before they begin using the system.

If you are already a filer on the EDGAR system: You may proceed directly to the *Commission's* primary EDGAR filing website at <https://www.edgarfiling.sec.gov> and navigate the links to the Form MA series. Then, you will be given a choice of which form in the series to access and complete.

If you are new to EDGAR: Before you can electronically file with the *SEC* on EDGAR, you must become an EDGAR filer with authorized access codes. To do so, log on to the following website: <https://www.filermanagement.edgarfiling.sec.gov/>. Through this website, you will be able to create a "Form ID" and submit it to the *SEC* for authorization.

Upon accessing the site, you will see a screen with a warning about use of government websites for unauthorized purposes, followed by some brief instructions. At the bottom of the screen, you will see a button that says "Press Here to Begin," through which you can access Form ID. Make sure that you specify *municipal advisors*, where indicated, when accessing the form. Complete the form online and submit it to the *SEC*. When the form is accepted, you will receive, via e-mail, a unique CIK (Central Index Key) number.

After receiving your CIK number, return to the same website (<https://www.filermanagement.edgarfiling.sec.gov/>). Use your CIK and a passphrase to create your EDGAR access codes. Once you have your access codes, you will be able to use EDGAR. Log on to the primary EDGAR filing website at <https://www.edgarfiling.sec.gov/> and navigate the links to the Form MA series. Then, you will be given a choice of which form in the series to access and complete.

12. What other legal designations and representations are made in signing the Execution Page of Form MA and Form MA-I?

Form MA: By signing the Execution Page of Form MA, if you are an authorized signatory of a domestic *municipal advisory firm* (see General Instruction 5 above), you are appointing on behalf of your firm the Secretary of State or other legally designated officer of the state in which the firm maintains its *principal office and place of business* as the firm's agent to receive service of process. You are also attesting to the truth and correctness of the information provided in the form. In addition, you are declaring on behalf of the firm that the firm's books and records will be preserved and available for

inspection and that any *person* having custody of the books and records is authorized to make them available to federal regulators.

If you are signing Form MA on behalf of a *non-resident municipal advisory firm*, you must use the version of the Execution Page that is specifically required for such firms. (See General Instruction 6.) On this page, you are attesting to the truth and correctness of the information the firm is providing on the form and making the same representations as a U.S. firm regarding books and records. Additionally, the signatory is agreeing on behalf of the firm to provide, at the firm's own expense, current, correct, and complete copies of the firm's books and records to the *SEC* upon request. A *non-resident municipal advisory firm* must designate its agent for service of process, however, on a separate form, Form MA-NR.

Form MA-I: If you are an authorized signatory of a domestic *municipal advisory firm* filing Form MA-I with respect to a natural person associated with the firm and engaged in *municipal advisory activities* on behalf of the firm, by signing the Execution Page of Form MA-I, you are attesting to the truth and correctness of the information provided in the form. You are also attesting that the *municipal advisory firm* has obtained and retained written consent from the natural person associated with the firm that service of any civil action brought by, or notice of any *proceeding* before, the *SEC* or any *self-regulatory organization* in connection with the individual's *municipal advisory activities* may be given by registered or certified mail to the individual's address given in Item 1 of the form.

If you are filing Form MA-I as a sole proprietor, by signing the Execution Page of Form MA-I, you are consenting that service of process may be given to you by registered or certified mail to the address you have supplied in Item 1 of the form. You are also attesting to the truth and correctness of the information you have provided in the form.

13. What is the opinion of counsel that is required to be filed by a *non-resident municipal advisory firm*?

A *non-resident municipal advisory firm* must attach to the Execution Page of its Form MA an opinion of counsel that the *municipal advisor* can, as a matter of law, provide the *Commission* with access to its books and records and that the *municipal advisor* can, as a matter of law, submit to inspection and examination by the *Commission*.

14. In what circumstances must additional documents be attached to Form MA or Form MA-I?

As already noted, an applicant filing a Form MA or a *municipal advisory firm* filing Form MA-I must complete the entire form online, including, where applicable, Schedules A, B, C, and D (in the case of Form MA) and any DRPs that are required. Note that these schedules and the DRPs comprise the form itself, and are not considered attachments. The signatures that are required on Form MA and Form MA-I are executed electronically; thus no paper document must be copied and attached to evidence a signature.

In certain circumstances, however, a filing requires the attachment of a copy (or copies) of an additional document (or documents) when the online Form MA or Form MA-I is submitted. Such copies must be filed in PDF format. Filers will be prompted to attach each such document at the appropriate place in the relevant online form. Filings that require such PDF attachments include:

- Documents relating to criminal actions. The Criminal Action DRPs of Form MA and Form MA-I require that applicable court documents (*e.g.*, criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) and other supporting documentation must be attached to, and filed electronically with, the form in conjunction with the DRPs.
- Manually-signed Form MA-NR (*for non-residents*). Form MA-NR is accessed electronically via links within Form MA and Form MA-I, and the information requested by the form may be entered online. However, the form must be printed out and signed manually – both by the *non-resident* (an authorized signatory in the case of a firm) and by the designated agent for service of process – and each of the signatures must be notarized. After the signatures and notarizations are completed, Form MA-NR must be attached in PDF format to the Form MA or Form MA-I.
- Written authorization to sign a Form MA-NR. When a Form MA-NR is signed on behalf of a *municipal advisory firm* or a natural person (whether a general partner, *managing agent*, or person associated with the firm and engaged in *municipal advisory activities* on the firm's behalf) pursuant to a written authorization (*e.g.*, a board resolution or power of attorney), a copy of the authorization must be attached in PDF format together with the signed and notarized Form MA-NR.
- Written contractual agreements relating to a Form MA-NR. When a written contractual agreement or other written document exists that evidences (a) the designation and appointment of the U.S. agent for service of process by the *non-resident* for whom a Form MA-NR is being filed, and/or (b) the agent's acceptance of such designation and appointment, a copy of the document must also be attached in PDF format together with the signed and notarized Form MA-NR.
- Opinion of Counsel for *non-resident municipal advisory firms*. As described in General Instruction 13, a *non-resident municipal advisory firm* must attach to its Form MA an opinion of counsel that the *municipal advisor* can comply with certain requirements. A copy of the opinion must be attached in PDF file format.

15. What if the deadline for submitting an initial filing, an annual update, or amendment to a form falls on a day on which the *Commission* is not open for business?

If the deadline for submitting an initial filing, annual update, or amendment to a form occurs on a Saturday, Sunday, or holiday on which the *Commission* is not open for business, then the deadline shall be the next business day.

Federal Information Law and Requirements

Section 15B(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78o-4(a)] authorizes the *SEC* to collect the information required by Forms MA, MA-I, MA-NR, and MA-W. The *SEC* collects the information for regulatory purposes. Filing Form MA and Form MA-I (where applicable) is mandatory for *municipal advisors* who are required to register with the *SEC*. Filing Form MA-W is mandatory for a *municipal advisor* that has a Form MA on file but is no longer required to be registered. Filing Form MA-NR is mandatory for each *non-resident municipal advisor*, *non-resident* general partner or *non-resident managing agent* of a *municipal advisor*, and *non-resident* natural person who is a person *associated* with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf. The *SEC* maintains the information submitted on these forms and, unless otherwise specified, makes it publicly available. The *SEC* will not accept forms that do not include the required information.

SEC's Collection of Information

An agency may not conduct or sponsor, and a *person* is not required to respond to, a collection of information unless it displays a currently valid control number. The Securities Exchange Act of 1934 authorizes the *SEC* to collect the information on Form MA from applicants and on Form MA-I from *municipal advisory firms*. See 15 U.S.C. 78o-4. Filing of the form is mandatory.

The main purpose of Form MA is to enable the *SEC* to register *municipal advisors*. Every applicant for registration with the *SEC* as a *municipal advisor* must file Form MA electronically with the *SEC*. See 17 CFR 240.15Ba1-2(a). The purpose of Form MA-I is to enable the *SEC* to collect information about natural persons associated with a *municipal advisory firm* and engaged in *municipal advisory activities* on behalf of the firm.

When an applicant for registration successfully transmits a Form MA and/or Form MA-I to the *SEC's* electronic systems, the *SEC* does not make a finding that the form has been completed or submitted correctly. Form MA must be updated annually by every *municipal advisory firm*, no later than 90 days after the end of its fiscal year (calendar year for sole proprietors). Form MA also must be amended promptly during the year to reflect changes as described in these instructions. Form MA-I must be filed by every *municipal advisory firm* with respect to each natural person associated with the firm and engaged in *municipal advisory activities* on behalf of the firm. Form MA-I also must be amended promptly whenever any information previously provided becomes inaccurate. The *SEC* maintains the information on the forms and, unless otherwise specified, makes it publicly available through the *SEC* website.

Anyone may send the *SEC* comments on the accuracy of the burden estimate on page 1 of the forms, as well as suggestions for reducing the burden. The Office of Management and Budget has reviewed this collection of information under 44 U.S.C. 3507.

The information contained in the forms is part of a system of records subject to the Privacy Act of 1974, as amended. The *SEC* has published in the Federal Register the Privacy Act System of Records Notice for these records.

.....
Intentional misstatements or omissions of fact constitute federal criminal violations.

.....
See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)
.....

Specific Instructions for Certain Items in Form MA

These instructions provide further detail and explain how to complete certain items in Form MA.

1. Item 3: Successions

If the applicant (i) is not currently registered as a *municipal advisor* and has taken over the business of a registered *municipal advisor* or (ii) was registered as a *municipal advisor* but has changed its structure or legal status (e.g., form of organization, composition of a partnership, or date or state of incorporation), a new organization has been created that has its own registration obligations under the Exchange Act. The applicant in these situations must file in accordance with the instructions below. In addition, the applicant may rely on special registration provisions in the SEC's rules for "successors" to registered *municipal advisors* that are designed to ease the transition to the successor *municipal advisor's* registration.

In situation (i), follow the instructions below under: "Succession by Application." In situation (ii), follow the instructions below under "Succession by Amendment."

- a. Succession by Application.** If the applicant is not registered with the SEC as a *municipal advisor*, and is acquiring or assuming substantially all of the assets and liabilities of the advisory business of a registered *municipal advisor*, file a new initial application for registration on Form MA. The applicant will receive a new SEC file number. The applicant must file the new application within 30 calendar days after the succession. On the application, make sure to check "Yes" to Item 3, enter the date of the succession in Item 3, and complete Section 3 of Schedule D.

Until the SEC declares the new registration effective, the applicant may rely on the registration of the acquired *municipal advisor*, but only if the acquired *municipal advisor* is no longer engaged in *municipal advisory activities*. Once the new registration is effective, a Form MA-W must be filed with the SEC to withdraw the registration of the acquired *municipal advisor*.

- b. Succession by Amendment.** If a new *municipal advisor* is formed solely as a result of a change in form of organization, composition of a partnership, or date or state of incorporation of an existing registered *municipal advisor*, and there has been no practical change in *control* or management, the new *municipal advisor* may file an amendment to the Form MA of the predecessor *municipal advisor* to reflect these changes rather than file a new, initial application. The new *municipal advisor* will keep the same SEC file number, and no Form MA-W should be filed. On the amendment, make sure to check "Yes" to Item 3, enter the date of the succession in Item 3, and complete Section 3 of Schedule D. The amendment must be submitted within 30 calendar days after the change or reorganization.

2. Item 4: Information About Applicant's Business

Guidance for Newly-Formed *Municipal Advisors*: Several questions in Item 4 that ask about *municipal advisory activities* assume that the *municipal advisor* has been in existence for some time. For newly-formed *municipal advisors*, responses to these questions should reflect the applicant's current *municipal advisory activities* (i.e., activities at the time of filing of the Form MA), with the following exceptions:

- Applicant should base responses to Item 4-I, J, and K on the types of compensation the applicant expects to accept; and
- Applicant should base responses to Item 4-L on the types of *municipal advisory activities* in which the applicant expects to engage during the next year.

3. Additional Information

Complete the final section of Schedule D – “Miscellaneous” – if any response to an item in Form MA requires further explanation or if the applicant wishes to provide additional information.

Specific Instructions for Certain Items in Form MA-I

These instructions provide further detail and explain how to complete certain items in Form MA-I.

1. Item 1: Identifying Information

A. The Individual

CRD Number. Some individuals may have an assigned number, known as a CRD Number, in the *CRD* system for the registration of broker-dealers and broker-dealer representatives or in the *IARD* system for *investment advisers* and investment adviser representatives. You are not required to provide an individual's *CRD* number if the individual does not have one.

Social Security Number. A social security number is needed for regulatory purposes. However, the version of completed Form MA-I that will be available for viewing by the public will not show a social security number.

B. *Municipal Advisory Firms Where the Individual Is Employed*

Office. The phrase “office from which the individual is or will be supervised” in subsection (2) of Item 1-B requires you to provide the information requested even if the individual does not work at that location.

2. Item 2: Other Names

This item requires you to enter – besides the full legal name you provided in Item 1 – any other name that the individual has used or is using, or by which the individual is known

or has been known, since the age of 18. Be certain to include, for example, nicknames, aliases, and names used before or after marriage.

3. Item 3: Residential History

You must provide all the addresses at which the individual has resided for the past 5 years, leaving no gaps greater than 3 months between addresses. Post office boxes are not acceptable. This information is needed for regulatory purposes. However, the version of completed Form MA-I that will be available for viewing by the public will not show the private residential addresses that you enter.

4. Item 4: Employment History

You must provide the individual's entire employment history for the past 10 years, leaving no gap greater than 3 months between entries. All entries must include beginning and end dates of employment. Account for full-time and part-time employment, self-employment, military service, and homemaking. Unemployment, full-time education, extended travel, and other, similar statuses must also be included, and entered on the line provided for "Name of *Municipal Advisor* or Company."

5. Item 5: Other Business

Provide information regarding any other business in which the individual is currently engaged, whether as a proprietor, partner, officer, director, *employee* (including independent contractor), trustee, agent, or otherwise. If you do not know exactly the number of hours the individual devotes to this business, give a reasonable estimate. If the number of hours per week or month varies, provide an average.

6. Item 6: Disclosure Questions

Note that an affirmative answer to certain disclosure questions may make an individual subject to statutory disqualification as defined in Section 3(a)(39) and Section 15B(c) of the Securities Exchange Act of 1934.

7. Item 7: Signature

Signature is effected by typing a name in the designated signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature. Submit the signed form electronically with the *Commission*. Note that if the individual is a *non-resident*, you must attach a manually-signed Form MA-NR to the form.

General Instructions to Form MA-NR

1. When must a Form MA-NR be filed?

Form MA-NR must be filed for each *non-resident municipal advisory firm* and each *non-resident* general partner and/or *managing agent* of a *municipal advisor* at the time of the *municipal advisory firm's* initial application for registration on Form MA as an attachment to the form. In addition, a *municipal advisory firm* must file Form MA-NR as an attachment to each Form MA-I filed by the firm for a *non-resident* natural person associated with the firm and engaged in *municipal advisory activities* on the firm's behalf when the firm initially files the Form MA-I.

2. Must more than one Form MA-NR be filed per *municipal advisory firm*?

In certain circumstances, yes. When you are filing a Form MA on behalf of a *municipal advisory firm*, and one or more general partners and/or *managing agents* of the firm is a *non-resident*, you must attach a separate Form MA-NR designating an agent for U.S. service of process for each such person, signed by that person and the designated agent. This requirement applies even when the firm itself is a *non-resident* and you are attaching a Form MA-NR on the firm's own behalf. You must attach a Form MA-NR for each such other person even if the person has previously designated an agent for service of process on a Form MA-NR filed by another *municipal advisor*. If you are filing Form MA-I, you must attach a Form MA-NR for every *non-resident* natural person associated with the firm and engaged in *municipal advisory activities* on behalf of the firm.

3. Must a Form MA-NR be filed at any time other than a *municipal advisor's* initial registration?

Yes. An SEC-registered *municipal advisory firm* that becomes a *non-resident* after the *municipal advisor firm's* initial application has been submitted must file a Form MA-NR within 30 days of becoming a *non-resident*. The same applies when a general partner or *managing agent* of a *municipal advisory firm* becomes a *non-resident*. A *municipal advisory firm* must also file Form MA-NR within 30 days of the date that a *non-resident* becomes a general partner or *managing agent* of a *municipal advisory firm* if this occurs after the firm initially registers on Form MA. In such cases, the *municipal advisor* must file an amendment to Form MA, with the new Form MA-NR attached.

A *municipal advisory firm* must file a Form MA-NR together with Form MA-I if, after the firm's initial registration, a *non-resident* natural person becomes associated with the firm and engages in *municipal advisory activities* on the firm's behalf. In addition, a *municipal advisory firm* must file a Form MA-NR if a natural person associated with the firm and engaged in *municipal advisory activities* on behalf of the firm becomes a *non-resident* after the firm has filed a Form MA-I relating to that individual. The firm must file the Form MA-NR within 30 days of such individual becoming a *non-resident*.

Note: As discussed elsewhere in these instructions, a *non-resident municipal advisory firm* that is filing a Form MA must also comply with two further requirements. In addition to completing Form MA-NR, the firm must (a) complete the special execution page of Form MA required for *non-residents*, which includes an undertaking regarding books and records (see General Instruction 12); and (b) attach to Form MA an opinion of

counsel that the *municipal advisory firm*, as a matter of law, can provide the *Commission* with access to its books and records and can submit to inspection and examination by the *Commission* (see General Instruction 13).

4. When must a new Form MA-NR be filed?

A new Form MA-NR must be filed promptly if a previously-filed Form MA-NR becomes invalid or the information in it becomes inaccurate. (This is accomplished by submitting an amendment to Form MA with the new MA-NR attached. No other changes to any information in Form MA need be made in the amendment if not otherwise required.) This includes any change to the name or address of the *non-resident municipal advisory firm*, general partner, *managing agent*, or natural person associated with the firm and engaged in *municipal advisory activities* on the firm's behalf, as well as any change to the name or address of the agent for service of process of the *municipal advisory firm*, general partner, *managing agent*, or natural person associated with the firm. Each *non-resident municipal advisory firm*, general partner, *managing agent*, and natural person associated with the firm and engaged in *municipal advisory activities* on the firm's behalf must promptly appoint a successor agent for service of process and the *municipal advisor* must file a new Form MA-NR if the *non-resident municipal advisor*, general partner, *managing agent*, or natural person associated with the firm discharges its identified agent for service of process or if its agent for service of process becomes unwilling or unable to accept service on behalf of the *non-resident municipal advisor*, general partner, *managing agent*, or natural person associated with the firm.

GLOSSARY OF TERMS

1. **Affiliate, affiliated, affiliation:** An affiliate of a *person* is (i) all the *person's* officers, partners, or directors (or any *person* performing similar functions); (ii) all *persons* directly or indirectly *controlling* or *controlled* by the *person*; and (iii) all of the *person's* current *employees* (other than *employees* performing only clerical, administrative, support or similar functions).
2. **Annual Update:** Within 90 calendar days after a *municipal advisory firm's* fiscal year end (calendar year for sole proprietors), the *municipal advisory firm* must file an "annual update," which is an amendment to the *municipal advisory firm's* Form MA that updates the responses to any item for which the information is no longer accurate.
3. **Associated Person or Associated Person of a Municipal Advisor:** Any partner, officer, director, or branch manager of a *municipal advisor* (or any *person* occupying a similar status or performing similar functions); any other *employee* of such *municipal advisor* who is engaged in the management, direction, supervision, or performance of any *municipal advisory activities* relating to the provision of advice to or on behalf of a *municipal entity* or *obligated person* with respect to *municipal financial products* or the issuance of municipal securities (other than *employees* who are performing solely clerical, administrative, support or similar functions); and any *person* directly or indirectly *controlling*, *controlled* by, or under common *control* with such *municipal advisor*.
4. **Charge, charged:** Being accused of a crime in a formal complaint, information, or indictment (or equivalent formal criminal charge).
5. **CFTC:** Commodity Futures Trading Commission.
6. **Chief Compliance Officer:** The officer in charge of the *municipal advisor's* compliance program.
7. **Client or Municipal Advisory Client:** Any of the *municipal advisor's* clients. This term includes clients from which the *municipal advisor* receives no compensation. If the *municipal advisor* also engages in activities that are not *municipal advisory activities*, this term does not include clients on behalf of whom those activities are conducted.
8. **Contingent Fees:** Any fee or payment for services provided where the fee is payable upon a condition to be satisfied.
9. **Control:** The power, directly or indirectly, to direct the management or policies of a *person*, whether through ownership of securities, by contract, or otherwise.
 - Each of the *municipal advisor's* officers, partners, or directors exercising executive responsibility (or *persons* having similar status or functions) is presumed to control the *municipal advisor*.

- A *person* is presumed to control a corporation if the *person*: (i) directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or (ii) has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities.
 - A *person* is presumed to control a partnership if the *person* has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership.
 - A *person* is presumed to control a limited liability company ("LLC") if the *person*: (i) directly or indirectly has the right to vote 25 percent or more of a class of the interests of the LLC; (ii) has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the LLC; or (iii) is an elected manager of the LLC.
 - A *person* is presumed to control a trust if the *person* is a trustee or *managing agent* of the trust.
10. **CRD:** The Web Central Registration Depository ("CRD") system operated by *FINRA* for the registration of broker-dealers and broker-dealer representatives.
 11. **Discretionary Authority:** The *municipal advisor* has discretionary authority or manages assets on a discretionary basis if it has the authority to decide which securities to purchase and sell for a *client*. The *municipal advisor* also has discretionary authority if it has the authority to decide which *investment advisers* to retain on behalf of a *client*.
 12. **Employee:** This term includes an independent contractor who engages in *municipal advisory activities* on the *municipal advisor's* behalf.
 13. **Enjoined:** This term includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or a temporary restraining *order*.
 14. **Federal Banking Agency:** This term includes any Federal banking agency as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).
 15. **Federal Regulatory Agency:** This term includes any *Federal banking agency* and the National Credit Union Administration.
 16. **Felony:** For jurisdictions that do not differentiate between a felony and a *misdemeanor*, a felony is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least \$1,000. This term also includes a general court martial.
 17. **FINRA:** Financial Industry Regulatory Authority.
 18. **Foreign Financial Regulatory Authority:** This term includes (i) a foreign securities regulatory authority; (ii) another governmental body or foreign equivalent of a *self-regulatory organization* empowered by a foreign government to administer or enforce its laws relating to the regulation of *municipal advisor-related activities*; and (iii) a foreign membership organization, a function of which is to regulate the participation of its members in the *municipal advisor-related activities*.

- 19. Found:** This term includes adverse final actions, including consent decrees in which the respondent has neither admitted nor denied the findings, but does not include agreements, deficiency letters, examination reports, memoranda of understanding, letters of caution, admonishments, and similar informal resolutions of matters.
- 20. Guaranteed Investment Contract:** This term includes any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, and also includes any agreement to supply investments on 2 or more future dates, such as a forward supply contract; provided, however, that the contract relates to investments of proceeds of municipal securities or municipal escrow investments.
- 21. IARD:** The Investment Adviser Registration Depository ("IARD") system operated by *FINRA* for the registration of *investment advisers* and investment adviser representatives.
- 22. Investigation:** This term includes: (i) grand jury investigations; (ii) *SEC* investigations after the "Wells" notice has been given; (iii) *FINRA* investigations after the "Wells" notice has been given or after a "person associated with a member," as such term is defined by The *FINRA* By-Laws, has been advised by the staff that it intends to recommend formal disciplinary action; (iv) *NYSE Regulation* investigations after the "Wells" notice has been given or after a *person* over whom *NYSE Regulation* has jurisdiction, as defined in the applicable rules, has been advised by *NYSE Regulation* that it intends to recommend formal disciplinary action; (v) formal investigations by other *SROs*; or (vi) actions or procedures designated as investigations by other federal, state, or local jurisdictions. The term investigation does not include subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, "blue sheet" requests or other trading questionnaires, or examinations.
- 23. Investment Adviser:** As defined in Section 202(a)(11) of the Investment Advisers Act of 1940.
- 24. Investment-Related:** Activities that pertain to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with an *investment adviser*, broker-dealer, municipal securities dealer, government securities broker or dealer, issuer, investment company, futures sponsor, bank, or savings association).
- 25. Investment Strategies:** The term includes plans or programs for the investment of proceeds of municipal securities that are not *municipal derivatives* or *guaranteed investment contracts*, and the recommendation of and brokerage of municipal escrow investments.
- 26. Involved:** Engaging in any act or omission, aiding, abetting, counseling, commanding, inducing, conspiring with, or failing reasonably to supervise another in an act.
- 27. Managing Agent:** Any *person*, including a trustee, who directs or manages, or who participates in directing or managing, the affairs of any unincorporated organization or association other than a partnership.
- 28. Minor Rule Violation:** A violation of a *self-regulatory organization* rule that has been designated as "minor" pursuant to a plan approved by the *SEC*. A rule violation may be

designated as “minor” under a plan if the sanction imposed consists of a fine of \$2,500 or less, and if the sanctioned *person* does not contest the fine. (Check with the appropriate *self-regulatory organization* to determine if a particular rule violation has been designated as “minor” for these purposes.)

- 29. Misdemeanor:** For jurisdictions that do not differentiate between a *felony* and a misdemeanor, a misdemeanor is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than \$1,000. This term also includes a special court martial.
- 30. MSRB or Board:** Municipal Securities Rulemaking Board.
- 31. Municipal Advisor:** Absent the availability of an exclusion under 17 CFR 240.15Ba1-1(d)(2) or an exemption under 17 CFR 240.15Ba1-1(d)(3), this term means a *person* (who is not a *municipal entity* or an *employee* of a *municipal entity*) that (i) provides advice to or on behalf of a *municipal entity* or *obligated person* with respect to *municipal financial products* or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a *solicitation of a municipal entity or obligated person*.
- 32. Municipal Advisor-Related:** Conduct that pertains to *municipal advisory activities* (including, but not limited to, acting as, or being an *associated person* of, a *municipal advisor*).
- 33. Municipal Advisory Activities:** This term means the following activities that, absent the availability of an exclusion under 17 CFR 240.15Ba1-1(d)(2) or an exemption under 17 CFR 240.15Ba1-1(d)(3) to the definition of *municipal advisor*, would cause a person to be a *municipal advisor*: (i) providing advice to or on behalf of a *municipal entity* or *obligated person* with respect to *municipal financial products* or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) *solicitation of a municipal entity or obligated person* acting in such capacity.
- 34. Municipal Advisory Firm:** Any organized entity that is a *municipal advisor*, including sole proprietors.
- 35. Municipal Derivatives:** Any swap (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) and section 3(a)(69) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(69)), including any rules and regulations thereunder) or security-based swap (as defined in Section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)), including any rules and regulations thereunder) to which (i) a *municipal entity* is a counterparty; or (ii) an *obligated person*, acting in such capacity, is a counterparty.
- 36. Municipal Entity:** Any State, political subdivision of a State, or municipal corporate instrumentality of a State, including (i) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (ii) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (iii) any other issuer of municipal securities.

- 37. Municipal Financial Products:** *Municipal derivatives, guaranteed investment contracts, and investment strategies.*
- 38. Non-Resident:** (i) In the case of an individual, one who resides in or has his *principal office and place of business* in any place not subject to the jurisdiction of the United States; (ii) in the case of a corporation, one incorporated in or that has its *principal office and place of business* in any place not subject to the jurisdiction of the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its *principal office and place of business* in any place not subject to the jurisdiction of the United States.
- 39. NYSE Regulation:** NYSE Regulation, Inc.
- 40. Obligated Persons:** Any *person*, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such *person*, committed by contract or other arrangement to support payment of all or part of the obligations of the municipal securities to be sold in an offering of municipal securities. This term does not include: (i) providers of municipal bond insurance, letters of credit, or other liquidity facilities; (ii) a *person* whose financial information or operating data is not material to a municipal securities offering, without reference to any municipal bond insurance, letter of credit, liquidity facility, or other credit enhancement; or (iii) the federal government.
- 41. Order:** A written directive issued pursuant to statutory authority and procedures, including an order of denial, exemption, suspension, or revocation. Unless included in an *order*, this term does not include special stipulations, undertakings, or agreements relating to payments, limitations on activity, or other restrictions.
- 42. Person:** An individual, sole proprietorship, or a firm. A firm includes any partnership, corporation, trust, limited liability company ("LLC"), limited liability partnership ("LLP"), or other organization.
- 43. Principal Place of Business or Principal Office and Place of Business:** The executive office of the *municipal advisor* from which the officers, partners, or managers of the *municipal advisor* direct, control, and coordinate the activities of the *municipal advisor*.
- 44. Proceeding:** This term includes a formal administrative or civil action initiated by a governmental agency, *self-regulatory organization* or *foreign financial regulatory authority*; a *felony* criminal indictment or information (or equivalent formal *charge*); or a *misdemeanor* criminal information (or equivalent formal *charge*). This term does not include other civil litigation, *investigations*, arrests or similar *charges* effected in the absence of a formal criminal indictment or information (or equivalent formal *charge*).
- 45. Resign:** relates to separation from employment with any employer, is not restricted to *municipal advisor-related* or *investment-related* employments, and would include any termination in which allegations are a proximate cause of separation, even if the individual initiated the separation.
- 46. Self-Regulatory Organization or SRO:** Any national securities or commodities exchange, registered securities association, or registered clearing agency. For example, the Chicago

Board of Trade ("CBOT"), *FINRA*, *MSRB*, and *NYSE Regulation* are self-regulatory organizations.

- 47. SEC or Commission:** Securities and Exchange Commission.
- 48. Solicitation or Solicitation of a Municipal Entity or Obligated Person:** A direct or indirect communication with a *municipal entity* or *obligated person* made by a *person*, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, *municipal advisor*, or *investment adviser* that does not *control*, is not *controlled* by, or is not under common *control* with the *person* undertaking such solicitation for the purpose of obtaining or retaining an engagement by a *municipal entity* or *obligated person* of a broker, dealer, municipal securities dealer, or *municipal advisor* for or in connection with *municipal financial products*, the issuance of municipal securities, or of an *investment adviser* to provide investment advisory services to or on behalf of a *municipal entity* or *obligated person*. The term does not include advertising by a broker, dealer, municipal securities dealer, *municipal advisor*, or *investment adviser*, or solicitation of an *obligated person*, if such *obligated person* is not acting in the capacity of an *obligated person* or the solicitation of the obligated person is not in connection with the issuance of municipal securities or with respect to *municipal financial products*.
- 49. Solicitee:** A *person* whom another *person* has *solicited* or intends to *solicit*.
- 50. State Regulatory Agency:** This term includes any State securities commission (or any agency or officer performing like functions); State authority that supervises or examines banks, savings associations, or credit unions; or State insurance commission (or any agency or office performing like functions to the above).
- 51. Supervised Person:** Any of the *municipal advisor's* officers, partners, directors (or other *persons* occupying a similar status or performing similar functions), or *employees*, or any other *person* who engages in *municipal advisory activities* on the *municipal advisor's* behalf and is subject to the *municipal advisor's* supervision or *control*.

FORM MA

APPLICATION FOR MUNICIPAL ADVISOR REGISTRATION ANNUAL UPDATE OF MUNICIPAL ADVISOR REGISTRATION AMENDMENT OF A PRIOR APPLICATION FOR REGISTRATION

Please read the General Instructions for this form and other forms in the MA series, as well as its subsection, "Specific Instructions for Certain Items in Form MA," before completing this form. All *italicized* terms herein are defined or described in the Glossary of Terms appended to the General Instructions.

PART I

This form must be completed by *municipal advisors* that are organized entities, including sole proprietors (referred to herein as "*municipal advisory firms*" or "firms," unless the context indicates otherwise).

WARNING: Complete this form truthfully. False statements or omissions may result in denial of application, revocation of registration, administrative or civil action, or criminal prosecution. Form MA must be amended promptly upon the occurrence of certain material events, and updated at least annually, within 90 days of the end of the *municipal advisor's* fiscal year, or, if a sole proprietor, the *municipal advisor's* calendar year. See General Instruction 8.

Type of Filing: This is an (check the appropriate box):

Initial application to register as a *municipal advisor* with the SEC.

Execution Page: After completing this form, you must complete the Execution Page.

Supporting Documentation: If you are required to make reportable disclosures in the Disclosure Reporting Pages, you must attach the supporting documentation.

Non-Resident Applicants: If you are a *non-resident* of the United States, certain additional requirements must be met at the time of filing your application, ***or processing of your application may be delayed***. See General Instruction 2.c. and subsection "General Instructions to Form MA-NR" of the General Instructions.

Annual update of *municipal advisor's* Form MA, for fiscal year ended _____, or, if a sole proprietor, for calendar year ended December 31, _____.

Execution Page: After completing this form, you must complete the Execution Page.

Changes: Are there changes in this *annual update* to information provided in the *municipal advisor's* most recent Form MA, other than the updated Execution Page? Yes No

Amendment (other than *annual update*) to any part of the *municipal advisor's* most recent Form MA.

Execution Page: After completing this form, you must complete the Execution Page.

Item 1 Identifying Information

A. Full Legal Name of the Firm:

(1) Firm Name: _____
Organization CRD No., if any: _____

(2) Sole Proprietor: If the applicant is a sole proprietor, check the box below, and provide full last name, first name, middle name, and suffix, if any:

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

Last Name First Name Middle Name Suffix

Individual CRD No., if any: _____

(3) Name Change: If full legal name has changed since the *municipal advisor's* most recent Form MA, check here and provide the previous full legal name.

B. Doing-Business-As (DBA) Name:

(1) If the name under which *municipal advisor-related* business is primarily conducted is different from Item 1-A., check here and provide the DBA name.

(2) Previous DBA Name:

If name under which *municipal advisor-related* business is primarily conducted has changed since the *municipal advisor's* most recent Form MA, check here and provide the previous name under which the *municipal advisor-related* business was primarily conducted.

(3) Additional Names:

(a) Is *municipal advisor-related* business conducted under any additional names? Yes No

(b) If "Yes," list any additional names on Section 1-B of Schedule D.

C. (1) IRS Employer Identification Number: _____

(2) If the applicant (such as a sole proprietor) has no employer identification number, provide the applicant's Social Security Number:

The Social Security Number will not be included in publicly available versions of this registration form.

D. Registrations

(1) Form MA-T Registration: Was the applicant previously registered on Form MA-T as a *municipal advisor*?

- Yes If "Yes," enter the SEC File No. MA-T: _____
 No

(2) Other Registrations: Is the applicant registered as or with any of the following?

Check all that apply. For each registration box you check, provide the requested file number(s). *An applicant firm should NOT provide the organization CRD number, or other specified number, of any of its organizational affiliates, or the individual CRD number of its officers, employees, or natural person affiliates.*

- Municipal Advisor* SEC File No.: _____
 Municipal Securities Dealer SEC File No.: _____
 Broker-Dealer SEC File No.: _____ Organization CRD No.: _____
 Investment Adviser
 SEC-Registered SEC File No.: _____ Organization CRD No.: _____
 Exempt Reporting Adviser SEC File No.: _____ Organization CRD No.: _____

Investment Adviser Registration in a US State or Other US Jurisdiction: If applicant is registered in a US state or other jurisdiction as an investment adviser, check the Registered in US State or Other US Jurisdiction box below and enter the organization CRD Number. In the table below, check the box for each US state or jurisdiction in which the applicant is so registered.

Registered in US State or Other US Jurisdiction Organization CRD No. _____

Check All That Apply	US State or Jurisdiction	Code	Check All That Apply	US State or Jurisdiction	Code
	Alabama	AL		Montana	MT
	Alaska	AK		Nebraska	NE
	Arizona	AZ		Nevada	NV
	Arkansas	AR		New Hampshire	NH
	California	CA		New Jersey	NJ
	Colorado	CO		New Mexico	NM
	Connecticut	CT		New York	NY
	Delaware	DE		North Carolina	NC
	District of Columbia	DC		North Dakota	ND
	Florida	FL		Ohio	OH
	Georgia	GA		Oklahoma	OK
	Guam	GU		Oregon	OR
	Hawaii	HI		Pennsylvania	PA
	Idaho	ID		Puerto Rico	PR
	Illinois	IL		Rhode Island	RI
	Indiana	IN		South Carolina	SC
	Iowa	IA		South Dakota	SD
	Kansas	KS		Tennessee	TN

	Kentucky	KY		Texas	TX
	Louisiana	LA		Utah	UT
	Maine	ME		Vermont	VT
	Maryland	MD		Virgin Islands	VI
	Massachusetts	MA		Virginia	VA
	Michigan	MI		Washington	WA
	Minnesota	MN		West Virginia	WV
	Mississippi	MS		Wisconsin	WI
	Missouri	MO			

Government Securities Broker-Dealer
SEC File No.: _____ Bank Identifier: _____

Other SEC Registration (Specify): _____
SEC File No. (if any): _____ EDGAR CIK (if any): _____

Another federal or state regulator (Specify): _____
Registration No. (if any): _____

(3) Additional Registrations

- (a) Does the applicant have any additional registrations that are not listed in subsection (2)? Yes No
- (b) If "Yes," list such additional registrations on **Section 1-D of Schedule D**.

E. Principal Office and Place of Business

(1) Address: (Do not use a P.O. Box.)

_____ (number and street)

_____ (city) _____ (state) _____ (country) _____ (postal code)

Telephone number at this location
(area code) (telephone number)

Fax number (if any) at this location
(area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

(2) Additional Offices:

- (a) Is *municipal advisor-related* business conducted at any office(s) other than applicant's principal office and place of business listed above? Yes No
- (b) If "Yes," list the five largest such additional offices on **Section 1-E of Schedule D**.

(3) Mailing Address:

Complete this item only if mailing address is different from principal office and place of business address in Item 1-E.(1):

_____ (number and street)

_____ (city) _____ (state) _____ (country) _____ (postal code)

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

F. Website

(1) Provide the address of the applicant's principal website (if any):
(specify) _____

(2) Does the applicant have additional websites? Yes No

(3) If "Yes," how many?
(specify) _____

If "Yes," list all additional website addresses on Section 1-F of Schedule D.

G. If the applicant has a Chief Compliance Officer, provide his or her name and contact information:

Please note that the applicant must provide name and contact information for either a *Chief Compliance Officer* in this Question 1-G., or another contact person in Question 1-H below. Both may be provided.

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

_____ Last Name _____ First Name _____ Middle Name

_____ (other title(s), if any)

_____ (number and street)

_____ (city) _____ (state) _____ (country) _____ (postal code)

_____ (area code) (telephone number) _____ (area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

_____ @ _____
(E-mail address of *Chief Compliance Officer*)

H. Contact Person: If a *person* other than the *Chief Compliance Officer* is authorized to receive information and respond to questions about this form, provide the name and contact information for that *person*:

Please note that the applicant must provide name and contact information for either a *Chief Compliance Officer* in Question 1-G. above, or another contact person in this Question 1-H. Both may be provided.

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

_____	_____	_____	_____
Last Name	First Name	Middle Name	

(other title(s), if any)			

(number and street)			
_____	_____	_____	_____
(city)	(state)	(country)	(postal code)
_____		_____	
(area code) (telephone number)		(area code) (fax number)	

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:
A private residential address will not be included in publicly available versions of this registration form.

@
(E-mail address of Contact Person)

I. Location of Books and Records

- (1) Does the applicant maintain, or intend to maintain, some or all of the books and records required to be kept under *MSRB* rules and *SEC* rules at a location other than the principal office and place of business address listed in Item 1-E? Yes No
- (2) If "Yes," list all such locations in Section 1-I of Schedule D.

J. Foreign Financial Regulatory Authorities

- (1) Is the applicant registered with a *foreign financial regulatory authority*? Answer "no" even if *affiliated* with a business that is registered with a *foreign financial regulatory authority*. Yes No
- (2) If "Yes," list all such registrations in **Section 1-J of Schedule D**.

K. Business Affiliates of the Applicant

- (1) Is the applicant *affiliated* with any other domestic or foreign business entity? Yes No
- (2) If "Yes," provide the names of all such *affiliates* and any applicable registrations in **Section 1-K of Schedule D**.

Item 2 Form of Organization

A. Applicant's Form of Organization

If this is not an initial application, and the applicant's form of organization has changed since the applicant's most recent Form MA, see Instruction 8 of the General Instructions.

- Corporation Sole Proprietorship Limited Liability Partnership (LLP)
 Partnership Limited Liability Company (LLC) Limited Partnership (LP)
 Other (specify): _____

B. Month of Applicant's Annual Fiscal Year End _____

(Sole proprietors are not required to complete this subpart B.)

C. State, Other US Jurisdiction, or Foreign Jurisdiction Under Which Applicant is Organized

If the applicant is a corporation or limited liability company, indicate the state or jurisdiction where the applicant is incorporated. If the applicant is a partnership, indicate the name of the state or jurisdiction under the laws of which the partnership was formed. If applicant is a sole proprietor, indicate the state or jurisdiction in which applicant resides.

If this is not an initial application for registration, and the applicant's information has changed since the applicant's most recent Form MA, see General Instruction 8.

Enter the full name of the state or other US jurisdiction, or the full name, in English, of the foreign jurisdiction: _____

D. Date of Organization: _____

E. Public Reporting Company

- (1) Is the applicant a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934? Yes No

- (2) If "Yes," provide applicant's EDGAR CIK number: _____

Item 3 Successions

A. Is the applicant, at the time of this filing, succeeding to the business of a registered *municipal advisor*?

If this succession was previously reported on Form MA, do not report the succession again. Instead, check "No." See Instruction 1 of the Specific Instructions for Certain Items in Form MA included in the General Instructions.

- Yes If "Yes," enter the Date of Succession: _____
(mm/dd/yyyy)
 No

B. If "Yes" in Item 3-A., complete Section 3 of Schedule D.

Item 4 Information About Applicant's Business

Note: Instruction 2 of the Specific Instructions for Certain Items in Form MA included in the General Instructions provides guidance for newly formed municipal advisors completing this Item 4.

Employees

If the applicant is organized as a sole proprietorship, include the sole proprietor as an employee.

- A. Number of Employees:** Approximate number of *employees* of applicant. Include full- and part-time *employees*, but do not include clerical, administrative, or support workers (or workers performing similar functions): _____ (If none, enter a zero.)
- B. Municipal Advisory Activities:** Approximately how many of these *employees* engage in *municipal advisory activities*? (Include such *employees* even if they perform other functions in addition to engaging in *municipal advisory activities*.) _____ (If none, enter a zero.)
- C. Registered Representatives**
- (1) Approximately how many of the *employees* who are included in the response to part B are registered representatives of a broker-dealer? _____ (If none, enter a zero.)
- (2) Approximately how many are investment adviser representatives? _____ (If none, enter a zero.)

D. Firms and Other Persons that Solicit on Behalf of the Applicant

Approximately how many firms and other *persons* who are not employed by the applicant and who are not otherwise *associated persons* of the applicant *solicit clients* on the applicant's behalf? (Count a firm only once; do not count each of the firm's *employees* that *solicits* on the applicant's behalf.)

_____ (If none, enter a zero.)

Please list the names of these firms and other *persons* on **Section 4-D of Schedule D**.

E. Employees Also Acting as Affiliates of the Applicant

- (1) Does the applicant have any *employees* that also do business independently on the applicant's behalf as *affiliates* of the applicant? Yes No
- (2) If "Yes," provide the total number of such *employees*: _____
- (3) List the names of these *employees* on **Section 4-E of Schedule D**.

Clients

F. Types of Clients: Approximately how many *clients* did the applicant serve in the context of its *municipal advisory activities* during its most-recently completed fiscal year? _____ (If none, enter a zero and check box 5 below.)

The applicant has the following types of *clients*:

Check all that apply.

- (1) *Municipal entities*
- (2) Non-profit organizations (e.g., 501(c)(3) organizations) who are *obligated persons*
- (3) Corporations or other businesses not listed above who are *obligated persons*
- (4) Other: _____
- (5) Not applicable - applicant engages only in *solicitation*; does not serve *clients* in the context of its *municipal advisory activities*.

G. Solicitations of Municipal Entities and Obligated Persons

Approximately how many *municipal entities* and *obligated persons* were *solicited* by the applicant on behalf of a third-party during its most-recently completed fiscal year? (If the applicant *solicits its clients* in addition to serving these *clients* in the context of its *municipal advisory activities*, the *clients* should be counted in the response to this Part G even if counted in Part F.)

- (1) *Municipal Entities*: _____ (If none, enter a zero.)
- (2) *Obligated Persons*: _____ (If none, enter a zero.)
- (3) Total: _____

H. Types of Persons Solicited

The applicant *solicits* the following types of *persons*:

Check all that apply.

- (1) Public pension funds
- (2) 529 Plans
- (3) Local government investment pools
- (4) State government investment pools
- (5) Hospitals
- (6) Colleges
- (7) Other: _____
- (8) Not applicable – applicant only serves *clients*; does not engage in *solicitation* in the context of its *municipal advisory activities*.

Compensation Arrangements

I. Applicant is compensated for its advice to or on behalf of *municipal entities* or *obligated persons* with respect to *municipal financial products* or the issuance of *municipal securities* by:

Check all that apply.

- (1) Hourly charges
- (2) Fixed fees (not contingent on the issuance of *municipal securities*)
- (3) *Contingent fees*
- (4) Subscription fees (for a newsletter or other publications)
- (5) Other (specify): _____
- (6) Not applicable – applicant engages only in *solicitation*; does not serve *clients* in the context of its *municipal advisory activities*.

J. Applicant is compensated for its *solicitation* activities by:

Check all that apply.

- (1) Hourly charges
- (2) Fixed fees (not contingent on the success of *solicitations*)
- (3) *Contingent fees*
- (4) Subscription fees (for a newsletter or other publications)
- (5) Other (specify): _____
- (6) Not applicable; applicant only serves *clients*; does not engage in *solicitation* as part of its *municipal advisory activities*.

K. Does the applicant receive compensation, in the context of its *municipal advisory activities*, from anyone other than *clients*? Yes No

If "Yes," please explain:

Applicant's Business Relating to Municipal Securities

L. Applicant is engaged in the following types of activities:

Check all that apply.

- (1) Advice concerning the issuance of *municipal securities* (including, without limitation, advice concerning the structure, timing, terms and other similar matters, such as the preparation of feasibility studies, tax rate studies, appraisals and similar documents, related to an offering of *municipal securities*)
- (2) Advice concerning the investment of the proceeds of *municipal securities* (including, without limitation, advice concerning the structure, timing, terms and other similar matters concerning such investments)
- (3) Advice concerning *municipal escrow investments* (including, without limitation, advice concerning their structure, timing, terms and other similar matters)
- (4) Advice concerning the investment of other funds of a *municipal entity* (including, without limitation, advice concerning the structure, timing, terms and other similar matters concerning

- such investments)
- (5) Advice concerning *guaranteed investment contracts* (including, without limitation, advice concerning their structure, timing, terms and other similar matters)
 - (6) Advice concerning the use of *municipal derivatives* (including, without limitation, advice concerning their structure, timing, terms and other similar matters)
 - (7) *Solicitation* of investment advisory business from a *municipal entity* or *obligated person* (including, without limitation, municipal pension plans) on behalf of an unaffiliated broker, dealer, *municipal advisor* or *investment adviser* (e.g., third party marketers, placement agents, solicitors, and finders)
 - (8) *Solicitation* of business other than investment advisory business from a *municipal entity* or *obligated person* on behalf of an unaffiliated *person* or firm (e.g., third party marketers, placement agents, solicitors, and finders)
 - (9) Advice or recommendations concerning the selection of other *municipal advisors* or underwriters with respect to *municipal financial products* or the issuance of municipal securities
 - (10) Brokerage of municipal escrow investments
 - (11) Other (specify): _____

Item 5 Other Business Activities

A. Applicant is actively engaged in business in or as a:

Other Business		(i) Is Applicant Actively Engaged? Check all that apply.	(ii) Is this Applicant's Primary Business(es)? Check all that apply.	(iii) Jurisdiction(s) where licensed:
1.	Broker-dealer, municipal securities dealer or government securities broker or dealer	<input type="checkbox"/>	<input type="checkbox"/>	
2.	Registered representative of a broker-dealer	<input type="checkbox"/>	<input type="checkbox"/>	
3.	Commodity pool operator (whether registered or exempt from registration)	<input type="checkbox"/>	<input type="checkbox"/>	
4.	Commodity trading advisor (whether registered or exempt from registration)	<input type="checkbox"/>	<input type="checkbox"/>	
5.	Futures commission merchant	<input type="checkbox"/>	<input type="checkbox"/>	
6.	Major swap participant	<input type="checkbox"/>	<input type="checkbox"/>	
7.	Major security-based swap participant	<input type="checkbox"/>	<input type="checkbox"/>	
8.	Swap dealer	<input type="checkbox"/>	<input type="checkbox"/>	
9.	Security-based swap dealer	<input type="checkbox"/>	<input type="checkbox"/>	
10.	Trust company	<input type="checkbox"/>	<input type="checkbox"/>	
11.	Real estate broker, dealer, or agent	<input type="checkbox"/>	<input type="checkbox"/>	
12.	Insurance company, broker, or agent	<input type="checkbox"/>	<input type="checkbox"/>	
13.	Banking or thrift institution (including a separately identifiable department or division of a bank)	<input type="checkbox"/>	<input type="checkbox"/>	
14.	Investment adviser (including financial planners)	<input type="checkbox"/>	<input type="checkbox"/>	

15.	Attorney or law firm	<input type="checkbox"/>	<input type="checkbox"/>	_____ _____ _____
16.	Accountant or accounting firm	<input type="checkbox"/>	<input type="checkbox"/>	_____ _____ _____
17.	Engineer or engineering firm	<input type="checkbox"/>	<input type="checkbox"/>	
18.	Other financial product advisor (specify): _____ _____ _____	<input type="checkbox"/>	<input type="checkbox"/>	

B. Other Business:

- (1) Is applicant actively engaged in any other business not listed in Part A of this Item (other than engaging in *municipal advisory activities*)? Yes No
- (2) If "Yes" to Part B-1., is this other business applicant's primary business? Yes No
- (3) If "Yes" to Part B-2., describe the other business on Section 5-B of Schedule D.

Item 6 Financial Industry and Other Activities of Associated Persons

A. Applicant has one or more associated persons that is a:

Check all that apply.

"Associated Person" herein refers to a person who is an associated person of a municipal advisor. Note that "associated person" includes employees and persons with control over the municipal advisor that do not themselves engage in municipal advisory activities, but does not include employees that are performing solely clerical, administrative, support or other similar functions. Note also that more than one box may be applicable to any such associated person. For example, if an associated person is both a swap dealer and security-based swap dealer, check both boxes (4) and (5) below.

- (1) Broker-dealer, municipal securities dealer, or government securities broker or dealer
- (2) Investment company (including mutual funds)
- (3) Investment adviser (including financial planners)
- (4) Swap dealer
- (5) Security-based swap dealer
- (6) Major swap participant
- (7) Major security-based swap participant
- (8) Commodity pool operator (whether registered or exempt from registration)
- (9) Commodity trading advisor (whether registered or exempt from registration)
- (10) Futures commission merchant
- (11) Banking or thrift institution
- (12) Trust company
- (13) Accountant or accounting firm
- (14) Attorney or law firm

- (15) Insurance company or agency
- (16) Pension consultant
- (17) Real estate broker or dealer
- (18) Sponsor or syndicator of limited partnerships
- (19) Engineer or engineering firm
- (20) Other *municipal advisor*

Total Associated Persons: Provide the total number of all such *associated persons*: _____

Provide the total number of such associated persons, not the number of boxes checked. For example, if the applicant's associated persons are 2 broker-dealers, 1 investment company, and 2 pension consultants, then 3 boxes would be checked in Item 6-A.1 to 20, while the total number of such associated persons entered in Item 6-A, Total Associated Persons, would be 5. If there are no associated persons, enter 0.

B. Applicant must list all such associated persons, including foreign associated persons, on Section 6 of Schedule D.

If Item 6-A, Total Associated Persons, is 2 or more, the applicant must complete a separate Section 6 of Schedule D for each associated person.

Item 7 Participation or Interest of Applicant, or of Associated Persons of Applicant, in Municipal Advisory Client or Solicitee Transactions

Proprietary Interest in Municipal Advisory Client or Solicitee Transactions

A. Does applicant or any associated person:

- (1) buy securities or other investment or derivative products for itself from *clients* or *solicitees* in the context of its *municipal advisory activities*, or sell securities it owns to such *clients* or *solicitees*? Yes No
- (2) buy or sell for itself securities (other than shares of mutual funds) or other investment or derivative products that the applicant also recommends to such *clients* or *solicitees*? Yes No
- (3) enter into derivatives contracts with such *clients* or *solicitees*? Yes No
- (4) recommend securities or other investment or derivative products to such *clients* or *solicitees* in which applicant or any *associated person* has some other proprietary (ownership) interest (other than those mentioned in Items 7-A(1), (2) or (3) above)? Yes No

Sales Interest in Client or Solicitee Transactions

B. Does applicant or any associated person:

- (1) recommend purchases of securities or derivatives to *clients* or *solicitees* that are served by the applicant or *associated person*, for which the applicant or any *associated person* serves as underwriter, general or managing partner, or purchaser representative? Yes No
- (2) recommend purchases or sales of securities or derivatives to such *clients* or *solicitees* in which applicant or any *associated person* has any other sales interest (other than the receipt of sales commissions as a broker or registered representative of a broker-dealer)? Yes No

Investment or Brokerage Discretion

C. Does applicant or any *associated person* have *discretionary authority* to determine the:

- (1) securities or other investment or derivative products to be bought or sold for the account of a *client* or *solicitee*? Yes No
- (2) amount of securities or other investment or derivative products to be bought or sold for the account of such a *client* or *solicitee*? Yes No
- (3) (a) broker or dealer to be used for a purchase or sale of securities or other investment or derivative products for the account of such a *client* or *solicitee*? Yes No
- (b) If "Yes," are any of the brokers or dealers *associated persons*? Yes No
- (4) commission rates or other fees to be paid to a broker or dealer for such a *client's* or *solicitee's* securities transactions or transactions in other investment or derivative products? Yes No

D. (1) Does applicant or any *associated person* recommend brokers, dealers or *investment advisers* to *clients* or *solicitees* in the context of its *municipal advisory activities*? Yes No

- (2) If "Yes," is any such broker, dealer, or *investment adviser* an *associated person*? Yes No

In responding to Items 7-E and 7-F below, consider all cash and non-cash compensation that the applicant or an associated person gave or received from any person in exchange for referrals of such clients or solicitees, including any bonus that is based, at least in part, on the number or amount of such referrals.

E. Does the applicant or any *associated person*, directly or indirectly, compensate any person for referrals of *clients* or *solicitees* in connection with *municipal advisory activities*? Yes No

F. Does the applicant or any *associated person*, directly or indirectly, receive compensation from any person for referrals of *clients* or *solicitees* in connection with *municipal advisory activities*? Yes No

Item 8 Owners, Officers, and Other Control Persons

A. Identifying Owners, Officers, and Other Control Persons

- (1) In this Item, identify every *person* that, directly or indirectly, *controls* the applicant, or that the applicant directly or indirectly *controls*.
- (a) If this is an initial application, the applicant must complete Schedule A and Schedule B. Schedule A asks for information about direct owners and executive officers. Schedule B asks for information about indirect owners.
- (b) If this is an amendment updating information reported on either the Schedule A or Schedule B (or both) filed with the applicant's initial application, the applicant must also complete Schedule C.
- (2) Does any *person* not named in Item 1-A or Schedules A, B, or C, directly or indirectly, *control* the applicant's management or policies? Yes No
- (3) If "Yes" to Item 8-A.2. above, complete Section 8-A of Schedule D.

B. Public Reporting Companies

(1) Is any *person* in Schedules A, B, or C, or in Section 8-A of Schedule D a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934? Yes No

(2) If "Yes" to Item 8-B.1. above, complete Section 8-B of Schedule D.

Item 9 Disclosure Information

In this Item, provide information about the criminal, regulatory, and judicial history, if any, of the applicant and each associated person of the applicant.

This information is used to determine whether to approve an application for registration, to decide whether to revoke registration, or to place limitations on the applicant's activities as a municipal advisor, and to identify potential problem areas on which to focus during on-site examinations. One event may result in the requirement to answer "Yes" to more than one question below.

Refer to the Glossary of Terms for explanations of italicized terms, such as associated person.

Criminal Action Disclosure

If the answer is "Yes" to any question below in Part A or B below, complete a Criminal Action DRP.

Disclosure of any event listed in this Criminal Action Disclosure section is not required if the date of the event was more than ten years ago. For purposes of calculating this ten-year period, the date of an event is the date that the final order, judgment, or decree was entered, or the date that any rights of appeal from preliminary orders, judgments, or decrees lapsed.

Check all that apply:

A. In the past ten years, has the applicant or any associated person:

(1) been convicted of any *felony*, or pled guilty or nolo contendere ("no contest") to any *charge* of a *felony*, in a domestic, foreign, or military court? Yes No

(2) been *charged* with any *felony*? Yes No

The response to Item 9-A(2) may be limited to charges that are currently pending.

B. In the past ten years, has the applicant or any associated person:

(1) been convicted of any *misdemeanor*, or pled guilty or nolo contendere ("no contest"), in a domestic, foreign, or military court to any *charge* of a *misdemeanor* in a case *involving: municipal advisor-related business, investments or an investment-related business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?* Yes No

(2) been *charged* with a *misdemeanor* of the kind listed in Item 9-B(1)? Yes No

The response to Item 9-B(2) may be limited to charges that are currently pending.

Regulatory Action Disclosure

If the answer is "Yes" to any question in Parts C-G below, complete a **Regulatory Action DRP**.

Check all that apply:

C. Has the SEC or the CFTC ever:

- (1) found the applicant or any associated person to have made a false statement or omission? Yes No
- (2) found the applicant or any associated person to have been involved in a violation of any SEC or CFTC regulation or statute? Yes No
- (3) found the applicant or any associated person to have been a cause of the denial, suspension, revocation, or restriction of the authorization of a municipal advisor-related or an investment-related business to operate? Yes No
- (4) entered an order against the applicant or any associated person in connection with municipal advisor-related or investment-related activity? Yes No
- (5) imposed a civil money penalty on the applicant or any associated person, or ordered the applicant or any associated person to cease and desist from any activity? Yes No

D. Has any other federal regulatory agency, any state regulatory agency, or any foreign financial regulatory authority ever:

- (1) found the applicant or any associated person to have made a false statement or omission, or been dishonest, unfair, or unethical? Yes No
- (2) found the applicant or any associated person to have been involved in a violation of municipal advisor-related or investment-related regulations or statutes? Yes No
- (3) found the applicant or any associated person to have been the cause of a denial, suspension, revocation, or restriction of the authorization of a municipal advisor-related or an investment-related business to operate? Yes No
- (4) entered an order against the applicant or any associated person in connection with a municipal advisor-related or investment-related activity? Yes No
- (5) denied, suspended, or revoked the registration or license of the applicant or that of any associated person, or otherwise prevented the applicant or any associated person, by order, from associating with a municipal advisor-related or investment-related business or restricted the activities of the applicant or any associated person? Yes No

E. Has any self-regulatory organization or commodities exchange ever:

- (1) found the applicant or any associated person to have made a false statement or omission? Yes No
- (2) found the applicant or any associated person to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the SEC)? Yes No

(3) *found* the applicant or any *associated person* to have been the cause of a denial, suspension, revocation or restriction of the authorization of a *municipal advisor-related* or an *investment-related* business to operate? Yes No

(4) disciplined the applicant or any *associated person* by expelling or suspending the applicant or the *associated person* from membership, barring or suspending the applicant or the *associated person* from association with other members, or by otherwise restricting the activities of the applicant or the *associated person*? Yes No

F. Revocation or Suspension: Has the applicant or any *associated person* ever had an authorization to act as an attorney, accountant, or federal contractor revoked or suspended? Yes No

G. Regulatory Proceedings: Is the applicant or any *associated person* currently the subject of any regulatory *proceeding* that could result in a "Yes" answer to any part of Item 9-C, 9-D, or 9-E? Yes No

Civil Judicial Disclosure

If the answer is "Yes" to a question below, complete a Civil Judicial Action DRP.

Check all that apply:

H. (1) Has any domestic or foreign court ever:

(a) *enjoined* the applicant or any *associated person* in connection with any *municipal advisor-related* or *investment-related* activity? Yes No

(b) *found* that the applicant or any *associated person* was *involved* in a violation of any *municipal advisor-related* or *investment-related* statute(s) or regulation(s)? Yes No

(c) dismissed, pursuant to a settlement agreement, a *municipal advisor-related* or *investment-related* civil action brought against the applicant or any *associated person* by a state or other US jurisdiction or a *foreign financial regulatory authority*? Yes No

(2) Current Proceedings: Is the applicant or any *associated person* the subject of any currently pending civil *proceeding* that could result in a "Yes" answer to any part of Item 9-H(1)? Yes No

Item 10 Small Businesses

The *SEC* is required by the Regulatory Flexibility Act to consider the effect of its regulations on small entities. In order to do this, the *SEC* needs to determine whether you meet the Small Business Administration's definition of "small business" for purposes of entities that provide investment and related activities. Accordingly, answer "Yes" or "No," as appropriate, to the questions below:

A. Did the applicant have annual receipts of less than \$7 million during its most recent fiscal year (or during the time the applicant has been in business, if it has not completed its first fiscal year in business)? Yes No

B. Is the applicant *affiliated* with any business or organization that had annual receipts of \$7 million or more during its most recent fiscal year (or during the time it has been in business, if it has not completed its first fiscal year in business)? Yes No

FORM MA

SCHEDULE A

Direct Owners and Executive Officers of the Applicant

1. **Complete Schedule A only if submitting an initial application.** Schedule A asks for information about the applicant's direct owners and executive officers. Use Schedule C to amend this information. To determine direct ownership and executive officer status, see instruction 2 below.

Separate subparts of Schedule A must be completed for: (1) direct owners that are business entities, and (2) direct owners and executive officers who are natural persons, as follows:

- **Complete Schedule A-1: "Direct Owners of Applicant – Business Entities,"** for owners that are organized as a business or other legal entity, such as a corporation, partnership, trust, or limited liability company.
- **Complete Schedule A-2: "Direct Owners and Executive Officers of Applicant – Natural Persons,"** for owners who are individuals, including sole proprietors, and for executive officers.

2. **List in either Schedule A-1 or Schedule A-2 below, or both, as applicable, the full names of:**

- (a) **If applicant is organized as a corporation,** each shareholder that is a direct owner of 5% or more of a class of the applicant's voting securities, unless applicant is a public reporting company (a company subject to Sections 12 or 15(d) of the Exchange Act). Direct owners include any *person* that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of the applicant's voting securities. For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security;
- (b) **If the applicant is organized as a partnership,** all general partners and each limited and special partner that has the right to receive upon dissolution, or has contributed, 5% or more of the applicant's capital;
- (c) **In the case of a trust,** a *person* that directly owns 5% or more of a class of the applicant's voting securities, or that has the right to receive upon dissolution, or has contributed, 5% or more of the applicant's capital, the trust and each trustee;
- (d) **If the applicant is organized as a limited liability company ("LLC"),** (i) each member that has the right to receive upon dissolution, or has contributed, 5% or more of the applicant's capital, and (ii) if managed by elected managers, all elected managers; and
- (e) **Each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, director** and any other individuals with similar status or functions (applies in Schedule A-2 only).

3. **In the DE/FE column of Schedule A-1 below,** enter "DE" if the owner is a domestic entity, or "FE" if the owner is an entity organized, incorporated or domiciled in a foreign country.

4. **Complete the Title or Status column** by entering board/management titles; status as partner, trustee, sole proprietor, elected manager, shareholder, or member. For shareholders or members, indicate the class of securities owned (if more than one is issued). In the next column, indicate the date that the title or status was

acquired.

5. Ownership codes are:

- NA - less than 5%
- A - 5% but less than 10%
- B - 10% but less than 25%
- C - 25% but less than 50%
- D - 50% but less than 75%
- E - 75% or more

6. (a) In the **Control Person** column, enter "Yes" in the first sub-column if the *person* has *control* as defined in the Glossary of Terms to Form MA, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.

(b) In the **PR** sub-column (**Schedule A-1 only**) enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.

7. (a) For **Schedule A-1**, enter the organization *CRD* number. If not registered with the *CRD*, then enter the IRS Tax Number, Employer Identification Number ("EIN"), or Foreign Business Number.

(b) For **Schedule A-2**, enter the individual *CRD* number. If not registered with the *CRD*, then enter the Social Security Number ("SSN") or Foreign Identity Number; and enter the Date of Birth ("DOB"). Social security numbers, foreign identity numbers, and dates of birth will not be publicly disseminated.

8. Does applicant have any indirect owners to be reported on Schedule B? Yes No

Schedule A-1: Direct Owners of Applicant – Business Entities

BUSINESS ENTITY FULL LEGAL NAME	DE/FE	Title or Status	Date Title or Status Acquired		Ownership Code	Control Person		Organization <i>CRD</i> No. (If None: IRS Tax No., EIN, or Foreign Business No.)				
			MM	YYYY		Yes/ No	PR	<i>CRD</i> No.	IRS Tax No.	EIN	Foreign Bus. No.	

Schedule A-2: Direct Owners and Executive Officers of Applicant – Natural Persons

NATURAL PERSON FULL LEGAL NAME			Title or Status	Date Title or Status Acquired		Ownership Code	Control Person		Individual <i>CRD</i> No. (If None: SSN and DOB, or Foreign ID No. and DOB)			
Last Name	First Name	Middle Name		MM	YYYY		Yes/No	CRD No.	SSN	DOB	Foreign ID No.	





FORM MA

SCHEDULE B

Indirect Owners of the Applicant

- 1. Complete Schedule B only if applicant is submitting an initial application.** Schedule B asks for information about the applicant's indirect owners. The applicant must first complete Schedule A, which asks for information about direct owners. For purposes of Schedule B, an "indirect owner" includes any owner of 25% or more of any direct owner listed in Schedule A, and any owner of 25% or more of each such indirect owner going up the chain of ownership. Use Schedule C to amend the information in this schedule. To determine indirect ownership, see instructions 2 and 3 below.

Separate subparts of Schedule B must be completed for: (1) indirect owners that are business entities, and (2) indirect owners who are natural persons, as follows:

- **Complete Schedule B-1: "Indirect Owners of Applicant – Business Entities,"** for owners who are organized as business or other legal entities, such as a corporation, partnership, trust, or limited liability company.
 - **Complete Schedule B-2: "Indirect Owners of Applicant – Natural Persons,"** for individuals and sole proprietors.
- 2. With respect to each direct owner listed on Schedule A-1 (business entities), list in either Schedule B-1 or Schedule B-2 below, as applicable:**
 - (a) in the case of a direct owner listed on Schedule A-1 that is a corporation,** each of its shareholders that beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 25% or more of a class of a voting security of that corporation;

For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.
 - (b) in the case of a direct owner listed on Schedule A-1 that is a partnership,** all general partners and each limited and special partner that has the right to receive upon dissolution, or has contributed, 25% or more of the partnership's capital;
 - (c) in the case of a direct owner listed on Schedule A-1 that is a trust,** the trust and each trustee; and
 - (d) in the case of a direct owner listed on Schedule A-1 that is a limited liability company ("LLC"),** (i) each member that has the right to receive upon dissolution, or has contributed, 25% or more of the LLC's capital, and (ii) if managed by elected managers, each elected manager.
 - 3. Continue up the chain of indirect ownership listing all 25% shareholders at each level.** Once a public reporting company (a company subject to Sections 12 or 15(d) of the Exchange Act) is reached, no further ownership information need be given.
 - 4. In the DE/FE column in Schedule B-1 below,** enter "DE" if the indirect owner is a domestic entity, or "FE" if the owner is an entity organized, incorporated or domiciled in a foreign country. Complete the next column by indicating the entity in the chain of ownership in which this indirect owner has an interest.
 - 5. Complete the Status column** by entering the indirect owner's status as partner, trustee, elected manager,

shareholder, or member. For shareholders or members, indicate the class of securities owned (if more than one is issued).

6. Ownership codes are:

- C - 25% but less than 50%
- D - 50% but less than 75%
- E - 75% or more
- F - Other (general partner, trustee, or elected manager)

7. (a) **In the Control Person column**, enter "Yes" in the first sub-column if the *person* has *control* as defined in the Glossary of Terms to Form MA, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.

(b) **In the PR sub-column, for Schedule B-1 only**, enter "PR" if the indirect owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.

8. (a) **For Schedule B-1**, enter the organization *CRD* number. If not registered with the *CRD*, then enter the IRS Tax Number, Employer Identification Number ("EIN"), or Foreign Business Number.

(b) **For Schedule B-2**, enter the individual *CRD* number. If not registered with the *CRD*, then enter the Social Security Number ("SSN") or Foreign Identity Number; and enter the Date of Birth ("DOB"). Social security numbers, foreign identity numbers, and dates of birth will not be publicly disseminated.

Schedule B-1: Indirect Owners of Applicant – Business Entities

BUSINESS ENTITY FULL LEGAL NAME	DE/FE	Entity In Which Interest Is Owned	Title or Status	Date Title or Status Acquired		Ownership Code	Control Person		Organization <i>CRD</i> No. (If None: IRS Tax No., EIN, or Foreign Business No.)				
				MM	YYYY		Yes/No	PR	<i>CRD</i> No.	IRS Tax No.	EIN	Foreign Bus. No.	

Schedule B-2: Indirect Owners of Applicant – Natural Persons

NATURAL PERSON FULL LEGAL NAME			Entity In Which Interest Is Owned	Status	Date Title or Status Acquired		Ownership Code	Control Person	Individual <i>CRD</i> No. (If None: SSN and DOB, or Foreign ID No. and DOB)				
Last Name	First Name	Middle Name			MM	YYYY			Yes/No	<i>CRD</i> No.	SSN	DOB	Foreign ID No.

FORM MA

SCHEDULE C

Amendments to Schedules A and B

1. Use Schedule C only to amend information requested on either Schedule A or Schedule B. Refer to instructions in Schedule A and Schedule B, which also apply for this Schedule C.
2. In the Type of Amendment column, indicate "A" (addition), "D" (deletion), or "C" (change in information about the same person).

3. Ownership codes are:

- NA - less than 5%
- A - 5% but less than 10%
- B - 10% but less than 25%
- C - 25% but less than 50%
- D - 50% but less than 75%
- E - 75% or more
- F - Other (general partner, trustee, or elected member)

4. List below all changes to Schedule A:

Schedule A-1: Direct Owners of Applicant – Business Entities

TYPE OF AMENDMENT	BUSINESS ENTITY FULL LEGAL NAME	DE/FE	Title or Status	Date Title or Status Acquired		Ownership Code	Control Person		Organization CRD No. (If None: IRS Tax No., EIN, or Foreign Business No.)					
				MM	YYYY		Yes/No	PR	CRD No.	IRS Tax No.	EIN	Foreign Bus. No.		

Schedule A-2: Direct Owners and Executive Officers of Applicant – Natural Persons

TYPE OF AMENDMENT	NATURAL PERSON FULL LEGAL NAME			Title or Status	Date Title or Status Acquired		Ownership Code	Control Person	Individual CRD No. (If None: SSN and DOB or Foreign ID No. and DOB)					
	Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.				MM	YYYY			Yes/No	CRD No.	SSN	DOB	Foreign ID No.	
	Last Name	First Name	Middle Name											

5. List below all changes to Schedule B:

Schedule B-1: Indirect Owners of Applicant – Business Entities

TYPE OF AMENDMENT	BUSINESS ENTITY FULL LEGAL NAME	DE /FE	Entity In Which Interest Is Owned	Status	Date Title or Status Acquired		Ownership Code	Control Person		Organization CRD No. (If None: IRS Tax No., EIN, or Foreign Business No.)
					MM	YYYY		Yes/No	PR	

Schedule B-2: Indirect Owners of Applicant – Natural Persons

TYPE OF AMENDMENT	NATURAL PERSON FULL LEGAL NAME			Entity In Which Interest Is Owned	Status	Date Title or Status Acquired		Ownership Code	Control Person	Individual CRD No. (If None: SSN and DOB or Foreign ID No. and DOB)				
	Last Name	First Name	Middle Name			MM	YYYY			Yes/No	CRD No.	SSN	DOB	Foreign ID No.

FORM MA

SCHEDULE D

Certain items in Part I of Form MA require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an: INITIAL or AMENDED Schedule D or ANNUAL UPDATE

SECTION 1-B Other Names under which *Municipal Advisor-Related Business* is Conducted

List the applicant's other business names and the jurisdictions in which they are used. A separate Schedule D must be completed for each business name and the jurisdictions where that name is used.

Select only one: Add Delete Amend
Name _____ Jurisdictions: _____
(List all jurisdictions.)

SECTION 1-D Additional Registrations of the Applicant

Indicate any additional registrations with federal or state regulators, and the relevant registration number. A separate Schedule D must be completed for each such registration.

Name _____ Registration No. _____

SECTION 1-E Additional Offices at which the Applicant's *Municipal Advisor-Related Business* is Conducted

Provide the location of the largest five additional offices (in terms of numbers of *employees*) at which the applicant's *municipal advisor-related* business is conducted other than applicant's *principal office and place of business*. A separate Schedule D must be completed for each such office.

Select only one: Add Delete Amend

(number and street)

(city) (state) (country) (postal code)

Telephone number at this location
(area code) (telephone number)

Fax number (if any) at this location
(area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:
A private residential address will not be included in publicly available versions of this registration form.

SECTION 1-F Additional Website Addresses

List any additional website addresses of the applicant. A separate Schedule D must be completed for each such website address.

Select only one: Add Delete Amend
Website Address: _____

SECTION 1-I Location of Books and Records

Complete the following information for each location at which the applicant keeps books and records, other than its principal office and place of business. A separate Schedule D must be completed for each location.

Select only one: Add Delete Amend

Name of entity where books and records are kept: _____

(number and street)

(city)

(state)

(country)

(postal code)

Telephone number at this location
(area code) (telephone number)

Fax number (if any) at this location
(area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

This is (select only one):

- one of applicant's branch offices or *affiliates*
- a third-party unaffiliated recordkeeper
- other

Briefly describe the books and records kept at the location(s) you checked. If you checked "other," describe additionally all such location(s).

SECTION 1-J Registration with Foreign Financial Regulatory Authorities

List the full name, in English, of each *foreign financial regulatory authority*, provide the foreign registration number (if any), and list the full name, in English, of the country with which the applicant is registered. A separate Schedule D must be completed for each *foreign financial regulatory authority* with whom the applicant is registered.

Select only one: Add Delete Amend

English Name of *Foreign Financial Regulatory Authority*

Foreign Registration
No. (if any)

English Name of Country

SECTION 1-K Business Affiliates of the Applicant

Provide the name of any domestic or foreign business *affiliate* of the applicant, and any federal, state, or foreign registration of such *affiliate* and the registration number. A separate Schedule D must be completed for each such *affiliate*.

Name of *Affiliate*: _____

1. Does the *affiliate* have an applicable federal, state, or foreign registration? Yes No

2. If "Yes" to Section 1-K (1) above, provide the:

(a) Name of Agency Issuing Registration (in English): _____

(b) Registration No., if any: _____

(c) Provide the jurisdiction (check the appropriate box, and if a US state or other jurisdiction, or a foreign country, provide the name of the jurisdiction):

US Federal

US State or Other US Jurisdiction: _____

Foreign Country Name (in English): _____

SECTION 3 Successions

Complete the following information if succeeding to the business of a currently-registered *municipal advisor*. If the applicant succeeded more than one *municipal advisory firm* in the succession being reported on this Form MA, a separate Schedule D must be completed for each predecessor firm. See Instruction 1 of the Specific Instructions for Certain Items in Form MA included in the General Instructions.

Name of Predecessor *Municipal Advisory Firm*: _____

Municipal Advisor

SEC File No.: _____

Municipal Securities Dealer

SEC File No.: _____

Broker-Dealer

SEC File No.: _____ Organization CRD No.: _____

Investment Adviser

SEC-Registered

SEC File No.: _____ Organization CRD No.: _____

Exempt Reporting Adviser

SEC File No.: _____ Organization CRD No.: _____

Investment Adviser Registration in a US State or Other US Jurisdiction: If predecessor *municipal advisory firm* is registered in a US state or other jurisdiction as an investment adviser, check the Registered in US State or Other US Jurisdiction box below and enter the organization CRD Number. In the table below, check the box for each US jurisdiction in which the applicant is so registered.

Registered in US State or Other US Jurisdiction

Organization CRD No. _____

Check All That Apply	US State or Jurisdiction	Code	Check All That Apply	US State or Jurisdiction	Code
	Alabama	AL		Montana	MT
	Alaska	AK		Nebraska	NE
	Arizona	AZ		Nevada	NV
	Arkansas	AR		New Hampshire	NH
	California	CA		New Jersey	NJ

Colorado	CO	New Mexico	NM
Connecticut	CT	New York	NY
Delaware	DE	North Carolina	NC
District of Columbia	DC	North Dakota	ND
Florida	FL	Ohio	OH
Georgia	GA	Oklahoma	OK
Guam	GU	Oregon	OR
Hawaii	HI	Pennsylvania	PA
Idaho	ID	Puerto Rico	PR
Illinois	IL	Rhode Island	RI
Indiana	IN	South Carolina	SC
Iowa	IA	South Dakota	SD
Kansas	KS	Tennessee	TN
Kentucky	KY	Texas	TX
Louisiana	LA	Utah	UT
Maine	ME	Vermont	VT
Maryland	MD	Virgin Islands	VI
Massachusetts	MA	Virginia	VA
Michigan	MI	Washington	WA
Minnesota	MN	West Virginia	WV
Mississippi	MS	Wisconsin	WI
Missouri	MO		

Government Securities Broker-Dealer
 SEC File No.: _____ Bank Identifier: _____

Other SEC Registration (Specify): _____
 SEC File No. (if any): _____ EDGAR CIK (if any): _____

Another federal or state regulator (Specify): _____
 Registration No. (if any): _____

SECTION 4-D Firms and Other Persons that Solicit Municipal Advisor Clients on the Applicant's Behalf

Provide the name, address, and phone number of any firm or other person that is not otherwise an associated person of the applicant that solicits municipal advisor clients on the applicant's behalf. A separate Schedule D must be completed for each such firm or natural person.

Name: _____

EDGAR CIK No. (if any) _____

Individual CRD No. (if any) _____

 (number and street)

 (city)

 (state)

 (country)

 (postal code)

 Telephone number at this location
 (area code) (telephone number)

 Fax number (if any) at this location
 (area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

SECTION 4-E Employees That Also Do Business Independently on the Applicant's Behalf as Affiliates of the Applicant

Name of Employee:

Enter all the letters of each name and initials or other abbreviations. If no middle name, enter NMN on that line.

_____	_____	_____	_____
Last Name	First Name	Middle Name	
_____		_____	
EDGAR CIK No. (if any)		Individual CRD No. (if any)	

(number and street)			
_____	_____	_____	_____
(city)	(state)	(country)	(postal code)
_____		_____	
Telephone number at this location		Fax number (if any) at this location	
(area code) (telephone number)		(area code) (fax number)	

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

SECTION 5-B Description of Primary Business (for businesses not listed in Part A of Item 5)

If you checked Item 5-B.2., describe the applicant's primary business (not the applicant's *municipal advisor-related* business):

SECTION 6 Financial Industry and Other Activities of Associated Persons

The following information must be completed for each *associated person* in every category you checked in Item 6-A. This section must be completed separately for each such *associated person*.

Select only one: Add Delete Amend

Legal Name of *Associated Person*: _____

Primary Business Name of *Associated Person*: _____

A. Associated person is a:
Check all that apply.

- (1) Broker-dealer, municipal securities dealer, or government securities broker or dealer
- (2) Investment company (including mutual funds)
- (3) *Investment adviser* (including financial planners)
- (4) Swap dealer
- (5) Security-based swap dealer

- (6) Major swap participant
- (7) Major security-based swap participant
- (8) Commodity pool operator (whether registered or exempt from registration)
- (9) Commodity trading advisor (whether registered or exempt from registration)
- (10) Futures commission merchant
- (11) Banking or thrift institution
- (12) Trust company
- (13) Accountant or accounting firm
- (14) Attorney or law firm
- (15) Insurance company or agency
- (16) Pension consultant
- (17) Real estate broker or dealer
- (18) Sponsor or syndicator of limited partnerships
- (19) Engineer or engineering firm
- (20) Other *municipal advisor*

B. Control Relationships and Foreign Registrations

(1) Control Relationships

- (a) Does the applicant *control* or is it *controlled* by the *associated person*? Yes No
- (b) Are the applicant and the *associated person* under common *control*? Yes No

(2) Foreign Financial Regulatory Authority Registration

- (a) Is the *associated person* registered with a *foreign financial regulatory authority*? Yes No
- (b) If the answer to (2)(a) is "Yes," list in English the name of each *foreign financial regulatory authority*, the *associated person's* registration number with that authority (if any), and the country in which the authority has jurisdiction.

English Name of <i>Foreign Financial Regulatory Authority</i>	Registration Number (if any)	English Name of Country
English Name of <i>Foreign Financial Regulatory Authority</i>	Registration Number (if any)	English Name of Country

SECTION 8 Control Persons (on a basis other than 25% ownership or executive officer status)

Section 8-A. A separate Schedule D must be completed for each control person not named in Item 1-A or Schedules A, B, or C that directly or indirectly controls the applicant's management or policies.

Select only one: Add Delete Amend
 The *control person* is a (select only one): Firm or organization. You must complete Section 8-A (1).
 Natural person. You must complete Section 8-A (2).

(1) If the control person is a firm or organization:

Name _____

Municipal Advisor
 Form MA-T Registration SEC File No.: _____
 Effective Date: _____ Termination Date: _____
mm/dd/yyyy mm/dd/yyyy

Form MA Registration SEC File No.: _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Municipal Securities Dealer SEC File No.: _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Broker-Dealer SEC File No.: _____ Organization CRD No.: _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Investment Adviser
 SEC-Registered SEC File No.: _____ Organization CRD No.: _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Exempt Reporting Adviser SEC File No.: _____ Organization CRD No.: _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Investment Adviser Registration in a US State or Other US Jurisdiction: If *control person* is registered in a US state or other jurisdiction as an investment adviser, check the Registered in US State or Other US Jurisdiction box below, and enter the organization CRD Number and other information requested. In the table below, check the box for each US state or jurisdiction in which the *control person* is so registered.

Registered in US State or Other US Jurisdiction Organization CRD No. _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Check All That Apply	US State or Jurisdiction	Code	Check All That Apply	US State or Jurisdiction	Code
	Alabama	AL		Montana	MT
	Alaska	AK		Nebraska	NE
	Arizona	AZ		Nevada	NV
	Arkansas	AR		New Hampshire	NH
	California	CA		New Jersey	NJ
	Colorado	CO		New Mexico	NM
	Connecticut	CT		New York	NY
	Delaware	DE		North Carolina	NC
	District of Columbia	DC		North Dakota	ND
	Florida	FL		Ohio	OH
	Georgia	GA		Oklahoma	OK
	Guam	GU		Oregon	OR
	Hawaii	HI		Pennsylvania	PA
	Idaho	ID		Puerto Rico	PR
	Illinois	IL		Rhode Island	RI
	Indiana	IN		South Carolina	SC
	Iowa	IA		South Dakota	SD

	Kansas	KS		Tennessee	TN
	Kentucky	KY		Texas	TX
	Louisiana	LA		Utah	UT
	Maine	ME		Vermont	VT
	Maryland	MD		Virgin Islands	VI
	Massachusetts	MA		Virginia	VA
	Michigan	MI		Washington	WA
	Minnesota	MN		West Virginia	WV
	Mississippi	MS		Wisconsin	WI
	Missouri	MO			

Government Securities Broker-Dealer SEC File No.: _____ Bank Identifier: _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Other SEC Registration (Specify) _____
 SEC File No. (if any): _____ EDGAR CIK (if any): _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Another Federal or State Regulator (Specify) _____
 Registration No. (if any): _____
 Effective Date: _____ Termination Date: _____
 mm/dd/yyyy mm/dd/yyyy

Business Address

 (number and street)

 (city) (state) (country) (postal code)

 Telephone number at this location Fax number (if any) at this location
 (area code) (telephone number) (area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:
 A private residential address will not be included in publicly available versions of this registration form.

Briefly describe the nature of the *control*:

(2) If control person is a natural person:

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

 Last Name First Name Middle Name

 EDGAR CIK No. (if any)

Individual CRD No. (if any)

Effective Date

Termination Date

(number and street)

(city)

(state)

(country)

(postal code)

Telephone number at this location
(area code) (telephone number)

Fax number (if any) at this location
(area code) (fax number)

For non-US telephone and fax numbers, include country code with area code and local number.

If this address is a private residence, check this box:

A private residential address will not be included in publicly available versions of this registration form.

Briefly describe the nature of the *control*:

Section 8-B. If any person named in Schedules A, B, or C or in Section 8-A of this Schedule D is a public reporting company under Section 12 or 15(d) of the Securities Exchange Act of 1934, provide the information below. A separate Section 8-B of Schedule D must be completed for each public reporting company.

1. Full legal name of the public reporting company: _____
2. The public reporting company's EDGAR CIK number: _____
3. The Schedules where the public reporting company was reported:

Check all that apply.

- Schedule A
- Schedule B
- Schedule C, Section 4
- Schedule C, Section 5
- Schedule D, Section 8-A

Schedule D: MISCELLANEOUS

The space below may be used to explain a response to an Item or to provide any other information.

FORM MA

PART II:

DISCLOSURE REPORTING PAGES (DRPs)

CRIMINAL ACTION DISCLOSURE REPORTING PAGE (MA)

CRIMINAL ACTION DRP – PART 1

This Disclosure Reporting Page (DRP MA) is an INITIAL OR AMENDED response used to report details for affirmative response(s) to *Items 9-A or 9-B* of Form MA.

Check item(s) in Form MA for which this DRP is providing details:

9-A(1) 9-A(2) 9-B(1) 9-B(2)

How to Report an Event or Proceeding on a Criminal Action DRP: Use a separate DRP for each event or proceeding. The same event or proceeding may be reported for more than one person or entity using one DRP. One event may result in more than one affirmative answer to **Items 9-A(1), 9-A(2), 9-B(1), and/or 9-B(2)**. Use this DRP to report all charges, including multiple counts of the same charge, arising out of the same event and filed in one criminal action. Separate criminal actions arising out of the same event, and unrelated criminal actions, must be reported on separate DRPs.

Requirement to Provide Court Documents: Applicable court documents (i.e., criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) must be attached to, and filed electronically with, this DRP (if not previously submitted).

Check all that apply, except where noted:

A. The person(s) or entity(ies) concerning whom this DRP is being filed is (are) the:

Select only one.

- Applicant (the *municipal advisory firm*)
- Applicant and one or more of the applicant's associated person(s)
- One or more of applicant's associated person(s)

1. Applicant

(a) Is this DRP an amendment that seeks to remove a previously filed DRP concerning the applicant from the record? Yes No

(b) If "Yes," the reason the DRP should be removed is:

- The applicant is registered or has submitted an application for registration that is currently pending and the event or proceeding previously reported was resolved in the applicant's favor.
- The event or proceeding occurred more than ten years ago.
- The DRP was filed in error. Explain the circumstances:

2. Associated Person(s)

(a) Does this DRP concern one or more *associated persons*? Yes No

(i) If "Yes," indicate the total number of such *associated person(s)*: ____

(b) Identify each such *associated person* by checking below either the box for firm or for natural person, as appropriate, and provide the requested information:

Firm

Full legal name of the *associated person*:

The *associated person* is:

registered with the *SEC* *SEC* Registration No. _____
 not registered with the *SEC*

CRD No., if any: _____

Is this DRP an amendment that seeks to remove a previously filed DRP concerning this *associated person*? Yes No

If "Yes," the reason the DRP should be removed is:

- The *associated person(s)* is no longer associated with the advisor.
- The event or *proceeding* was resolved in the *associated person's* favor.
- The event or *proceeding* occurred more than ten years ago.
- The DRP was filed in error. Explain the circumstances:

Provide the information for each additional firm below:

Natural Person

Full name of the *associated person*:

Enter all the letters of each name and not initials or other abbreviations.
If no middle name, enter NMN on that line.

Last Name	First Name	Middle Name	Suffix
-----------	------------	-------------	--------

The *associated person* is:

registered with the *SEC* *SEC* Registration No. _____
 not registered with the *SEC*

CRD No., if any: _____

Is this DRP an amendment that seeks to remove a previously filed DRP concerning this *associated person*? Yes No

If "Yes," the reason the DRP should be removed is:

- The *associated person(s)* is no longer associated with the advisor.
- The event or *proceeding* was resolved in the *associated person's* favor.
- The event or *proceeding* occurred more than ten years ago.
- The DRP was filed in error. Explain the circumstances:

Provide the information for each additional natural person below:

B. DRP filed elsewhere for this event: Is an accurate and up-to-date DRP containing the information regarding the applicant or *associated person* required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____
MA-I File Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 below.

NOTE: The completion of all or any part of this form does not relieve the *municipal advisor* or *associated person* of its obligation to update its *IARD* or *CRD* records.

CRIMINAL ACTION DRP – PART 2

1. Firm or Organization

A. Were *charge(s)* brought against a firm or organization over which the applicant or an *associated person* exercise(s)(d) *control*? Yes No

B. If "Yes," provide the following information:

(1) Enter the firm or organization name: _____

(2) Was the firm or organization engaged in a *municipal advisor-related* or *investment-related* business?
 Yes No

(3) What was the relationship of the applicant or the *associated person* with the firm or organization?
(Include any position or title with the firm or organization.)

2. Court Where Formal Charge(s) Were Brought: (File a separate Criminal Action DRP for charges brought in separate courts and/or separate cases in the same court. If brought in a foreign jurisdiction, provide all the information below in English.)

- Federal Court
- Military Court
- State Court
- Foreign Country Court
- International Court
- Other : _____

A. Name of the Court: _____

B. Location of the Court

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Number and Case Name: _____

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

A. Date First Charged (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

B. Details of Event: Report all *charges* separately. For each *charge*, provide all of the following information.

(1) First Charge

(a) List the *charge/charge* description:

(b) Number of counts: ____

(c) Check the applicable box: *Felony* *Misdemeanor*

(d) Plea for this *charge*:

(e) (i) Is the *charge municipal advisor-related*? Yes No

(ii) If "Yes," what is the product type?

(f) (i) Is the *charge investment-related*? Yes No

(ii) If "Yes," what is the product type?

(g) (i) Amended *Charge*: Indicate if the original *charge* was amended or reduced:

Yes No

(ii) If "Yes," provide the date the *charge* was amended or reduced (MM/DD/YYYY):

Report the information for each additional *charge* below:

C. **Felony Charge(s)**: Did any of the *charge(s)* within the event *involve a felony*? Yes No

4. **Current Status of the Event**: Pending On Appeal Final

5. **Event Status Date** (Complete unless status is pending) (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

6. **On Appeal – Judicial Review**: If Item 4 On Appeal is checked, to whom was the criminal action appealed? (If brought in a foreign jurisdiction, provide all the information below in English.)

Federal Court

Military Court

State Court

Foreign Country Court

International Court

Other (specify): _____

Provide the name and location of the court, docket/case number, and case name:

Date appeal filed (MM/DD/YYYY): _____

**For Item 7: If Item 4 Final or On Appeal is checked, complete Item 7.
For Pending Actions, skip to Item 8.**

7. Disposition Disclosure Detail (For each charge provide the following information):

(a) First Charge

(1) Disposition of the Charge

(Check all that apply to this charge.)

- | | | |
|--|---|--|
| <input type="checkbox"/> Acquitted | <input type="checkbox"/> Found not guilty | <input type="checkbox"/> Pretrial diversion/intervention |
| <input type="checkbox"/> Amended | <input type="checkbox"/> Pled guilty | <input type="checkbox"/> Reduced |
| <input type="checkbox"/> Convicted | <input type="checkbox"/> Pled nolo contendere | <input type="checkbox"/> Other (specify) _____ |
| <input type="checkbox"/> Deferred Adjudication | <input type="checkbox"/> Pled not guilty | |
| <input type="checkbox"/> Dismissed | | |
|
 | | |
| <input type="checkbox"/> Appealed | | |
| <input type="checkbox"/> Affirmed | | |
| <input type="checkbox"/> Vacated & Returned For Further Action | | |
| <input type="checkbox"/> Vacated / Final | | |
| <input type="checkbox"/> Other (specify) _____ | | |

Explanation: *If more than one disposition is checked, and/or Other is checked, or the above otherwise does not adequately summarize the disposition of the charge, provide an explanation.*

(2) Date (MM/DD/YYYY): _____

(3) Sentence/Penalty: Is a sentence or other penalty ordered? Yes No

If "Yes," list each type (e.g., prison, jail, probation, community service, counseling, education, other - specify):

(4) Is there an incarceration in connection with this sentence? Yes No

If "Yes," provide the following details:

(i) Duration (length of the sentence): Days ___ Months ___ Years ___

(ii) Start Date of Penalty (MM/DD/YYYY): _____ Not determined.

(iii) End Date of Penalty (MM/DD/YYYY): _____ Not determined.

(iv) Is the sentence to be served concurrently with any other sentence? Yes No

If yes, indicate the end date of the concurrent sentence (MM/DD/YYYY):

(v) Explanation (Optional):

(5) Monetary Penalty/Fine:

(i) Was a monetary penalty/fine imposed? Yes No
If "Yes," provide the following details in (ii) and (iii) below:

(ii) Total Penalty/Fine Amount: \$ _____

(iii) Was any portion suspended/reduced?

Yes If "Yes," how much? \$ _____
 No

(iv) Final Amount: \$ _____

(v) Was the final amount paid in full?

Yes If "Yes," date paid in full (MM/DD/YYYY): _____
 No

If "No," indicate the amount unpaid: \$ _____
And explain the circumstances:

Report the disposition(s) of each additional charge below:

8. Summary of Circumstances: Use this space to provide a brief summary of the circumstances leading to the action, allegation(s), finding(s) and disposition(s), if any. Include any relevant information on the current action status, and on any terms, conditions, and dates not already provided above, and any other relevant information. The information must fit within the space provided.

REGULATORY ACTION DISCLOSURE REPORTING PAGE (MA)

REGULATORY ACTION DRP – PART 1

This **Disclosure Reporting Page (DRP MA)** is an **INITIAL OR** **AMENDED** response used to report details for affirmative responses to **Items 9-C, 9-D, 9-E, 9-F or 9-G** of Form MA.

Check item(s) being responded to:

- 9-C(1) 9-C(2) 9-C(3) 9-C(4) 9-C(5)
- 9-D(1) 9-D(2) 9-D(3) 9-D(4) 9-D(5)
- 9-E(1) 9-E(2) 9-E(3) 9-E(4)
- 9-F 9-G

How to Report an Event or Proceeding on a Regulatory Action DRP: Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. One event may result in more than one affirmative answer to **Items 9-C, 9-D, 9-E, 9-F, and/or 9-G**. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

Check all that apply, except where noted:

A. The person(s) or entity(ies) for whom this DRP is being filed is (are) the:

Select only one.

- Applicant (the *municipal advisory firm*)
- Applicant and one or more of the *applicant's associated person(s)*
- One or more of applicant's *associated person(s)*

1. Applicant

(a) Is this DRP an amendment filed for the applicant that seeks to remove a previously filed DRP concerning the applicant from the record? Yes No

(b) If "Yes," the reason the DRP should be removed is:

- The applicant is registered or applying for registration and the event or *proceeding* was resolved in the applicant's favor.
- The DRP was filed in error. Explain the circumstances:

2. Associated Person(s)

(a) Is this DRP being filed for one or more *associated persons*? Yes No

(i) If "Yes," indicate the total number of such *associated person(s)*: ____

(b) Identify each such associated firm and/or natural person in the space below:

Firm

Full name of the *associated person*:

The *associated person* is:

- registered with the SEC SEC Registration No. _____
- not registered with the SEC

CRD No., if any: _____

Is this DRP an amendment that seeks to remove a previously filed DRP concerning this *associated person*?

- Yes No

If "Yes," the reason the DRP should be removed is:

- The *associated person(s)* is no longer associated with the advisor.
- The event or *proceeding* was resolved in the *associated person's* favor.
- The DRP was filed in error. Explain the circumstances:

Provide the information for each additional firm below:

Natural Person

Full name of the *associated person*:

Enter all the letters of each name and not initials or other abbreviations.
If no middle name, enter NMN on that line.

Last Name	First Name	Middle Name	Suffix
-----------	------------	-------------	--------

The *associated person* is:

- registered with the SEC SEC Registration No. _____
- not registered with the SEC

CRD No., if any: _____

Is this DRP an amendment that seeks to remove a previously filed DRP concerning this *associated person*?

- Yes No

If "Yes," the reason the DRP should be removed is:

- The *associated person(s)* is no longer associated with the advisor.
- The event or *proceeding* was resolved in the *associated person's* favor.
- The DRP was filed in error. Explain the circumstances:

Provide the information for each additional natural person below:

B. DRP filed elsewhere for this event: Is an accurate and up-to-date DRP containing the information regarding the applicant or *associated person* required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____
MA-I File Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 below.

NOTE: The completion of all or any part of this form does not relieve the *municipal advisor* or *associated person* of its obligation to update its *IARD* or *CRD* records.

REGULATORY ACTION DRP – PART 2

1. Regulatory Action was initiated by:

A. Select the Appropriate Item.

Select only one box below. A separate Regulatory Action DRP is required for each such regulator or other authority.

- | | | |
|---|--------------------------------|---|
| <input type="checkbox"/> SEC | <input type="checkbox"/> State | <input type="checkbox"/> Foreign Financial Regulatory Authority |
| <input type="checkbox"/> CFTC | <input type="checkbox"/> SRO | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Federal Banking Agency | | |
| <input type="checkbox"/> National Credit Union Administration | | |
| <input type="checkbox"/> Other Federal Authority | | |

B. Full name of the individual regulator (if not fully identified in Item 1-A) or other authority that initiated the action. For a foreign financial regulatory authority, please provide the full name in English.

2. Sanction(s) Sought:

Check all that apply.

- | | | |
|--|---------------------------------------|--|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Disgorgement | <input type="checkbox"/> Restitution |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Requalification |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Civil and Administrative Penalty(ies)/Fine(s) | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Rescission | |

Other Sanction(s) Sought (list each such additional sanction):

3. Date Initiated (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

4. Regulatory Action was brought in (if brought in a foreign jurisdiction, provide all the information below in English):

A. Name of the Administrative Proceeding, Commission/Agency Hearing, or other regulatory proceeding or forum: _____

B. Location of the Proceeding / Hearing:

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Number: _____

5. A. Principal Product Type (check appropriate item):

No Product

- | | | |
|---|---|--|
| <input type="checkbox"/> Annuity – Charitable | <input type="checkbox"/> Direct Investment – DPP & LP Interest | <input type="checkbox"/> Oil & Gas |
| <input type="checkbox"/> Annuity – Fixed | <input type="checkbox"/> Equipment Leasing | <input type="checkbox"/> Options |
| <input type="checkbox"/> Annuity – Variable | <input type="checkbox"/> Equity Listed (Common & Preferred Stock) | <input type="checkbox"/> Penny Stock |
| <input type="checkbox"/> Banking Product
(other than CD) | <input type="checkbox"/> Equity OTC | <input type="checkbox"/> Prime Bank Instrument |
| <input type="checkbox"/> CD | <input type="checkbox"/> Futures – Commodity | <input type="checkbox"/> Promissory Note |
| <input type="checkbox"/> Commodity Option | <input type="checkbox"/> Futures – Financial | <input type="checkbox"/> Real Estate Security |
| <input type="checkbox"/> Debt – Asset Backed | <input type="checkbox"/> Index Option | <input type="checkbox"/> Security Futures |
| <input type="checkbox"/> Debt – Corporate | <input type="checkbox"/> Insurance | <input type="checkbox"/> Security-based Swap |
| <input type="checkbox"/> Debt – Government | <input type="checkbox"/> Investment Contract | <input type="checkbox"/> Swap |
| <input type="checkbox"/> Debt – Municipal | <input type="checkbox"/> Money Market Fund | <input type="checkbox"/> Unit Investment Trust |
| <input type="checkbox"/> Derivative | <input type="checkbox"/> Mutual Fund | <input type="checkbox"/> Viatical Settlement |

Other Principal Product Type (specify):

B. Other Product Types? Yes No If “Yes,” describe each additional product type:

6. Allegations: Describe the allegations related to this regulatory action. (The response must fit within the space provided.)

7. Current Status: Pending On Appeal Final

8. Pending: If you checked Item 7 Pending, provide the following information.

A. Date Served: The date that notice or other process was served (MM/DD/YYYY): _____
 Exact Explanation

If not exact, provide explanation:

B. Limitation or Restrictions: Are there any limitations or restrictions currently in effect?

Yes No

If the answer is “Yes,” provide details:

9. **On Appeal – Administrative or Judicial Review of the Regulatory Action:** If you appealed, provide the following information.

A. Name of Regulator or Court Action Appealed To: *Provide the name of the US regulator (i.e., the SEC, an SRO, other), federal court, state court or state regulator, or a foreign or international court or regulator to whom you appealed. If brought in a foreign jurisdiction, provide all the information below in English.*

B. Location of the Regulator or Judicial Court to Whom You Appealed:

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

E. Date Appeal filed (MM/DD/YYYY): _____ Exact Explanation
If not exact, provide explanation:

F. Appeal Details (including status):

G. Limitation or Restrictions: Are there any limitations or restrictions currently in effect while on appeal?
 Yes No

If the answer is "Yes," provide details:

**If you checked Item 7 Final or On Appeal, complete Items 10 through 13.
For Pending Actions, skip to Item 13.**

10. A. Resolution: How was the action resolved? (Check all the applicable boxes that reflect the most recent resolution of the action by a regulator or a court, whether or not any part of the resolution is on appeal. If any part of the resolution is on appeal, identify in Item 10-B which part is currently on appeal.)

- | | | |
|--|--|---|
| <input type="checkbox"/> Acceptance, Waiver & Consent (AWC) | <input type="checkbox"/> Dismissed | <input type="checkbox"/> Stipulation and Consent |
| <input type="checkbox"/> Consent | <input type="checkbox"/> Judgment Rendered | <input type="checkbox"/> Withdrawn |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Order | <input type="checkbox"/> Other (requires explanation) |
| <input type="checkbox"/> Decision & Order of Offer of Settlement | <input type="checkbox"/> Settled | |

- Appealed
- Affirmed
- Vacated Nunc Pro Tunc / ab initio
- Vacated & Returned For Further Action
- Vacated / Final
- Other (requires explanation)

B. Explanation: *If more than one box in Item 10-A is checked, or Other is checked, or Item 10-A otherwise does not adequately summarize the type of resolution, provide an explanation. For example, if you appealed all or part of a resolution by the regulator or court, indicate what is being appealed.*

C. Order: If **Order** is checked above in Item 10-A, does the *order* constitute a final *order* based on violations of any laws or regulations that prohibit fraudulent, or deceptive conduct? Yes No

11. Resolution Date (MM/DD/YYYY): _____ Exact Explanation
(For a resolution that is being appealed in part, the date to be provided should be the date on which the regulator (reviewing a decision by an SRO or an Administrative Law Judge) or a court provided its resolution.)

If not exact, provide explanation:

12. Resolution Detail

A. Sanction(s): Were any Sanctions Ordered? Yes No, none were ordered.

B. If "Yes," check each individual sanction below that was ordered:

- | | | |
|---|--|--|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Disgorgement* | <input type="checkbox"/> Restitution* |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Requalification |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Civil and Administrative Penalty(ies)/Fine(s)* | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Rescission | |

*** Monetary Sanction(s):** Were one or more sanctions *ordered* that require a monetary payment?
 Yes No

If "Yes," enter the total amount ordered: \$ _____

Other Sanction(s) Ordered (list each such additional sanction):

C. Sanction Detail (Provide the details of the following specific sanctions, if checked above in Item 12-B.)

(1) Barred, Enjoined, or Suspended: If you checked one or more of these sanctions in Item 12-B. above, check the applicable box(es) below and provide the corresponding information.

(a) Barred

(i) Duration (length of time):

- Permanent (not limited by length of time).
 Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iv) Description: Provide remaining details and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.). If none, enter "None":

If the applicant or an associated person received in the above action one or more bars from registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(b) Enjoined

(i) Duration (length of time):

- Permanent (not limited by length of time).
 Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iv) Description: Provide remaining details and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.). If none, enter "None":

If the applicant or an *associated person* received in the above action one or more injunctions from registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(c) Suspended

(i) Duration (length of time):

Permanent (not limited by length of time).
 Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iv) Description: Provide remaining details and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.). If none, enter "None":

If the applicant or an *associated person* received in the above action one or more suspensions from registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(2) **Requalification:** Was requalification by examination, retraining, or other process a condition of a sanction? Yes No

If "Yes," provide:

(a) Length of time given to requalify, retrain, or complete other process:

No time period is specified.
 Time period is specified: Days ___ Months ___ Years ___

(b) Type of examination, retraining, or other process required:

(c) Was the condition satisfied? Yes No

(1) If "Yes," provide the date (MM/DD/YYYY): _____

(2) If "No," explain the circumstances:

If the applicant or an *associated person* received in the above action one or more requalifications in connection with registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(3) **Monetary Sanction(s):** If you indicated in Item 12-B above that one or more monetary sanctions were *ordered*, provide the following information.

(a) Total Amount *Ordered*: \$ _____

(b) Portion levied against:

Applicant

(i) Amount *Ordered*: \$ _____

(ii) Was any portion waived?

Yes

No

If "Yes," how much? \$ _____

(iii) Final Amount: \$ _____

(iv) Was final amount paid in full?

Yes

No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

Associated Person

(i) Amount Ordered: \$ _____

(ii) Was any portion waived?

Yes _____

No

If "Yes," how much? \$ _____

(iii) Final Amount: \$ _____

(iv) Was final amount paid in full?

Yes

No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

Provide the information for each additional *associated person* below:

13. Summary of Circumstances: Use this space to provide a brief summary of the circumstances leading to the action, allegation(s), finding(s) and disposition(s), if any. Include any relevant information on the current action status, and on any terms, conditions, and dates not already provided above, and any other relevant information. The information must fit within the space provided.

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (MA)

CIVIL JUDICIAL ACTION DRP – PART 1

This **Disclosure Reporting Page (DRP MA)** is an **INITIAL OR** **AMENDED** response used to report details for affirmative responses to Item 9-H. of Form MA.

Check item(s) being responded to: **9-H(1)(a)** **9-H(1)(b)** **9-H(1)(c)** **9-H(2)**

How to Report an Event or Proceeding on a Civil Judicial Action DRP: Use a separate DRP for each event or proceeding. The same event or proceeding may be reported for more than one person or entity using one DRP. One event may result in more than one affirmative answer to Item 9-H. Separate cases arising out of the same event, and unrelated civil judicial actions, must be reported on separate DRPs; if they are later consolidated into a single civil judicial action, the consolidated action can be reported on one DRP.

Check all that apply, except where noted:

A. The person(s) or entity(ies) for whom this DRP is being filed is (are) the:

Select only one.

- Applicant (the *municipal advisory firm*)
- Applicant and one or more of the applicant's associated person(s)
- One or more of applicant's associated person(s)

1. Applicant

(a) Is this DRP an amendment filed for the applicant that seeks to remove a previously filed DRP concerning the applicant from the record? Yes No

(b) If "Yes," the reason the DRP should be removed is:

- The applicant is registered or applying for registration and the event or proceeding was resolved in the applicant's favor.
- The DRP was filed in error. Explain the circumstances:

2. Associated Person(s)

(a) Is this DRP being filed for one or more associated persons? Yes No

(i) If "Yes," indicate the total number of such associated person(s): ____

(b) Identify each such associated firm and/or natural person in the space below:

Firm

Full name of the associated person:

The *associated person* is:

- registered with the *SEC* *SEC* Registration No. _____
 not registered with the *SEC*

CRD No., if any: _____

Is this *DRP* an amendment that seeks to remove a previously filed *DRP* concerning this *associated person*?

- Yes No

If "Yes," the reason the *DRP* should be removed is:

- The *associated person(s)* is no longer associated with the advisor.
 The event or *proceeding* was resolved in the *associated person's* favor.
 The *DRP* was filed in error. Explain the circumstances:

Provide the information for each additional firm below:

Natural Person

Full name of the *associated person*:

Enter all the letters of each name and not initials or other abbreviations.
If no middle name, enter NMN on that line.

Last Name First Name Middle Name Suffix

The *associated person* is:

- registered with the *SEC* *SEC* Registration No. _____
 not registered with the *SEC*

CRD No., if any: _____

Is this *DRP* an amendment that seeks to remove a previously filed *DRP* concerning this *associated person*?

- Yes No

If "Yes," the reason the *DRP* should be removed is:

- The *associated person(s)* is no longer associated with the advisor.
 The event or *proceeding* was resolved in the *associated person's* favor.
 The *DRP* was filed in error. Explain the circumstances:

Provide the information for each additional natural person below:

B. DRP filed elsewhere for this event: Is an accurate and up-to-date DRP containing the information regarding the applicant or *associated person* required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____

CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____

MA Registration Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____

MA-I File Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided. If the answer is "No," complete Part 2 below.

NOTE: The completion of all or any part of this form does not relieve the *municipal advisor* or *associated person* of its obligation to update its *IARD* or *CRD* records.

CIVIL JUDICIAL ACTION DRP – PART 2

1. Court Action was initiated by:

A. Select the Appropriate Item(s).

Check all that apply.

- SEC
- CFTC
- Other Federal Authority
- State
- SRO
- Commodities Exchange
- Foreign Financial Regulatory Authority
- Municipal Advisory Firm
- Private Plaintiff
- Other: _____

B. Plaintiff(s): Enter the full name(s) of the plaintiff(s), unless only SEC and/or CFTC is/are checked above. For a foreign financial regulatory authority, please provide the full name in English.

Were all plaintiffs fully identified in the space provided? Yes No

2. Defendant(s):

A. Enter the full name(s) of the defendant(s). For foreign defendant(s), please provide the full name(s) in English:

B. Are you a named defendant? Yes No If "No," describe how this action involves you:

3. Sanction(s) or Relief Sought (check appropriate items):

- Bar (Permanent)
- Bar (Temporary / Time Limited)
- Cease and Desist
- Censure
- Civil /Administrative Penalty(ies)/Fine(s)
- Denial
- Disgorgement
- Exemption
- Expulsion
- Injunction
- Money Damage(s)
(Private/Civil Complaint)
- Prohibition
- Reprimand
- Rescission
- Restitution
- Restraining Order
- Requalification
- Revocation
- Suspension
- Undertaking

Other Sanction(s) or Relief Sought:

4. A. Filing Date of Court Action (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

B. Date Notice/Process was served (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

5. Formal Action was brought in *(If brought in a foreign jurisdiction, provide all the information below in English):*

Check the applicable box:

Federal Court Military Court State Court Foreign Court International Court

Other : _____

A. Name of the Court: _____

B. Location of the Court

Street Address: _____

City or County: _____ State/Country: _____

Postal Code: _____

C. Docket/Case Number and Case Name: _____

6. A. Principal Product Type (check appropriate item):

No Product

Annuity – Charitable

Annuity – Fixed

Annuity – Variable

Banking Product

Direct Investment – DPP & LP Interest

Equipment Leasing

Equity Listed (Common & Preferred Stock)

Equity OTC

Oil & Gas

Options

Penny Stock

Prime Bank Instrument

- | | | |
|--|--|--|
| (other than CD) | <input type="checkbox"/> Futures – Commodity | <input type="checkbox"/> Promissory Note |
| <input type="checkbox"/> CD | <input type="checkbox"/> Futures – Financial | <input type="checkbox"/> Real Estate Security |
| <input type="checkbox"/> Commodity Option | <input type="checkbox"/> Index Option | <input type="checkbox"/> Security Futures |
| <input type="checkbox"/> Debt – Asset Backed | <input type="checkbox"/> Insurance | <input type="checkbox"/> Security-based Swap |
| <input type="checkbox"/> Debt – Corporate | <input type="checkbox"/> Investment Contract | <input type="checkbox"/> Swap |
| <input type="checkbox"/> Debt – Government | <input type="checkbox"/> Money Market Fund | <input type="checkbox"/> Unit Investment Trust |
| <input type="checkbox"/> Debt – Municipal | <input type="checkbox"/> Mutual Fund | <input type="checkbox"/> Viatical Settlement |
| <input type="checkbox"/> Derivative | | |

Other Principal Product Type (specify):

B. Other Product Types? Yes No If “Yes,” describe each additional product type:

7. Allegations: Describe the allegations related to this civil action. (The response must fit within the space provided.)

8. Current Status: Pending On Appeal Final

9. Pending: If you checked Item 8 Pending, provide the following information.

A. Date Served: The date that notice or other process was served (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

B. Limitation or Restrictions: Are there any limitations or restrictions currently in effect?

Yes No

If the answer is “Yes,” provide details:

10. On Appeal – Judicial Review: If you appealed, provide the following information.
(If brought in a foreign jurisdiction, provide all the information below in English):

A. Action Appealed to: (Provide the name of the federal, state, foreign, or international court to whom you appealed.) _____

B. Location of the Court:

Street Address: _____

City or County: _____ State/Country: _____

Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

E. Date Appeal filed (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

F. Appeal Details (including status):

G. Limitation or Restrictions: Are there any limitations or restrictions currently in effect while on appeal?

Yes No

If the answer is "Yes," provide details:

**If you checked Item 8 Final or On Appeal, complete Items 11 through 14.
For Pending Actions, skip to Item 14.**

11. A. **Resolution:** How was the action resolved? *Check all the applicable boxes that reflect the most recent resolution of the action by a court, whether or not any part of the resolution is on appeal. If any part of the resolution is on appeal, identify in Item 11-B which part is currently on appeal.*

- | | | |
|--|--|--|
| <input type="checkbox"/> Consent | <input type="checkbox"/> Judgment Rendered | <input type="checkbox"/> Stipulation and Consent |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Opinion | <input type="checkbox"/> Withdrawn |
| <input type="checkbox"/> Decision & Order of Offer of Settlement | <input type="checkbox"/> Order | |
| <input type="checkbox"/> Dismissed | <input type="checkbox"/> Settled | |

Other: _____

- Appealed
- Affirmed
 - Vacated Nunc Pro Tunc / ab initio
 - Vacated & Returned For Further Action
 - Vacated / Final
 - Other: _____

B. Explanation: *If more than one box in Item 11-A is checked or Item 11-A otherwise does not adequately summarize the type of resolution, provide an explanation. For example, if you appealed all or part of a resolution by the regulator or court, indicate what is being appealed.*

C. Order: If *Order* is checked above in Item 11-A, does the *order* constitute a final *order* based on violations of any laws or regulations that prohibit fraudulent, or deceptive conduct? Yes No

12. Resolution Date (MM/DD/YYYY): _____ Exact Explanation
(For a resolution that is being appealed in part, the date to be provided should be the date on which the regulator or court provided its resolution.)

If not exact, provide explanation:

13. Resolution Detail

A. Sanction(s): Were any Sanctions Ordered or Relief Granted?

- Yes
 No, none were *ordered*, or granted.

B. If "Yes," check each individual sanction ordered and/or relief granted below:

- | | | |
|--|--|--|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Exemption | <input type="checkbox"/> Rescission |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Restitution* |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Restraining Order |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Money Damage(s) | <input type="checkbox"/> Requalification |
| <input type="checkbox"/> Civil /Administrative Penalty(ies)/Fine(s)* | (Private/Civil Complaint)* | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Disgorgement* | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |

* **Monetary Sanction(s):** Were one or more sanctions *ordered* that require a monetary payment?

- Yes No

If "Yes," enter the total amount *ordered*: \$ _____

Other Sanctions Ordered or Relief Granted (list each such additional sanction or relief):

C. Sanction Detail (Provide the details of the following specific sanctions, if checked above in Item 13-B.)

(1) Barred, Enjoined, or Suspended: If you checked one or more of these sanctions in Item 13-B. above, check the applicable box(es) below and provide the corresponding information.

(a) Barred

(i) Duration (length of time):

- Permanent (not limited by length of time).
- Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iv) Description: Provide remaining details and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.). If none, enter "None":

If the applicant or an *associated person* received in the above action one or more bars from registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(b) *Enjoined*

(i) Duration (length of time):

- Permanent (not limited by length of time).
- Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iv) Description: Provide remaining details and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.). If none, enter "None":

If the applicant or an *associated person* received in the above action one or more injunctions from registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(c) Suspended

(i) Duration (length of time):

Permanent (not limited by length of time).

Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

(iv) Description: Provide remaining details and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.). If none, enter "None":

If the applicant or an *associated person* received in the above action one or more suspensions from registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(2) Requalification: Was requalification by examination, retraining, or other process a condition of a sanction? Yes No

If "Yes," provide:

(a) Length of time given to requalify, retrain, or complete other process:

- No time period is specified.
- Time period is specified: Days ___ Months ___ Years ___

(b) Type of examination, retraining, or other process required:

(c) Was the condition satisfied? Yes No

(1) If "Yes," provide the date (MM/DD/YYYY): _____

(2) If "No," explain the circumstances:

If the applicant or an *associated person* received in the above action one or more requalifications in connection with registration capacities, associations, and/or other activities; and the terms specify different time periods; report the additional details below:

(3) **Monetary Sanction(s):** If you indicated in Item 13-B above that one or more monetary sanctions were ordered, provide the following information.

(a) Total Amount Ordered: \$ _____

(b) Portion levied against:

Applicant

(i) Amount Ordered: \$ _____

(ii) Was any portion waived?

- Yes
- No

If "Yes," how much? \$ _____

(iii) Final Amount: \$ _____

(iv) Was final amount paid in full?

- Yes _____
- No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

Associated Person

(i) Amount Ordered: \$ _____

(ii) Was any portion waived?

Yes

No

If "Yes," how much? \$ _____

(iii) Final Amount: \$ _____

(iv) Was final amount paid in full?

Yes

No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

Provide the information for each additional *associated person* below:

14. Summary of Circumstances: Use this space to provide a brief summary of the circumstances leading to the action, allegation(s), finding(s) and disposition(s), if any. Include any relevant information on the current action status, and on any terms, conditions, and dates not already provided above, and any other relevant information. The information must fit within the space provided.

Form MA
APPLICATION FOR MUNICIPAL ADVISOR REGISTRATION

DOMESTIC MUNICIPAL ADVISOR EXECUTION

You must complete the following execution page to Form MA. This execution page must be signed and attached to your initial application for *SEC* registration and all amendments to registration.

Appointment of Agent for Service of Process

By signing this Form MA, you, the undersigned advisor, irrevocably appoint the Secretary of State or other legally designated officer, of the state in which you maintain your *principal office and place of business*, as your agents to receive service, and agree that such *persons* may be served any process, pleadings, subpoenas, or other papers in (a) any *investigation* or administrative *proceeding* conducted by the *Commission* that relates to the applicant or about which the applicant may have information; and (b) any civil suit or action brought against the applicant or to which the applicant has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state or of the United States of America or of any of its territories or possessions or of the District of Columbia, where the *investigation, proceeding* or cause of action arises out of or relates to or concerns *municipal advisory activities* of the *municipal advisor*. The applicant stipulates and agrees that any such civil suit or action or administrative *proceeding* may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon the above-named Agent for Service of Process, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

Signature

I, the undersigned, sign this Form MA on behalf of, and with the authority of, the *municipal advisor*. The *municipal advisor* and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form MA, including exhibits and any other information submitted, are true and correct, and that I am signing this Form MA as a free and voluntary act.

I certify that the advisor's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having custody or possession of these books and records to make them available to federal regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Advisor *CRD* Number (if any): _____

Title: _____

**Form MA
APPLICATION FOR MUNICIPAL ADVISOR REGISTRATION**

NON-RESIDENT MUNICIPAL ADVISOR EXECUTION

Instructions: If you are a *non-resident*, you must complete these steps:

1. **Execution Page:** You must complete the following *non-resident* execution page to Form MA. This execution page must be signed and attached to your initial application for *SEC* registration and all amendments to registration.
2. **Opinion of Counsel:** You must also attach to Form MA an Opinion of Counsel. See General Instructions.
3. **Form MA-NR:** You must also attach to Form MA one or more executed Form MA-NR(s) for the *non-resident municipal advisor* applicant, and, if any, the *non-resident* general partner(s) and/or *non-resident managing agents*. See General Instructions for Form MA-NR.

Non-Resident Municipal Advisor Undertaking Regarding Books and Records

By signing this Form MA, you agree to provide, at your own expense, to the U.S. Securities and Exchange Commission at its principal office in Washington D.C., at any Regional or District Office of the *Commission*, or at any one of its offices in the United States, as specified by the *Commission*, correct, current, and complete copies of any or all records that you are required to maintain by law. This undertaking shall be binding upon you, your heirs, successors and assigns, and any *person* subject to your written irrevocable consents or powers of attorney or any of your general partners and *managing agents*.

Signature

I, the undersigned, sign this Form MA on behalf of, and with the authority of, the *non-resident municipal advisor*. The *municipal advisor* and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form MA, including exhibits and any other information submitted, are true and correct, and that I am signing this Form MA as a free and voluntary act.

I certify that the *municipal advisor's* books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having custody or possession of these books and records to make them available to federal regulatory representatives. Further, attached to this Form MA as an exhibit is an opinion of counsel that the *municipal advisor* can, as a matter of law, provide the *Commission* with access to the books and records of such *municipal advisor*, as required by law, and that the *municipal advisor* can, as a matter of law, submit to inspection and examination by the *Commission*. Finally, attached to this Form MA is one or more executed Form MA-NR(s) for the *non-resident municipal advisor* applicant, and, if any, the *non-resident* general partner(s) and/or *non-resident managing agents*.

Signature: _____ Date: _____

Printed Name: _____ Advisor CRD Number (if any): _____

Title: _____

FORM MA-I

INFORMATION REGARDING NATURAL PERSONS WHO ENGAGE IN MUNICIPAL ADVISORY ACTIVITIES

Please read the General Instructions for this form and other forms in the MA series, as well as its subsection, "Specific Instructions for Form MA-I," before completing this form. All *italicized* terms herein are defined or described in the Glossary of Terms appended to the General Instructions.

PART I

This form must be completed by:

- Every *municipal advisory firm* applying for registration or registered as a *municipal advisor* on Form MA, to provide information regarding each natural person who is an *associated person* of the firm and engages in *municipal advisory activities* on the firm's behalf (for purposes of Form MA-I, the "individual"); and
- Every natural person (sole proprietor) applying for registration as a *municipal advisor* on Form MA, to provide additional personal information.

WARNING: Complete this form truthfully. False statements or omissions may result in denial of a *municipal advisor's* application or revocation or suspension of such registration, administrative or civil action, or criminal prosecution. Form MA-I must be amended promptly whenever any information previously provided becomes inaccurate. See General Instruction 9.

Type of Filing:

This is an (check the appropriate box):

Initial Form MA-I

Execution Pages: Before submitting this form, you must complete the Execution Page.

Supporting Documentation: If you are required to make reportable disclosures in the Disclosure Reporting Pages, you must attach the supporting documentation.

Non-Resident Individuals: If the individual is a *non-resident* of the United States, you must attach a completed Form MA-NR signed by the individual to this Form MA-I at the time of the initial filing of Form MA-I. See the General Instructions.

Amendment to the most recent Form MA-I

Amendment to indicate that the individual is no longer an *associated person* of the *municipal advisory firm* or no longer engages in *municipal advisory activities* on its behalf. (If you check this box, complete only Item 1-A and Item 7 below.)

Item 1 Identifying Information

Is this an amendment to change identifying information regarding the individual named in part A below?

Yes No

A. The Individual

Full Legal Name:

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

Last Name First Name Middle Name Suffix

Individual CRD No. (if any): _____

Social Security No.: _____ The Social Security Number will not be included in publicly available versions of this form.

B. Municipal Advisory Firms Where the Individual Is Employed

In providing your responses, please note that the definition of "employee" for purposes of this form includes an independent contractor who engages in municipal advisory activities on behalf of a municipal advisory firm. See Glossary of Terms.

Is the individual employed at more than one municipal advisory firm? Yes No

If the answer is "Yes," enter the number of municipal advisory firms the individual is employed with (sole proprietors not employed with any other firm enter 1): _____

(For individuals who are employed with more than one firm, provide the information required by this Item 1-B for each such firm. For sole proprietors, enter the legal name under which you conduct your municipal advisor-related activities, and skip to Item 1-B.1.)

Full Legal Name of municipal advisory firm with which the individual is employed:

Name under which municipal advisor-related business is primarily conducted, if different from above:

Date that the individual's most recent employment with this municipal advisory firm commenced (MM/DD/YYYY): _____

Does the individual have an independent contractor relationship with the above-named firm? Yes No

(1) Municipal Advisory Firm's Registration Information:

Is the municipal advisory firm currently registered on Form MA as a municipal advisor? (Answer "Yes" if you have already filed Form MA and your application for registration on that form has been approved. Otherwise, answer "No.")

Yes SEC File No. _____

No

If "No," has the municipal advisory firm filed a Form MA application?

Yes Form MA Filing Date: _____ EDGAR CIK No.: _____
(MM/DD/YYYY)

No

If "No," please provide an explanation:

(2) Office

Enter the following information for each office of the *municipal advisory firm* where the individual is or will be physically located, and each office from which the individual is or will be supervised:

Located At: Supervised From:
Start Date: _____
Street Address 1: _____
Street Address 2: _____
City: _____ State: _____ Country: _____ Postal Code: _____

If the office where the individual is or will be physically located is a private residence, check this box:
A private residential address will not be included in publicly available versions of this form.

Item 2 Other Names

Enter the following information for all other names that the individual has used or is using, or by which the individual is known or has been known, other than the individual's legal name, since the age of 18. This space should include, for example, nicknames, aliases, and names used before or after marriage.

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

Last Name	First Name	Middle Name	Suffix
-----------	------------	-------------	--------

Item 3 Residential History

Starting with the current address, enter the following information for all the individual's residential addresses for the past 5 years. Leave no gaps greater than three months between addresses. Report changes in an amendment to this form as they occur in the future. Private residential addresses will not be included in publicly available versions of this form.

Current Address:

From (MM/YYYY): _____ To (MM/YYYY): _____
Street Address 1: _____
Street Address 2: _____
City: _____ State: _____ Country: _____ Postal Code: _____

Prior Address:

From (MM/YYYY): _____ To (MM/YYYY): _____
Street Address 1: _____
Street Address 2: _____
City: _____ State: _____ Country: _____ Postal Code: _____

Item 4 Employment History

Provide complete employment history of the individual for the past 10 years. Include the *municipal advisory firm(s)* entered in Item 1-B. Enter the following information for each employer. Account for all time, leaving no gaps longer than three months. Include full- and part-time employment, self-employment, military service, and homemaking. Also include statuses such as unemployed, full-time education, extended travel, or other similar

statuses. Such statuses should be entered in the space provided below for "Name of *Municipal Advisory Firm* or Company."

Current Employer:

From (MM/YYYY): _____ To (MM/YYYY): _____
Name of *Municipal Advisory Firm* or Company: _____

City: _____ State: _____ Country: _____ Postal Code: _____
Municipal Advisor-Related Business? Yes No
Investment-Related Business? Yes No
Position Held: _____

Prior to the Above:

From (MM/YYYY): _____ To (MM/YYYY): _____
Name of *Municipal Advisory Firm* or Company: _____

City: _____ State: _____ Country: _____ Postal Code: _____
Municipal Advisor-Related Business? Yes No
Investment-Related Business? Yes No
Position Held: _____

Item 5 Other Business

Is the individual currently engaged in any other business either as a proprietor, partner, officer, director, *employee*, trustee, agent or otherwise? Yes No

If "Yes," please enter the following details for each other business below:

Other Business:

Start Date (MM/YYYY): _____
Name of Business: _____

Street Address 1: _____
Street Address 2: _____
City: _____ State: _____ Country: _____ Postal Code: _____

Is this a *municipal advisor-related* business? Yes No
Is this an *investment-related* business? Yes No

Nature of Business: _____
Position/Title/Relationship: _____
Approximate No. of Hours / Month Devoted to This Business: _____
Description of Duties: _____

Item 6 Disclosure Information

If the answer to any of the questions in Items 6A-6J and 6M is "Yes," provide details of all events or *proceedings* on the appropriate Disclosure Reporting Pages ("DRPs") in Part II.

One event or proceeding may result in the requirement to answer "Yes" to more than one question below.

Refer to the Glossary of Terms for definitions or descriptions of italicized terms.

CRIMINAL ACTION DISCLOSURE

If the answer is "Yes" to any question below in Item 6A or 6B, complete a Criminal Action DRP.

Item 6A.

(1) Has the individual ever:

(a) been convicted of any *felony*, or pled guilty or nolo contendere ("no contest") to any *charge* of a *felony* in a domestic, foreign, or military court? Yes No

(b) been *charged* with any *felony*? Yes No

(2) Based upon activities that occurred while the individual exercised *control* over it, has an organization ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *charge* of a *felony*? Yes No

(b) been *charged* with any *felony*? Yes No

Item 6B.

(1) Has the individual ever:

(a) been convicted of any *misdemeanor* or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any *charge* of a *misdemeanor* involving: *municipal advisory activities* or a *municipal advisor-related* or *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? Yes No

(b) been *charged* with any *misdemeanor* of the kind described in 6B(1)(a)? Yes No

(2) Based upon activities that occurred while the individual exercised *control* over it, has an organization ever:

(a) been convicted of any *misdemeanor* or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *charge* of a *misdemeanor* of the kind specified in 6B(1)(a)? Yes No

(b) been *charged* with any *misdemeanor* of the kind specified in 6B(1)(a)? Yes No

REGULATORY ACTION DISCLOSURE

If the answer is "Yes" to any question below in Items 6C-6G(1), complete a Regulatory Action DRP.

Item 6C.

Has the *SEC* or the *CFTC* ever:

(1) *found* the individual to have made a false statement or omission? Yes No

(2) *found* the individual to have been *involved* in a violation of any *SEC* or *CFTC* regulation or statute? Yes No

(3) *found* the individual to have been a cause of a denial, suspension, revocation, or restriction of the authorization of a *municipal advisor-related* business or *investment-related* business to operate? Yes No

(4) entered an *order* against the individual in connection with *municipal advisor-related* or *investment-related* activity? Yes No

(5) imposed a civil money penalty on the individual, or *ordered* the individual to cease and desist from any activity? Yes No

(6) *found* the individual to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the *MSRB*, or *found* the individual to have been unable to comply with any provision of such Acts, rules or regulations? Yes No

(7) *found* the individual to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any *person* of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the *MSRB*? Yes No

(8) *found* the individual to have failed reasonably to supervise another *person* subject to his or her supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the *MSRB*? Yes No

Item 6D.

(1) Has any other *federal regulatory agency* or any *state regulatory agency* or *foreign financial regulatory authority* ever:

(a) *found* the individual to have made a false statement or omission or to have been dishonest, unfair or unethical? Yes No

(b) *found* the individual to have been *involved* in a violation of *municipal advisor-related* or *investment-related* regulation(s) or statute(s)? Yes No

(c) *found* the individual to have been a cause of a denial, suspension, revocation, or restriction of the authorization of a *municipal advisor-related* or *investment-related* business to operate? Yes No

(d) entered an *order* against the individual in connection with a *municipal advisor-related* or *investment-related* activity? Yes No

(e) denied, suspended, or revoked the individual's registration or license or otherwise, by *order*, prevented the individual from associating with a *municipal advisor-related* or *investment-related* business or restricted his or her activities? Yes No

(2) Has the individual ever been subject to any final *order* of a state securities commission (or any agency or office performing like functions), a state authority that supervises or examines banks, savings associations, or credit unions, a state insurance commission (or any agency or office performing like functions), a *federal banking agency*, or the National Credit Union Administration, that:

(a) bars the individual from association with an entity regulated by such commission, authority, agency, or office, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or Yes No

(b) is based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct? Yes No

Item 6E.

Has any *self-regulatory organization* or commodities exchange ever:

- (1) *found* the individual to have made a false statement or omission? Yes No
- (2) *found* the individual to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the *SEC*)? Yes No
- (3) *found* the individual to have been a cause of a denial, suspension, revocation, or restriction of the authorization of a *municipal advisor-related* or *investment-related* business to operate? Yes No
- (4) disciplined the individual by expelling or suspending him or her from membership, barring or suspending the individual's association with its members, or restricting the individual's activities? Yes No
- (5) *found* the individual to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the *MSRB*, or *found* the individual to have been unable to comply with any provision of such Acts, rules or regulations? Yes No
- (6) *found* the individual to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any *person* of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the *MSRB*? Yes No
- (7) *found* the individual to have failed reasonably to supervise another *person* subject to his or her supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the *MSRB*? Yes No

Item 6F.

Has the individual ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended? Yes No

Item 6G.

Has the individual been notified, in writing, that he or she is currently the subject of any:

- (1) regulatory complaint or *proceeding* that could result in a "Yes" answer to any part of 6C, D or E? Yes No

INVESTIGATION DISCLOSURE

If the answer is "Yes" to Item 6G(2) below, complete an Investigation DRP.

- (2) *investigation* that could result in a "Yes" answer to any part of 6A, B, C, D or E? Yes No

CIVIL JUDICIAL ACTION DISCLOSURE

If the answer is "Yes" to a question below in Item 6H, complete a Civil Judicial Action DRP.

Item 6H.

- (1) Has any domestic or foreign court ever:
- (a) *enjoined* the individual in connection with any *municipal advisor-related* or *investment-related* activity? Yes No
 - (b) *found* that the individual was *involved* in a violation of any *municipal advisor-related* or *investment-related* statute(s) or regulation(s)? Yes No
 - (c) dismissed, pursuant to a settlement agreement, a *municipal advisor-related* or *investment-related* civil action brought against the individual by a domestic jurisdiction or *foreign financial regulatory authority*? Yes No
- (2) Is the individual named in any currently pending civil *proceeding* that could result in a "Yes" answer to any part of 6H(1)? Yes No

CUSTOMER COMPLAINT/ARBITRATION/CIVIL LITIGATION DISCLOSURE

If the answer is "Yes" to a question below in Item 6I, complete a Customer Complaint / Arbitration / Civil Litigation DRP.

Item 6I.

- (1) Has the individual ever been the subject of a *municipal advisor-related* or *investment-related*, customer-initiated (written or oral) complaint that alleged that he or she was *involved* in fraud, false statements, omissions, theft, embezzlement, wrongful taking of property, bribery, forgery, counterfeiting, extortion, or dishonest, unfair or unethical practices, which:
- (a) is still pending, or; Yes No
 - (b) was settled? Yes No
- (2) Has the individual ever been the subject of a *municipal advisor-related* or *investment-related*, customer-initiated arbitration or civil litigation that alleged that he or she was *involved* in fraud, false statements, omissions, theft, embezzlement, wrongful taking of property, bribery, forgery, counterfeiting, extortion, or dishonest, unfair or unethical practices, which:
- (a) is still pending, or; Yes No
 - (b) resulted in an arbitration award or civil judgment against the individual, regardless of amount, or; Yes No
 - (c) was settled? Yes No

TERMINATION DISCLOSURE

If the answer is "Yes" to a question below in Item 6J, complete a Termination DRP.

Item 6J.

Has the individual ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused him or her of:

- (1) violating *municipal advisor-related* or *investment-related* statutes, regulations, rules, or industry standards of conduct? Yes No
- (2) fraud or the wrongful taking of property? Yes No
- (3) failure to supervise in connection with *municipal advisor-related* or *investment-related* statutes, regulations, rules or industry standards of conduct? Yes No

FINANCIAL DISCLOSURE

Item 6K.

Within the past 10 years:

- (1) has the individual made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? Yes No
- (2) based upon events that occurred while the individual exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? Yes No
- (3) based upon events that occurred while the individual exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act? Yes No

Item 6L.

Has a bonding company ever denied, paid out on, or revoked a bond for the individual? Yes No

JUDGMENT / LIEN DISCLOSURE

If the answer is "Yes" to a question below in Item 6M, complete a Judgment/Lien DRP.

Item 6M. Are there currently any unsatisfied judgments or liens against the individual? Yes No

Item 7 Signature

NOTE: In addition to completing Item 7, to the extent that the individual is a *non-resident*, a Form MA-NR completed and signed by the individual must be attached as an exhibit to this Form MA-I.

Complete either Subpart A or Subpart B:

By typing a name in the signature field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature.

A. For Municipal Advisory Firms filing this form:

The *municipal advisory firm* has obtained and retained written consent from the individual that service of any civil action brought by, or notice of any *proceeding* before, the *SEC* or any *self-regulatory organization* in connection with the individual's *municipal advisory activities* may be given by registered or certified mail to the individual's address given in Item 1.

I, the undersigned, sign this Form MA-I on behalf of, and with the authority of, the *municipal advisory firm* that is filing this form. The *municipal advisory firm* and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form MA-I, including exhibits and any other information submitted, are true and correct, and that I am signing this Form MA-I as a free and voluntary act.

Date: _____

By: _____

(signature)

Title: _____

B. For Natural Person Municipal Advisors (Sole Proprietors) filing this form:

The individual named below consents that service of any civil action brought by, or notice of any *proceeding* before, the *SEC* or any *self-regulatory organization* in connection with the individual's *municipal advisory activities* may be given by registered or certified mail to the individual's address given in Item 1.

I, the undersigned, certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form MA-I, including exhibits and any other information submitted, are true and correct, and that I am signing this Form MA-I Execution Page as a free and voluntary act.

Date: _____

Full Legal Name of the Individual

Enter all the letters of each name and not initials or other abbreviations. If no middle name, enter NMN on that line.

_____	_____	_____	_____
Last Name	First Name	Middle Name	Suffix
Individual CRD No. (if any): _____			

By: _____

(signature)

Warning: Intentional misstatements or omissions of fact constitute Federal criminal violations. See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).12.

FORM MA-I

PART II:

DISCLOSURE REPORTING PAGES (DRPs)

CRIMINAL ACTION DISCLOSURE REPORTING PAGE (MA-I)

CRIMINAL ACTION DRP – PART 1

This **Disclosure Reporting Page (DRP MA-I)** is an **INITIAL** or **AMENDED** response to report details for affirmative response(s) to *Question(s) 6A and 6B* on Form MA-I.

Check the question(s) to which this DRP pertains:

6A(1)(a) 6A(1)(b) 6A(2)(a) 6A(2)(b)

6B(1)(a) 6B(1)(b) 6B(2)(a) 6B(2)(b)

Is this DRP an amendment that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If "Yes," the reason the DRP should be removed is:

The event or *proceeding* was resolved in the individual's favor

The DRP was filed in error. Explain the circumstances:

How to Report an Event or Proceeding on a Criminal Action DRP: Use a separate DRP for each event or *proceeding*. One event may result in more than one affirmative answer to Items **6A(1)(a)**, **6A(1)(b)**, **6A(2)(a)**, **6A(2)(b)**, **6B(1)(a)**, **6B(1)(b)**, **6B(2)(a)** and/or **6B(2)(b)**. Use this DRP to report all *charges*, including multiple counts of the same *charge*, arising out of the same event and filed in one criminal action. Separate cases arising out of the same event, and unrelated criminal actions, must be reported on separate DRPs.

How to Provide Court Documents: Applicable court documents (*i.e.*, criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) must be attached as an exhibit if not previously submitted.

DRP On File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC-registrant about the individual as an associated person.

Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____
MA-I File Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

CRIMINAL ACTION DRP – PART 2

1. Firm or Organization

A. Were *charge(s)* brought against a firm or organization over which the individual exercise(d) control?

Yes No

B. If “Yes,” provide the following information:

(1) Enter the firm or organization name: _____

(2) Was the firm or organization engaged in a *municipal advisor-related* or *investment-related* business? Yes No

(3) What was the individual’s position, title, or relationship with the firm or organization?

2. Court Where Formal Charge(s) Were Brought: (File a separate Criminal Action DRP for charges brought in separate courts and/or separate cases in the same court. If brought in a foreign jurisdiction, provide all the information below in English.)

- Federal Court
- Military Court
- State Court
- Foreign Country Court
- International Court
- Other : _____

A. Name of the Court: _____

B. Location of the Court

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

A. Date First Charged (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

B. Details of Event: Report all *charges* separately. For each *charge*, provide the following information.

(1) First Charge

(a) List the *charge/charge* description:

(b) Number of counts: ____

(c) Check the appropriate box: *Felony* *Misdemeanor*

(d) Plea for this *charge*:

(e) (i) Is the *charge municipal advisor-related*? Yes No

(ii) If "Yes," what is the product type?

(f) (i) Is the *charge investment-related*? Yes No

(ii) If "Yes," what is the product type?

(g) (i) Amended *Charge*: Indicate if the original *charge* was amended or reduced:

Yes No

(ii) If "Yes," provide the date the *charge* was amended or reduced (MM/DD/YYYY):

Report each additional *charge* below:

C. *Felony Charge(s)*: Did any of the *charge(s)* within the event *involve a felony*? Yes No

4. Current Status of the Event: Pending On Appeal Final

5. Event Status Date (Complete unless status is pending) (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

6. **On Appeal – Judicial Review:** If you checked “On Appeal” in Item 4, to whom was the criminal action appealed? (If brought in a foreign jurisdiction, provide all the information below in English.)

- Federal Court
- Military Court
- State Court
- Foreign Country Court
- International Court
- Other (specify): _____

A. **Name of the Court:** _____

B. **Location of the Court**

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. **Docket/Case Name:** _____

D. **Docket/Case Number:** _____

E. **Date Appeal filed (MM/DD/YYYY):** _____

**For Item 7: If you checked “Final” or “On Appeal” in Item 4, complete Item 7.
For actions that are “Pending,” skip to Item 8.**

7. **Disposition Disclosure Detail** (For each *charge*, provide the following information):

(a) **First Charge**

(1) **Disposition of the Charge:**

Check all that apply.

- | | | |
|--|---|---|
| <input type="checkbox"/> Acquitted | <input type="checkbox"/> Found not guilty | <input type="checkbox"/> Pre-trial diversion/intervention |
| <input type="checkbox"/> Amended | <input type="checkbox"/> Pled guilty | <input type="checkbox"/> Reduced |
| <input type="checkbox"/> Convicted | <input type="checkbox"/> Pled nolo contendere | <input type="checkbox"/> Other (requires explanation) |
| <input type="checkbox"/> Deferred Adjudication | <input type="checkbox"/> Pled not guilty | _____ |
| <input type="checkbox"/> Dismissed | | |

- Appealed
 - Affirmed
 - Vacated & Returned For Further Action
 - Vacated / Final
 - Other (requires explanation) _____

Explanation: *If more than one disposition is checked, and/or “Other” is checked, or the above otherwise does not adequately summarize the disposition of the charge, provide an explanation.*

(2) Date (MM/DD/YYYY): _____

(3) Sentence/Penalty: Is a sentence or other penalty ordered? Yes No

If "Yes," list each type (e.g., prison, jail, probation, community service, counseling, education, other - specify):

(4) Was or is the individual incarcerated in connection with this sentence? Yes No

If "Yes," provide the following details:

(i) Duration (length of the sentence): Days ___ Months ___ Years ___

(ii) Start Date of Penalty (MM/DD/YYYY): _____ Not determined.

(iii) End Date of Penalty (MM/DD/YYYY): _____ Not determined.

(iv) Is the sentence to be served concurrently with any other sentence? Yes No

If "Yes," indicate the end date of the concurrent sentence (MM/DD/YYYY):

(v) Explanation (Optional):

(5) Monetary Penalty/Fine:

(i) Was a monetary penalty/fine imposed? Yes No

If "Yes," provide the following details in (ii) and (iii) below:

(ii) Total Penalty/Fine Amount: \$ _____

(iii) Was any portion suspended/reduced?

Yes If "Yes," how much? \$ _____

No

(iv) Final Amount: \$ _____

(v) Was the final amount paid in full?

Yes If "Yes," date paid in full (MM/DD/YYYY): _____

No

If "No," indicate the amount unpaid: \$ _____

And explain the circumstances:

Report the disposition(s) of each additional *charge* below:

8. **Summary of Circumstances (Optional):** You may use this space to provide a brief summary of the circumstances leading to the *charge(s)*, as well as the current status or final disposition, if any. Include the relevant dates when the conduct which was the subject of the *charge(s)* occurred, and any other relevant information. The information must fit within the space provided.

REGULATORY ACTION DISCLOSURE REPORTING PAGE (MA-I)

REGULATORY ACTION DRP – PART 1

This Disclosure Reporting Page (DRP MA-I) is an INITIAL or AMENDED response to report details for affirmative response(s) to Question(s) 6C, 6D, 6E, 6F and 6G(1) on Form MA-I.

Check the question(s) to which this DRP pertains:

- Grid of checkboxes for questions 6C(1) through 6C(8), 6D(1)(a) through 6D(2)(b), 6E(1) through 6E(7), 6F, and 6G(1).

Is this DRP an amendment that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If "Yes," the reason the DRP should be removed is:

- Two checkbox options: 'The event or proceeding was resolved in the individual's favor' and 'The DRP was filed in error. Explain the circumstances:'

Two horizontal lines for providing an explanation for the second checkbox option.

How to Report an Event or Proceeding on a Regulatory Action DRP: Use a separate DRP for each event or proceeding. One event may result in more than one affirmative answer to the above items. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

DRP On File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the IARD or CRD system (with a Form ADV, BD, or U4), or (b) in the SEC's EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC registrant about the individual as an associated person.

- Checkbox option: Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

- Checkbox 1. Form ADV, BD, or U4 Filing: For a DRP filed on the IARD or CRD system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____

MA Registration Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____

MA-I File Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

REGULATORY ACTION DRP – PART 2

1. Regulatory Action was initiated by:

A. Select the Appropriate Item.

Select only one box below. A separate Regulatory Action DRP is required for each such regulator or other authority.

- | | | |
|---|--------------------------------|---|
| <input type="checkbox"/> SEC | <input type="checkbox"/> State | <input type="checkbox"/> Foreign Financial Regulatory Authority |
| <input type="checkbox"/> CFTC | <input type="checkbox"/> SRO | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Federal Banking Agency | | |
| <input type="checkbox"/> National Credit Union Administration | | |
| <input type="checkbox"/> Other Federal Authority | | |

B. Full name of the individual regulator (if not fully identified in Item 1-A.) or other authority that initiated the action. For a *foreign financial regulatory authority*, please provide the full name in English.

2. Sanction(s) Sought

Select all that apply.

- | | | |
|--|--|--------------------------------------|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Disgorgement | <input type="checkbox"/> Rescission |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Restitution |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Civil and Administrative Penalty(ies)/Fine(s) | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Requalification | |

Other Sanction(s) Sought (list each such additional sanction):

3. Date Initiated (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

4. Regulatory Action was brought in (if brought in a foreign jurisdiction, provide all the information below in English):

A. Name of the Administrative Proceeding, Commission/Agency Hearing, or Other Regulatory Proceeding or Forum: _____

B. Location of the Proceeding / Hearing:

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Number: _____

5. **Employing Firm:** Provide the full legal name of the individual's employing firm, if any, when the activity occurred which led to the regulatory action (if there was no such employing firm at that time, enter "None"). Enter the employing firm's MA and CRD registration numbers below, if any.

A. **Employing Firm:** _____

B. **Municipal Advisor Registration Number, if any:** _____

C. **CRD Number, if any:** _____

6. **A. Principal Product Type**
Check appropriate item.

No Product

Annuity – Charitable

Annuity – Fixed

Annuity – Variable

Banking Product
(other than CD)

CD

Commodity Option

Debt – Asset Backed

Debt – Corporate

Debt – Government

Debt – Municipal

Derivative

Direct Investment – DPP & LP Interest

Equipment Leasing

Equity Listed (Common & Preferred Stock)

Equity OTC

Futures – Commodity

Futures – Financial

Index Option

Insurance

Investment Contract

Money Market Fund

Mutual Fund

Oil & Gas

Options

Penny Stock

Prime Bank Instrument

Promissory Note

Real Estate Security

Security Futures

Security-based Swap

Swap

Unit Investment Trust

Viatical Settlement

Other Principal Product Type (specify):

B. Other Product Types? Yes No If "Yes," describe each additional product type:

7. **Allegations:** Describe the allegations related to this regulatory action. (The response must fit within the space provided.)

8. **Current Status:** Pending On Appeal Final

9. Pending: If you checked "Pending" in Item 8, provide the following information.

A. Date Served: The date that notice or other process was served (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

B. Limitation or Restrictions: Are there any limitations or restrictions currently in effect?

Yes No

If the answer is "Yes," provide details:

10. On Appeal – Administrative or Judicial Review of the Regulatory Action: If the individual appealed, provide the following information.

A. Name of Regulator or Court Action Appealed To: *Provide the name of the US regulator (i.e., the SEC, an SRO, other), federal court, state court or state regulator, or a foreign or international court or regulator to whom the individual appealed. If brought in a foreign jurisdiction, provide all the information below in English.*

B. Location of the Regulator or Judicial Court to Whom the Individual Appealed:

Street Address: _____

City or County: _____ State/Country: _____

Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

E. Date Appeal filed (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

F. Appeal Details (including status):

G. Limitation or Restrictions: Are there any limitations or restrictions currently in effect while on appeal?

Yes No

If the answer is "Yes," provide details:

If you checked "Final" or "On Appeal" in Item 8, complete Items 11 through 13, and consider Item 14. For actions that are "Pending," skip to Item 14.

11. A. Resolution: How was the matter resolved?

Check all the applicable boxes that reflect the most recent resolution of the matter by a regulator or a court, whether or not any part of the resolution is on appeal. If any part of the resolution is on appeal, identify in Item 11-B which part is currently on appeal.

- | | | |
|--|--|---|
| <input type="checkbox"/> Acceptance, Waiver & Consent (AWC) | <input type="checkbox"/> Dismissed | <input type="checkbox"/> Stipulation and Consent |
| <input type="checkbox"/> Consent | <input type="checkbox"/> Judgment Rendered | <input type="checkbox"/> Withdrawn |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Order | <input type="checkbox"/> Other (requires explanation) |
| <input type="checkbox"/> Decision & Order of Offer of Settlement | <input type="checkbox"/> Settled | |

- Appealed
- Affirmed
 - Vacated Nunc Pro Tunc / ad initio
 - Vacated & Returned For Further Action
 - Vacated / Final
 - Other (requires explanation)

B. Explanation: *If more than one box in Item 11-A is checked, or Other is checked, or Item 11-A otherwise does not adequately summarize the type of resolution, provide an explanation. For example, if the individual appealed all or part of a resolution by the regulator or court, indicate what is being appealed.*

C. Order: If Order is checked above in Item 11-A, does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, or deceptive conduct? Yes No

12. Resolution Date (MM/DD/YYYY): _____ Exact Explanation
(For a resolution that is being appealed in part, the date to be provided should be the date on which the regulator (reviewing a decision by an SRO or an Administrative Law Judge) or a court provided its resolution.)

If not exact, provide explanation:

13. Resolution Detail

A. Sanction(s): Was/were any Sanction(s) Ordered? Yes
 No, none were ordered.

B. If "Yes," check each individual sanction below that was ordered:

- | | | |
|---|--|--|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Disgorgement* | <input type="checkbox"/> Restitution* |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Requalification |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Civil and Administrative Penalty(ies)/Fine(s)* | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Rescission | |

*** Monetary Sanction(s):** Were one or more sanctions ordered that require a monetary payment?

Yes No

If "Yes," enter the total amount ordered: \$ _____

Other Sanction(s) Ordered (list each such additional sanction):

C. Sanction Detail (Provide the details of the following specific sanctions, if checked above in Item 13-B.)

(1) Barred, Enjoined, or Suspended: If you checked one or more of these sanctions in Item 13-B. above, check the appropriate box(es) below and provide the corresponding information.

(a) Barred

(i) Duration (length of time):

- Permanent (not limited by length of time).
 Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

(iv) Description: Provide remaining details, including any explanation boxes checked above, and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.):

If, in the above action, the individual received one or more bars from registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(b) Enjoined

(i) Duration (length of time):

- Permanent (not limited by length of time).
- Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

(iv) Description: Provide remaining details, including any explanation boxes checked above, and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.):

If, in the above action, the individual received one or more injunctions from registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(c) Suspended

(i) Duration (length of time):

- Permanent (not limited by length of time).
- Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

(iv) Description: Provide remaining details, including any explanation boxes checked above, and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.):

If, in the above action, the individual received one or more suspensions from registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(2) **Requalification:** Was requalification by examination, retraining, or other process a condition of a sanction?

Yes No

If "Yes," provide:

(a) Length of time given to requalify, retrain, or complete other process:

No time period is specified.

Time period is specified: Days ___ Months ___ Years ___

(b) Type of examination, retraining, or other process required:

(c) Was the condition satisfied? Yes No

(1) If "Yes," provide the date (MM/DD/YYYY): _____

(2) If "No," explain the circumstances:

If, in the above action, the individual received one or more requalifications in connection with registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(3) Monetary Sanction(s): If you indicated in Item 13-B above that one or more monetary sanctions were *ordered*, provide the following information.

(a) Total Amount *Ordered*: \$ _____

(b) Portion levied against the individual:

(i) Amount *Ordered*: \$ _____

(ii) Was any portion waived?

- Yes
 No

If "Yes," how much? \$ _____

(iii) Final Amount: \$ _____

(iv) Was final amount paid in full?

- Yes
 No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

14. Summary of Circumstances (Optional): You may use this space to provide a brief summary of the circumstances leading to the action, allegation(s), finding(s) and disposition(s), if any. Include any relevant information on the current action status, and on any terms, conditions, and dates not already provided above, and any other relevant information. The information must fit within the space provided.

INVESTIGATION DISCLOSURE REPORTING PAGE (MA-I)

INVESTIGATION DRP – PART 1

This Disclosure Reporting Page (DRP MA-I) is an INITIAL or AMENDED response to report details for an affirmative response to *Question 6G(2)* on Form MA-I.

Check the question(s) to which this DRP pertains:

6G(2) Investigation that could result in a “Yes” answer to any part of:
Check all that apply.

- 6A (Criminal Action Disclosure – Felony)**
- 6B (Criminal Action Disclosure – Misdemeanor)**
- 6C (Regulatory Action Disclosure – SEC or CFTC)**
- 6D (Regulatory Action Disclosure – Other Federal, State, Foreign)**
- 6E (Regulatory Action Disclosure – SRO)**

Is this DRP an amendment that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If “Yes,” the reason the DRP should be removed is:

- The event or *proceeding* was resolved in the individual’s favor
- The DRP was filed in error. Explain the circumstances:

How to Report an Event or Investigation on an Investigation DRP: Complete this *Investigation* DRP only if you are answering “yes” to Item 6G(2), *i.e.*, that the individual has been notified, in writing, that he or she is currently the subject of an *investigation*. (If you answered “yes” to Item 6G(1), *i.e.*, that the individual has been notified in writing that he or she is currently the subject of a regulatory complaint or *proceeding*, complete the Regulatory Action DRP.) Use a separate *Investigation* DRP for each event or *investigation*. One event may result in more than one *investigation*. If an event gives rise to more than one authority *investigating* the individual, provide the details of each *investigation* on a separate DRP.

Investigation Concluded Without Formal Action: If the individual has been notified that the *investigation* has been concluded without formal action, complete items 4 and 5 of this DRP to update.

DRP on File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC*’s EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC-registrant about the individual as an associated person.

Yes

If the answer is “Yes,” provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____
MA-I File Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

- Debt – Corporate
- Debt – Government
- Debt – Municipal
- Derivative

- Investment Contract
- Money Market Fund
- Mutual Fund

- Swap
- Unit Investment Trust
- Viatical Settlement

Other Product Type:

5. **Current Status:** Is the *investigation* pending? Yes **If “Yes,” skip to Item 7.**
 No **If “No,” complete Item 6.**

6. **Resolution Details:**

- A. **Date Closed/Resolved (MM/DD/YYYY):** _____ Exact Explanation
 If not exact, provide explanation:
-
-

B. **How was the *investigation* resolved?** (select appropriate item):

- Closed Without Further Action
 - Closed - Regulatory Action Initiated
 - Other (Explain):
-
-

If you checked “Closed - Regulatory Action Initiated” in Item 6-B, you must promptly complete and file an accurate and up-to-date Regulatory Action DRP (MA-I).

7. **Summary of Circumstances (Optional):** You may use this space to provide a brief summary of the circumstances leading to the *investigation*, as well as the current status or final disposition and/or finding(s), if any. Include any other relevant information. The information must fit within the space provided.
-
-
-
-
-

TERMINATION DISCLOSURE REPORTING PAGE (MA-I)

TERMINATION DRP – PART 1

This Disclosure Reporting Page (DRP MA-I) is an INITIAL or AMENDED response to report details for affirmative response(s) to **Question 6J** on Form MA-I;

Check the question(s) to which this DRP pertains:

- 6J(1) 6J(2) 6J(3)

Is this DRP an amendment that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If "Yes," the reason the DRP should be removed is:

- The event or *proceeding* was resolved in the individual's favor
- The DRP was filed in error. Explain the circumstances:

How to Report a Termination on a Termination DRP: One termination may result in more than one affirmative answer to the above items. Use only one Termination DRP to report details about the same termination. Use a separate Termination DRP for each termination reported.

DRP on File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC registrant about the individual as an associated person.

- Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

- 1. Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

- 2. Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____

MA-I File Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided. If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

TERMINATION DRP – PART 2

1. Name of Employing Firm: _____

MA Registration Number, if any: _____ CRD Number, if any: _____

2. Termination Type: Discharged Permitted to Resign Voluntary Resignation

3. Termination Date (MM/DD/YYYY): _____ Exact Explanation
If not exact, provide explanation:

4. Allegation(s):

5. Product Type(s): (Select all that apply.)

No Product

Annuity – Charitable

Annuity – Fixed

Annuity – Variable

Banking Product
(other than CD)

CD

Commodity Option

Debt – Asset Backed

Debt – Corporate

Debt – Government

Debt – Municipal

Derivative

Direct Investment – DPP & LP Interest

Equipment Leasing

Equity Listed (Common & Preferred Stock)

Equity OTC

Futures – Commodity

Futures – Financial

Index Option

Insurance

Investment Contract

Money Market Fund

Mutual Fund

Oil & Gas

Options

Penny Stock

Prime Bank Instrument

Promissory Note

Real Estate Security

Security Futures

Security-based Swap

Swap

Unit Investment Trust

Viatical Settlement

Other Product Type:

6. Summary of Circumstances (Optional): You may use this space to provide a brief summary of the circumstances leading to the termination, including any relevant information. The information must fit within the space provided.

JUDGMENT / LIEN DISCLOSURE REPORTING PAGE (MA-I)

JUDGMENT / LIEN DISCLOSURE DRP – PART 1

This **Disclosure Reporting Page (DRP MA-I)** is an **INITIAL** or **AMENDED** response to report details for an affirmative response to **Question 6M** on Form MA-I.

Is this DRP an amendment that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If "Yes," the reason the DRP should be removed is:

- The event or *proceeding* was resolved in the individual's favor
- The DRP was filed in error. Explain the circumstances:

How to Report an Event or a Judgment/Lien on a Judgment/Lien DRP: If multiple, unrelated events result in the same affirmative answer, details relating to each separate event must be provided on a separate Judgment/Lien DRP.

DRP on File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC-registrant about the individual as an associated person.

Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

- 1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

- 2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

- 3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____

MA-I File Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

JUDGMENT / LIEN DISCLOSURE DRP – PART 2

1. Judgment/Lien Amount: \$ _____
2. Judgment/Lien Holder: _____
3. Judgment/Lien Type: Civil Tax
4. Date Filed (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

5. Formal Action Was Brought In: *(If brought in a foreign jurisdiction, provide all the information below in English):*

- Federal Court Military Court State Court Foreign Court International Court
- Other : _____

A. Name of the Court: _____

B. Location of the Court

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

6. Is Judgment/Lien outstanding? Yes **If "Yes," skip to item 8.**
 No **If "No," complete item 7.**

7. If Judgment/Lien is not outstanding, provide:

A. Status Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

B. How was matter resolved? (select appropriate item):

Discharged Released Removed Satisfied

Other (provide explanation):

8. **Summary of Circumstances (Optional):** You may use this space to provide a brief summary of the circumstances leading to the action as well as the current status or final disposition. Include any other relevant information. The information must fit within the space provided.

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (MA-I)

CIVIL JUDICIAL ACTION DRP – PART 1

This Disclosure Reporting Page (DRP MA-I) is an INITIAL or AMENDED response to report details for affirmative response(s) to *Question(s) 6H* on Form MA-I.

Check the question(s) to which this DRP pertains:

- 6H(1)(a) 6H(1)(b) 6H(1)(c) 6H(2)

Is this DRP an amendment filed for the individual that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If "Yes," the reason the DRP should be removed is:

- The event or *proceeding* was resolved in the individual's favor
- The DRP was filed in error. Explain the circumstances:

How to Report an Event or *Proceeding* on a Civil Judicial Action DRP: Use a separate DRP for each event or *proceeding*. One event may result in more than one affirmative answer to Item 6H. Separate cases arising out of the same event, and unrelated civil judicial actions, must be reported on separate DRPs; if they are later consolidated into a single civil judicial action, the consolidated action can be reported on one DRP.

DRP on File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC-registrant about the individual as an associated person.

- Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____
MA Registration Number: _____
Date of filing that contains the DRP (MM/DD/YYYY): _____
Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____

MA-I File Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

- No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

CIVIL JUDICIAL ACTION DRP – PART 2

1. Court Action initiated by:

A. Select the Appropriate Item(s).

Check all that apply.

- | | | |
|--|---|---|
| <input type="checkbox"/> SEC | <input type="checkbox"/> State | <input type="checkbox"/> Foreign Financial Regulatory Authority |
| <input type="checkbox"/> CFTC | <input type="checkbox"/> SRO | <input type="checkbox"/> Municipal Advisory Firm |
| <input type="checkbox"/> Other Federal Authority | <input type="checkbox"/> Commodities Exchange | <input type="checkbox"/> Private Plaintiff |
| <input type="checkbox"/> Other: _____ | | |

B. Plaintiff(s): Enter the full name(s) of the plaintiff(s), unless only SEC and/or CFTC is/are checked above. For a foreign financial regulatory authority, please provide the full name in English.

Were all plaintiffs fully identified in the space provided? Yes No

2. Defendant(s):

A. Enter the full name(s) of the defendant(s). For foreign defendant(s), please provide the full name(s) in English:

B. Is the individual a named defendant? Yes No If "No," describe how this action involves the individual:

3. Sanction(s) or Relief Sought:

Check appropriate items.

- | | | |
|---|--|--|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Exemption | <input type="checkbox"/> Requalification |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Rescission |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Restitution |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Money Damage(s) | <input type="checkbox"/> Restraining Order |
| <input type="checkbox"/> Civil /Administrative Penalty(ies)/Fine(s) | (Private/Civil Complaint) | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Disgorgement | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |

Other Sanction(s) or Relief Sought:

4. A. Filing Date of Court Action (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

B. Date Notice/Process was served (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

5. Formal Action was brought in (If brought in a foreign jurisdiction, provide all the information below in English):

Check the appropriate box.

Federal Court Military Court State Court Foreign Court International Court

Other : _____

A. Name of the Court: _____

B. Location of the Court

Street Address: _____

City or County: _____ State/Country: _____

Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

6. **Employing Firm:** Provide the full legal name of the individual's employing firm, if any, when the activity occurred which led to the civil judicial action. (If there was no such employing firm at that time, enter "None"). Enter the employing firm's MA and CRD registration numbers below, if any.

A. Employing Firm: _____

B. Municipal Advisor Registration Number, if any: _____

C. CRD Number, if any: _____

7. A. Principal Product Type:

Check appropriate item.

No Product

- Annuity – Charitable
- Annuity – Fixed
- Annuity – Variable
- Banking Product
(other than CD)
- CD
- Commodity Option
- Debt – Asset Backed
- Debt – Corporate
- Debt – Government
- Debt – Municipal
- Derivative

- Direct Investment – DPP & LP Interest
- Equipment Leasing
- Equity Listed (Common & Preferred Stock)
- Equity OTC
- Futures – Commodity
- Futures – Financial
- Index Option
- Insurance
- Investment Contract
- Money Market Fund
- Mutual Fund

- Oil & Gas
- Options
- Penny Stock
- Prime Bank Instrument
- Promissory Note
- Real Estate Security
- Security Futures
- Security-based Swap
- Swap
- Unit Investment Trust
- Viatical Settlement

Other Principal Product Type (specify):

B. Other Product Types? Yes No If "Yes," describe each additional product type:

8. Allegations: Describe the allegations related to this civil action. (The response must fit within the space provided.)

9. Current Status: Pending On Appeal Final

10. Pending: If you checked "Pending" in Item 9, provide the following information:

A. Date Served: The date that notice or other process was served (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

B. Limitation or Restrictions: Are there any limitations or restrictions currently in effect?

Yes No

If the answer is "Yes," provide details:

11. On Appeal – Judicial Review: If the individual appealed, provide the following information.
(If brought in a foreign jurisdiction, provide all the information below in English.):

A. Action Appealed to: (Provide the name of the federal, state, foreign, or international court to whom the individual appealed.):

B. Location of the Court:

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

E. Date Appeal filed (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

F. Appeal Details (including status):

G. Limitation or Restrictions: Are there any limitations or restrictions currently in effect while on appeal?

Yes No

If the answer is "Yes," provide details:

**If you checked "Final" or "On Appeal" in Item 9, complete Items 12 through 14.
For Pending Actions, skip to Item 15.**

12. A. Resolution: How was the action resolved?

Check all the applicable boxes that reflect the most recent resolution of the action by a court, whether or not any part of the resolution is on appeal. If any part of the resolution is on appeal, identify in Item 12-B which part is currently on appeal.

- Consent
- Decision
- Decision & *Order* of Offer of Settlement
- Dismissed
- Judgment Rendered
- Stipulation and Consent
- Opinion
- Order*
- Settled
- Withdrawn

Other: _____

- Appealed
 - Affirmed
 - Vacated Nunc Pro Tunc / ad initio
 - Vacated & Returned For Further Action
 - Vacated / Final
 - Other: _____

B. Explanation: *If more than one box in Item 12-A is checked or Item 12-A otherwise does not adequately summarize the type of resolution, provide an explanation. For example, if the individual appealed all or part of a resolution by the regulator or court, indicate what is being appealed.*

C. Order: If *Order* is checked above in Item 12-A, does the *order* constitute a final *order* based on violations of any laws or regulations that prohibit fraudulent, or deceptive conduct? Yes No

13. Resolution Date (MM/DD/YYYY): _____ Exact Explanation
(For a resolution that is being appealed in part, the date to be provided should be the date on which the regulator or court provided its resolution.)

If not exact, provide explanation:

14. Resolution Detail

A. Sanctions(s): Was/were any Sanction(s) Ordered or Relief Granted?

- Yes
- No, none were *ordered* or granted.

B. If "Yes," check each individual sanction ordered and/or relief granted below:

- | | | |
|--|--|---|
| <input type="checkbox"/> Bar (Permanent) | <input type="checkbox"/> Exemption | <input type="checkbox"/> Requalification |
| <input type="checkbox"/> Bar (Temporary / Time Limited) | <input type="checkbox"/> Expulsion | <input type="checkbox"/> Rescission |
| <input type="checkbox"/> Cease and Desist | <input type="checkbox"/> Injunction | <input type="checkbox"/> Restitution* |
| <input type="checkbox"/> Censure | <input type="checkbox"/> Money Damage(s) | <input type="checkbox"/> Restraining <i>Order</i> |
| <input type="checkbox"/> Civil /Administrative Penalty(ies)/Fine(s)* | (Private/Civil Complaint)* | <input type="checkbox"/> Revocation |
| <input type="checkbox"/> Denial | <input type="checkbox"/> Prohibition | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Disgorgement* | <input type="checkbox"/> Reprimand | <input type="checkbox"/> Undertaking |

* **Monetary Sanction(s):** Were one or more sanctions *ordered* that require a monetary payment?
 Yes No

If "Yes," enter the total amount *ordered*: \$ _____
 752

Other Sanctions Ordered or Relief Granted (list each such additional sanction or relief):

C. Sanction Detail (Provide the details of the following specific sanctions, if checked above in Item 14-B.)

(1) Barred, Enjoined, or Suspended: If you checked one or more of these sanctions in Item 14-B. above, check the appropriate box(es) below and provide the corresponding information.

(a) Barred

(i) Duration (length of time):

Permanent (not limited by length of time).

Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

(iv) Description: Provide remaining details, including any explanation boxes checked above, and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.):

If, in the above action, the individual received one or more bars from registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(b) Enjoined

(i) Duration (length of time):

Permanent (not limited by length of time).

Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

(iv) Description: Provide remaining details, including any explanation boxes checked above, and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.):

If, in the above action, the individual received one or more injunctions from registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(c) Suspended

(i) Duration (length of time):

Permanent (not limited by length of time).
 Temporary / Time Limited. Specify the: Days ___ Months ___ Years ___

(ii) Start Date (MM/DD/YYYY): _____ Exact Explanation

(iii) End Date (MM/DD/YYYY): _____ Exact Explanation

(iv) Description: Provide remaining details, including any explanation boxes checked above, and the registration capacities affected (General Securities Principal, Financial Operations Principal, etc.):

If, in the above action, the individual received one or more suspensions from registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(2) Requalification: Was requalification by examination, retraining, or other process a condition of a sanction?

Yes No

If "Yes," provide:

(a) Length of time given to requalify, retrain, or complete other process:

No time period is specified.
 Time period is specified: Days ___ Months ___ Years ___

(b) Type of examination, retraining, or other process required:

(c) Was the condition satisfied? Yes No

If "Yes," provide the date (MM/DD/YYYY): _____

If "No," explain the circumstances:

If, in the above action, the individual received one or more requalifications in connection with registration capacities, associations, and/or other activities, and the terms specify different time periods, report the additional details below:

(3) Monetary Sanction(s): If you indicated in Item 14-B above that one or more monetary sanctions were *ordered*, provide the following information.

(a) Total Amount *Ordered*: \$ _____

(b) Portion levied against the individual:

(i) Amount *Ordered*: \$ _____

(ii) Was any portion waived?

Yes

No

If "Yes," how much? \$ _____

(iii) Final Amount: \$ _____

(iv) Was final amount paid in full?

Yes

No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

15. Summary of Circumstances (Optional): You may use this space to provide a brief summary of the circumstances leading to the action, allegation(s), finding(s) and disposition(s), if any. Include any relevant information on the current action status, and on any terms, conditions, and dates not already provided above, and any other relevant information. The information must fit within the space provided.



**CUSTOMER COMPLAINT / ARBITRATION / CIVIL LITIGATION
DISCLOSURE REPORTING PAGE (MA-I)**

CUSTOMER COMPLAINT / ARBITRATION / CIVIL LITIGATION DRP – PART 1

This Disclosure Reporting Page (DRP MA-I) is an INITIAL or AMENDED response to report details for affirmative response(s) to *Question(s) 6I* on Form MA-I.

Check the question(s) to which this DRP pertains:

- 6I(1)(a) 6I(2)(a) 6I(2)(c)
 6I(1)(b) 6I(2)(b)

Is this DRP an amendment that seeks to remove a previously filed DRP concerning the individual from the record? Yes No

If "Yes," the reason the DRP should be removed is:

- The event or *proceeding* was resolved in the individual's favor
 The DRP was filed in error. Explain the circumstances:

How to Report a Matter or a *Proceeding* on this DRP: Use a separate DRP for each matter or *proceeding*. One matter may result in more than one affirmative answer to the above items. Use a single DRP to report details relating to a particular matter (*i.e.*, a customer complaint, arbitration, *CFTC* reparation, or civil litigation). If an event gives rise to separate *proceedings* by more than one regulator or other authority, or other plaintiff, provide details for each *proceeding* on a separate DRP. Separate cases arising out of the same matter, and unrelated civil judicial actions, must be reported on separate DRPs; if they are later consolidated into a single civil judicial action, the consolidated action can be reported on one DRP.

DRP on File for This Event: Is an accurate and up-to-date DRP containing the information regarding the individual required by this DRP already on file (a) in the *IARD* or *CRD* system (with a Form ADV, BD, or U4), or (b) in the *SEC's* EDGAR system (with a Form MA or Form MA-I)?

Note: The filer may identify a DRP filed by the individual directly, or filed by another SEC-registrant about the individual as an associated person.

- Yes

If the answer is "Yes," provide the applicable information indicated below that identifies where the DRP may be found.

1. **Form ADV, BD, or U4 Filing:** For a DRP filed on the *IARD* or *CRD* system with one of these forms, provide the following information:

Name on Registration: _____
CRD No.: _____ Disclosure Occurrence No.: _____

2. **Form MA Filing:** For a DRP filed on EDGAR with a Form MA, provide the following information:

Name on Registration: _____

MA Registration Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

3. **Form MA-I Filing:** For a DRP filed on EDGAR with a Form MA-I, provide the following information:

Name of Individual: _____

MA-I File Number: _____

Date of filing that contains the DRP (MM/DD/YYYY): _____

Accession number of the filing: _____

No

If the answer is "Yes," no other information on this DRP (other than set forth above) must be provided.
If the answer is "No," complete Part 2 of this DRP.

NOTE: The completion of all or any part of this form does not relieve the individual or any *municipal advisor* with which the individual is associated of the obligation to update any relevant Form MA or *IARD* or *CRD* records.

CUSTOMER COMPLAINT / ARBITRATION / CIVIL LITIGATION DRP – PART 2

Disclosure Instructions and the Individual's Status: You must indicate the individual's status in Items II and III below:

I. All Matters: Items 1-6. Complete Items 1-6 for all matters, whether or not the individual is named as a party, including:

- A. Customer complaints, arbitrations/*CFTC* reparations and civil litigation in which the individual is not named as a party, as well as,
- B. Arbitrations/*CFTC* reparations and civil litigation in which the individual is named as a party.

II. If the individual is not named as a party, check here: **And complete Items 7-11.**

- A. If the matter *involves* a customer complaint, or an arbitration/*CFTC* reparation or civil litigation in which the individual is not named as a party, complete Items 7-11 as appropriate.
- B. If a customer complaint has evolved into an arbitration/*CFTC* reparation or civil litigation, amend the existing Disclosure Form by completing Items 9 and 10.

III. If the individual is named as a party, check here: **And check the appropriate boxes below:**

- A. **Arbitration/*CFTC* Reparation:** If the matter *involves* an arbitration/*CFTC* reparation in which the individual is a named party, check here: **And complete Items 12-16, as appropriate.**
- B. **Civil Litigation:** If the matter *involves* a civil litigation in which the individual is a named party, check here: **And complete Items 17-23.**

IV. Summary of the Circumstances: Item 24. This is an optional space and applies to all event types (*i.e.*, customer complaint, arbitration/*CFTC* reparation, civil litigation).

Complete Items 1-6 for all matters (*i.e.*, customer complaints, arbitrations/*CFTC* reparations, civil litigation).

1. Customer Name(s): _____

2. A. Customer(s) State of Residence or domicile, if applicable: _____

B. Does/do the customer(s) have other state(s) of residence or domicile, if applicable? Yes No
If "Yes," provide the information: _____

3. **Employing Firm:** Provide the full legal name of the individual's employing firm, if any, when activities occurred which led to the customer complaint, arbitration, *CFTC* reparation or civil litigation. (If there was no such employing firm at that time, enter "None"). Enter the employing firm's MA and CRD registration numbers below, if any.

A. **Employing Firm:** _____

B. **Municipal Advisor Registration Number, if any:** _____

C. **CRD Number, if any:** _____

4. **Product Type(s): (select all that apply)**

No Product

- | | | |
|---|---|--|
| <input type="checkbox"/> Annuity – Charitable | <input type="checkbox"/> Direct Investment – DPP & LP Interest | <input type="checkbox"/> Oil & Gas |
| <input type="checkbox"/> Annuity – Fixed | <input type="checkbox"/> Equipment Leasing | <input type="checkbox"/> Options |
| <input type="checkbox"/> Annuity – Variable | <input type="checkbox"/> Equity Listed (Common & Preferred Stock) | <input type="checkbox"/> Penny Stock |
| <input type="checkbox"/> Banking Product
(other than CD) | <input type="checkbox"/> Equity OTC | <input type="checkbox"/> Prime Bank Instrument |
| <input type="checkbox"/> CD | <input type="checkbox"/> Futures – Commodity | <input type="checkbox"/> Promissory Note |
| <input type="checkbox"/> Commodity Option | <input type="checkbox"/> Futures – Financial | <input type="checkbox"/> Real Estate Security |
| <input type="checkbox"/> Debt – Asset Backed | <input type="checkbox"/> Index Option | <input type="checkbox"/> Security Futures |
| <input type="checkbox"/> Debt – Corporate | <input type="checkbox"/> Insurance | <input type="checkbox"/> Security-based Swap |
| <input type="checkbox"/> Debt – Government | <input type="checkbox"/> Investment Contract | <input type="checkbox"/> Swap |
| <input type="checkbox"/> Debt – Municipal | <input type="checkbox"/> Money Market Fund | <input type="checkbox"/> Unit Investment Trust |
| <input type="checkbox"/> Derivative | <input type="checkbox"/> Mutual Fund | <input type="checkbox"/> Viatical Settlement |

Other Product Type? Yes No If “Yes,” describe each additional product type:

5. **Allegation(s):** Describe the allegation(s) and provide a brief summary of events related to the allegation(s), including dates when activities leading to the allegation(s) occurred:

6. **Alleged Compensatory Damage(s)**

A. **Do the allegations include any amount(s) for compensatory damage(s)?** Yes No

B. **If “Yes,” indicate the amount:** \$ _____

Exact Explanation

If not exact, provide explanation:

If the Individual Is Not a Named Party: If the matter *involves* a customer complaint, arbitration/*CFTC* reparation or civil litigation in which the individual is not named as a party, complete items 7-11 as appropriate.

If the Individual Is a Named Party: Report in Items 12-16, or 17-23, as appropriate, only arbitrations/*CFTC* reparations or civil litigation in which the individual is named as a party.

7. A. Is this an oral complaint? Yes No
- B. Is this a written complaint? Yes No
- C. Is this an arbitration/*CFTC* reparation or civil litigation? Yes No

If "Yes," provide:

(1) Arbitration/reparation forum or court name: _____

(2) Location of the Forum or Court

Street Address: _____

City or County: _____ State/Country: _____

Postal Code: _____

(3) Docket/Case Name: _____

(4) Docket/Case Number: _____

(5) Filing date of arbitration/*CFTC* reparation or civil litigation (MM/DD/YYYY): _____

D. Date received by/served on firm (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

8. Pending: Is the complaint, arbitration/*CFTC* reparation or civil litigation pending? Yes No
If "No," complete item 9.

9. Final: If the complaint, arbitration/*CFTC* reparation or civil litigation is not pending, provide status:

- Closed/No Action Withdrawn Denied Settled
- Arbitration Award/Monetary Judgment (for claimants/plaintiffs)
- Arbitration Award/Monetary Judgment (for respondents/defendants)
- Evolved into Arbitration/*CFTC* reparation (individual is a named party): **Complete Items 12-16.**
- Evolved into Civil litigation (individual is a named party): **Complete Items 17-23.**

Status:

If the Individual Is Not a Named Party: If the status is arbitration/*CFTC* reparation in which the individual is not a named party, provide details in Item 7C.

If the Individual Is a Named Party: If the status is arbitration/*CFTC* reparation in which the individual is a named party, complete Items 12-16. If the status is civil litigation in which the individual is a named party, complete Items 17-23.

10. Status Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

11. Settlement/Award/Monetary Judgment:

A. Is there a Settlement/Award/Monetary Judgment? Yes No
If "Yes," provide the details below in Item 11-B. and Item 11-C.

B. Settlement/Award/Monetary Judgment Amount: \$ _____

C. Was the individual required to pay any portion of the total amount? Yes No

If "Yes," indicate:

(1) The individual's contribution amount: \$ _____

(2) Was any portion waived?

- Yes
 No

If "Yes," how much? \$ _____

(3) Final Amount: \$ _____

(4) Was final amount paid in full?

- Yes
 No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

If the matter involves an arbitration or CFTC reparation in which the individual is a named respondent, complete Items 12-16, as appropriate.

12. A. Arbitration/CFTC reparation claim filed with (FINRA, AAA, CFTC, etc.):

B. Location of the Forum

Street Address: _____
City or County: _____ State/Region: _____
Country: _____ Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

E. Date notice/process was served (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

13. Pending: Is arbitration/CFTC reparation pending? Yes No
If "No," complete Items 14 and 15.

14. Final: If the arbitration/CFTC reparation is not pending, what was the disposition?

- Award to the Individual (Agent/Representative)
- Award to Customer
- Denied
- Dismissed
- Judgment (other than monetary)
- No Action
- Settlement that includes a monetary payment to customer
- Settlement without a monetary payment to customer
- Withdrawn

Other: _____

15. Disposition Date (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

16. Monetary Compensation Details (If you checked "Award to Customer," or "Settlement that includes a monetary payment to customer" in Item 14, or otherwise a payment of money must be made to the customer, provide the following information.)

A. Total Amount: \$ _____

B. The Individual's Portion: Was the individual required to pay any portion of the total amount?

Yes No

C. If you answered "Yes," to Item 16-B, indicate:

(1) The individual's contribution amount: \$ _____

(2) Was any portion waived?

Yes

No

If "Yes," how much? \$ _____

(3) Final Amount: \$ _____

(4) Was final amount paid in full?

Yes

No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

If the matter involves a civil litigation in which the individual is a defendant, complete items 17-23.

17. Court in which case was filed (if brought in a foreign jurisdiction, provide all the information below in English):

Federal Court Military Court State Court Foreign Court International Court

Other : _____

A. Name of the Court: _____

B. Location of the Court

Street Address: _____

City or County: _____ State/Country: _____

Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

18. Date received by/served on firm (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

19. Current Status of the Civil Litigation:

- Pending (Skip to Item 24.)
 On Appeal (Complete Items 20-23; and consider Item 24.)
 Final (Complete Items 20-22; and Item 23 if applicable; and consider Item 24.)

20. Resolution:

- Denied
 Dismissed
 Judgment (other than monetary)
 Monetary Judgment to the Individual (Agent/Representative)
 Monetary Judgment to Customer
 No Action
 Settlement that includes a monetary payment to customer
 Settlement without a monetary payment to customer
 Withdrawn

 Other:

21. Disposition Date (MM/DD/YYYY): _____

Exact Explanation

If not exact, provide explanation:

22. Monetary Compensation Details (If you checked "Monetary Judgment to Customer" or "Settlement that includes a monetary payment to customer" in Item 20, or otherwise a payment of money must be made to the customer, provide the following information.)

A. Total Amount: \$ _____

B. Was the individual required to pay any portion of the total amount? Yes No

C. If you answered "Yes" to Item 22-B, indicate:

(1) The individual's contribution amount: \$ _____

(2) Was any portion waived?

- Yes
 No

If "Yes," how much? \$ _____

(3) Final Amount: \$ _____

(4) Was final amount paid in full?

- Yes
- No

If "Yes," date paid in full (MM/DD/YYYY): _____

If "No," explain the circumstances:

23. On Appeal – Judicial Review: If the individual appealed, provide the following information.
(If brought in a foreign jurisdiction, provide all the information below in English):

A. Action Appealed to: (Provide the name of the federal, military, state, foreign, or international court to which the individual appealed.)

B. Location of the Court:

Street Address: _____
City or County: _____ State/Country: _____
Postal Code: _____

C. Docket/Case Name: _____

D. Docket/Case Number: _____

E. Date Appeal filed (MM/DD/YYYY): _____ Exact Explanation

If not exact, provide explanation:

F. Appeal Details (including status):

24. Summary of the Circumstances (Optional). You may use this space to provide a brief summary of the circumstances leading to the customer complaint, arbitration/CFTC reparation and/or civil litigation as well as the current status or final disposition(s). The information must fit within the space provided.

Form MA-NR

DESIGNATION OF U.S. AGENT FOR SERVICE OF PROCESS FOR NON-RESIDENTS

Please read the General Instructions for this form and other forms in the MA series, as well as its subsection, "General Instructions to Form MA-NR," before completing this form. All *italicized* terms herein are defined or described in the Glossary of Terms appended to the General Instructions.

Purpose: Each *non-resident municipal advisor*, *non-resident* general partner or *non-resident managing agent* of a *municipal advisor*, and *non-resident* natural person who is a person associated with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf must execute a written irrevocable consent and power of attorney on Form MA-NR to appoint an agent in the United States, upon whom may be served any process, pleadings, or other papers in any action brought against such *non-resident municipal advisor*, general partner, *managing agent* or natural person associated with the *municipal advisor*.

Instructions to Complete this Form:

1. This power of attorney, consent, stipulation, and agreement shall be signed and notarized by the *non-resident municipal advisor*, *non-resident* general partner or *managing agent*, or *non-resident* natural person who is a person associated with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf, as applicable, in Section A of Form MA-NR. The form must be signed by the authorized agent for service of process in the United States in Section B of Form MA-NR.
2. The name of each *person* who signs this Form MA-NR must be typed or printed beneath the *person's* signature.
3. Any *person* who occupies more than one of the specified positions must indicate each capacity in which the *person* is signing the form.
4. Section C Documentation: If any *person* signs this form pursuant to a written authorization – *e.g.*, a board resolution or power of attorney – an accurate and complete copy of each such document must be included with the Form MA-NR.
5. Attachment to Form MA or Form MA-I:
 - a) Complete and execute a printed Form MA-NR, including signatures and notarization. Then scan the original completed and executed form to create a PDF file. Please consult the instructions for uploading PDF files into EDGAR, found in the EDGAR Filer's Manual, available at <http://www.sec.gov/info/edgar.shtml>.
 - b) If any other documents are required, as specified in Section C of the form, include these documents in the same PDF file or create a separate one(s).
 - c) Attach the PDF file(s) to the Form MA or Form MA-I, as appropriate, where prompted in the form.

Power of Attorney, Consent, Stipulation, and Agreement

A. Designation and Appointment of Agent for Service of Process

Identify the agent for service of process for the *non-resident municipal advisor*, for the *non-resident* general partner or *managing agent* of a *municipal advisor*, or for the *non-resident* natural person associated with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf. Fill in all lines.

1. Name of United States *person* designated and appointed as agent for service of process.

Enter all the letters of each name and not initials or other abbreviations.

(If no middle name, enter NMN on that line.)

(name)

2. Mailing Address of United States *person* designated and appointed as agent for service of process.

Do not use a P.O. Box. Do not use a foreign address.

(number and street; office suite or room number)

(city)

(state)

(U.S. postal code: zip+4)

(area code) (telephone number)

By signing this Form MA-NR or authorizing the signatory below to sign on your behalf, you – the *non-resident municipal advisor*, *non-resident* general partner or *non-resident managing agent* of a *municipal advisor*, or *non-resident* natural person who is a person associated with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf (hereinafter, “the Designator”) – irrevocably designate and appoint the above United States *person* as your Agent for Service of Process, and agree that such *person* may be served on your behalf, of any process, pleadings, subpoenas, or other papers, and you further agree that such service may be made by registered or certified mail, in:

- (a) *any investigation* or administrative *proceeding* conducted by the *Commission* (i) that relates to you or (as applicable) to the *municipal advisor* of which you are a general partner or *managing agent*, or with which you are associated and on whose behalf you are engaged in *municipal advisory activities* or (ii) with respect to which you may have information; and
- (b) any civil suit or action brought against you or (as applicable) the *municipal advisor* of which you are a general partner or *managing agent*, or with which you are associated and on whose behalf you are engaged in *municipal advisory activities* or to which you, or (as applicable) the *municipal advisor* of which you are a general partner or *managing agent*, or with which you are associated and on whose behalf you are engaged in *municipal advisory activities* has been joined as defendant or respondent, in any appropriate court in any place subject to the jurisdiction of any state, or of the United States or of any of its territories or possessions or of the District of Columbia, where the *investigation*, *proceeding*, or cause of action arises out of or relates to or concerns *municipal advisory activities* of the *municipal advisor*.

The Designator stipulates and agrees that: any such civil suit or action or administrative *proceeding* may be commenced by the service of process upon, and that service of an administrative subpoena shall be effected by service upon, the above-named Agent for Service of Process; and that service as aforesaid shall be taken and

held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made. Such person cannot be a *Commission* member, official, or employee.

Appointment and Consent: Effect on Partnerships. If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

Certification:

The undersigned certifies under penalty of perjury under the laws of the United States of America, that the information contained in this Form MA-NR is true and correct and that this Form MA-NR is signed as a free and voluntary act.

Unless the Designator is a natural person signing on his or her own behalf, the undersigned further certifies that the Designator has duly caused this power of attorney, consent, stipulation, and agreement to be signed on the Designator's behalf by the undersigned, thereunto duly authorized:

Signature of Designator or Person Signing on Behalf of Designator:

_____ Date: _____

Printed Name: _____ Title: _____

In the City of: _____ In the Country of: _____

The Designator is executing this Form MA-NR as a:
(Check all that apply.)

- Non-resident municipal advisory firm*, other than a sole proprietor
- Non-resident natural person* who is a person associated with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf
- Non-resident municipal advisor* sole proprietor
- Non-resident general partner* of a *municipal advisor*
Name of *municipal advisor* _____
- Non-resident managing agent* of a *municipal advisor*
Name of *municipal advisor* _____

The Designator is executing this Form MA-NR in connection with a(n):
(Check all that apply.)

- Initial application on Form MA of the Designator for registration as a *municipal advisor*
- Initial application on Form MA of the *municipal advisor* of which the Designator is a general partner or *managing agent*
- Initial submission on Form MA-I filed regarding a natural person who is a person associated with the *municipal advisor* and engaged in *municipal advisory activities* on its behalf
- Change of status of Designator from a resident to a *non-resident*
- Amendment to information supplied on a previous Form MA-NR

Mailing Address of the Designator
Do not use a P.O. Box.

(number and street)

(city) (state/region) (country) (postal code)

(country code) (area code) (telephone number)

For a telephone number outside of the U.S., provide the country code with the area code and number.

EDGAR CIK No. (if any) _____ SEC File No. (if any): _____

Notary Public Signature and Information:

Signature: _____ [PLACE SEAL HERE]

Subscribed and sworn to me this ____ day of _____, _____

My commission expires on _____ County of _____
State/Region of _____ Country of _____

B. Acceptance of the Above Designation and Appointment as Agent for Service of Process.

The United States *person* identified in Section A above as the agent for service of process hereby accepts this designation and appointment as agent for service of process, under the terms set forth in this Form MA-NR. By signing below, the signatory certifies that the *person* identified in Section A above as the agency for service of process has duly caused this power of attorney, consent, stipulation, and agreement to be signed on its behalf by the undersigned, thereunto duly authorized:

Signature of U.S. Agent for Service of Process:

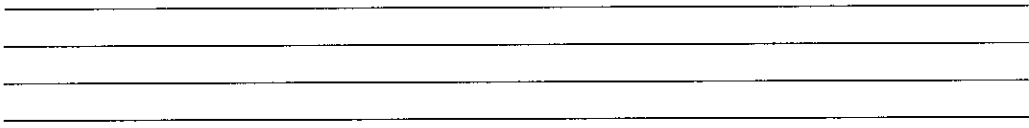
_____ Date: _____

Printed Name: _____ Title: _____

C. Attached Documents

1. Is any name signed above pursuant to a written authorization, such as a board resolution or power of attorney? Yes No
2. Is there a written contractual agreement or other written document evidencing the designation and appointment of the above named U.S. agent for service of process and/or the agent's acceptance? Yes No

If "Yes" to Section C-1 and/or Section C-2., identify each such document on a separate line below, and include an accurate and complete copy of each such document as part of the PDF file in which the Form MA-NR is attached to the Form MA or Form MA-I, or attach each such document as a separate PDF to the relevant Form MA or Form MA-I.



FORM MA-W

NOTICE OF WITHDRAWAL FROM REGISTRATION AS A MUNICIPAL ADVISOR

Please refer to the General Instructions for forms in the MA series before completing this form. All italicized terms herein are defined or described in the Glossary of Terms appended to the General Instructions.

A municipal advisor must complete this Form MA-W to withdraw its municipal advisor registration with the SEC.

WARNING: Complete this form truthfully. False statements or omissions may result in administrative or civil action or criminal prosecution.

Item 1 Identifying Information

A. Full Legal Name:

The name entered here must be the same as the name entered on the registrant's most recent Form MA. Do not report a name change on this Form MA-W.

B. SEC File Number: _____

Item 2 Contact Person (for *Municipal Advisory Firms*)

The registrant's contact person must be a principal or employee (not outside counsel) of the municipal advisor authorized to receive information and respond to questions about this Form MA-W.

Name, title, and contact information:

(name) (title)

(number and street)

(city) (state) (country) (postal code)

(area code) (telephone number)

(E-mail address) @

Item 3 Money Owed to *Clients*

Has the registrant:

A. Received any pre-paid municipal advisory fees for *municipal advisory activities*, including subscription fees for publications, that have not been delivered? Yes No

If "yes," what is the amount owed for these pre-paid services (including subscriptions)? \$ _____ .00

B. Borrowed any money from *clients* that has not been repaid? Yes No

If "yes," what is the amount owed for these borrowed funds? \$ _____ .00

Item 4 Advisory Contract Assignments

Has the registrant assigned any municipal advisory contracts to another *person* that engages in *municipal advisory activities*? Yes No

If yes, list on Section 4 of Schedule W1 each *person* to whom the registrant has assigned any such municipal advisory contracts and provide the requested information.

Item 5 Judgments and Liens

Are there any unsatisfied judgments or liens against the registrant? Yes No

Item 6 Books and Records

NOTE: Rule 15Ba1-8 under the Exchange Act requires a municipal advisor to preserve its books and records after the municipal advisor ceases to conduct or discontinues business as a municipal advisor.

Provide in Schedule W1 the name and address of each *person* who has or will have custody or possession of the *municipal advisor's* books and records and each location at which any of such books and records are or will be kept.

Item 7 Statement of Financial Condition

If registrant answered "yes" to Item 3A, Item 3B, or Item 5, complete Schedule W2, disclosing the nature and amount of the registrant's assets and liabilities and net worth as of the last day of the month prior to the filing of this Form MA-W.

Execution

For a Sole Proprietor:

I, the undersigned, certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form MA-W, including exhibits and any other information submitted, are true. I further certify that the books and records of my *municipal advisor-related* business will be preserved and available for inspection as required by law, and that all information submitted on my most recent Form MA and Form MA-I is accurate and complete as of this date. I understand that if any information contained in this Form MA-W is different from the information contained on my Form MA and Form MA-I, the information on this Form MA-W will replace the corresponding entry on my Form MA and Form MA-I. Finally, I authorize any *person* having custody or possession of these books and records to make them available to authorized regulatory representatives.

Signature: _____ Date: _____
Printed Name: _____ Title: _____

For a *Municipal Advisory Firm*:

I, the undersigned, have signed this Form MA-W on behalf of, and with the authority of, the *municipal advisor* withdrawing its registration. The advisor and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form MA-W, including exhibits and any other information submitted, are true. I further certify that the *municipal advisor's* books and records will be preserved and available for inspection as required by law, and that all information submitted on the *municipal advisor's* most recent Form MA is accurate and complete as of this date. The *municipal advisor* and I understand that if any information contained in this Form MA-W is different from the information contained on Form MA, the information on this Form MA-W will replace the corresponding entry on the *municipal advisor's* Form MA. Finally, I authorize any *person* having custody or possession of these books and records to make them available to authorized regulatory representatives.

Signature: _____ Date: _____
Printed Name: _____ Title: _____

FORM MA-W
Schedule W1

Certain items in Form MA-W may require additional information on this Schedule W1. Use this Schedule W1 to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

SECTION 4 Advisory Contract Assignments

Check here if this section is being completed:

Complete the following information for each *person* to whom the registrant has assigned any advisory contract to provide *municipal advisor-related* services. Complete a separate Schedule W1 for each *person* to whom the registrant has assigned such a contract.

Name and business address of the *person* to whom advisory contracts were assigned:

(name)

(number and street)

(city) (state) (country) (postal code)

(area code) (telephone number)

Is this address a private residence? Yes No

SECTION 6 Books and Records

Person with Custody

Complete the following information for the *person* that has or will have custody or possession of the books and records kept at the location described in this Section 6 of this Schedule. A separate Schedule W1 must be completed for each *person* that has or will have custody of any of the registrant's books and records. If the *person* listed below has or will have custody of any of the registrant's books and records at any other location, a separate Schedule W1 must be completed listing this *person* and each other location where the *person* has custody of the registrant's books and records.

(name)

(number and street)

(city) (state) (country) (postal code)

(area code) (telephone number)

Is this address a private residence? Yes No

Location

Complete the following information for the location where the books and records of which the *person* listed in this Section 6 of this Schedule has or will have custody or possession. A separate Schedule W1 must be completed for each location at which the registrant's records are or will be kept. If any other *person* has or will have custody or possession of any of the books and records at the location described below, a separate Schedule W1 must be completed listing this location and each other *person* that has or will have custody of the registrant's books and records.

(name)

(number and street)

(city) (state) (country) (postal code)

(area code) (telephone number)

Is this address a private residence? Yes No

Briefly describe the books and records kept at this location. _____

FORM MA-W
Schedule W2

If the registrant answered "yes" to Item 3A, 3B, or 5 of Form MA-W, complete this Schedule W2. This balance sheet must be prepared in accordance with generally accepted accounting principles, but need not be audited.

SECTION 7 STATEMENT OF FINANCIAL CONDITION

I. Assets

Current Assets

Cash _____
Securities at Market _____
Non-Marketable Securities _____
Other Current Assets _____
Total Current Assets \$ _____

Fixed Assets

Total Fixed Assets \$ _____

TOTAL ASSETS \$ _____

II. Liabilities & Shareholders' Equity

Current Liabilities

Prepaid Advisory Fees _____
Short-Term Loans from *Clients* _____
Other Short-Term Loans _____
Other Current Liabilities _____
Total Current Liabilities \$ _____

Fixed Liabilities

Long-Term Debt Owed to *Clients* _____
Other Long-Term Debt _____
Other Long-Term Liabilities _____
Total Fixed Liabilities \$ _____

Shareholders' Equity

Total Shareholders' Equity (or Deficit) \$ _____

TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY \$ _____

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy

Secretary

Date: September 20, 2013

*Commissioner Gallagher
Commissioner Fungwa
Disapproved*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70450 / September 18, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3489 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15504

In the Matter of

BRENDAN N. CONNORS, CPA,

Respondent.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS, A CEASE-AND-
DESIST ORDER, AND A CIVIL PENALTY

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Brendan N. Connors, CPA ("Respondent" or "Connors") pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.¹

¹Section 4C provides, in relevant part, that:

The Commission may . . . deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions, a Cease-and-Desist Order, and a Civil Penalty ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds² that:

Summary

1. This matter involves improper tax accounting practices and material weaknesses in internal control over financial reporting at Medifast, Inc. ("Medifast" or "the Company") from 2006 through 2008. During that time, Respondent Brendan Connors was Medifast's Vice President of Finance and head of Medifast's accounting department. He was one of the officials responsible for ensuring that the Company's financial statements were presented fairly in conformity with generally accepted accounting principles ("GAAP"), and for devising and maintaining a system of internal accounting controls.

2. Connors calculated Medifast's income tax expense during the years 2006 through 2008 in a manner that did not comply with GAAP. Connors' improper conduct resulted in Medifast filing periodic reports with the Commission for the years 2006 through 2008 that materially understated its tax expense and overstated its net income after tax. Medifast thus violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder, and Connors willfully³ aided and abetted and was a cause of those violations.

Respondent

3. **Brendan Connors**, age 35, joined Medifast in 2005 as its Vice-President of Finance. He was promoted to Chief Financial Officer in May 2010, and resigned from Medifast in

² The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

³ A willful violation of the securities laws means "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 *Gearheart & Otis, Inc. v. SEC*, 348 F. 2d 798, 803 (D.C. Cir. 1965)).

November 2012. He is a certified public accountant currently licensed to practice in Massachusetts. He resides in Baltimore County, Maryland.

Other Relevant Entity

4. **Medifast, Inc.** is a Delaware corporation headquartered in Owings Mills, Maryland. Through its operating subsidiaries, Medifast manufactures, distributes, and sells weight loss and other health and diet products and supplements. From 2005 to 2010, Medifast's revenues grew from \$40.1 million to \$257.5 million. Medifast's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and trades on the New York Stock Exchange.

Facts

5. On March 31, 2010, Medifast filed its Form 10-K for the year ended December 31, 2009 and restated its financial statements for the years ended December 31, 2006, 2007, and 2008 (the "2010 Restatement"). The 2010 Restatement was required to correct material errors in the Company's reported income tax expense that were the result of Connors' failure to account for Medifast's income tax provision in conformity with Statement of Financial Accounting Standards 109, *Accounting for Income Taxes* ("FAS 109").

The Accounting Standard

6. FAS 109 establishes standards for companies to account for and report the effects of income taxes.⁴ Due to differences between tax laws and accounting standards for financial statements, some events are recognized for financial reporting purposes and for tax purposes in different years. This can give rise to temporary differences between the tax bases of assets or liabilities and their reported amounts in financial statements. The differences are temporary because the event will become taxable or deductible when the related asset is recovered or the related liability is settled. These temporary differences, or deferred taxes, are accounted for under FAS 109 using an asset and liability approach. A deferred tax asset exists when temporary differences will result in deductible amounts in future years. A deferred tax liability exists when temporary differences will result in taxable amounts in future years. Under FAS 109, a company must recognize both a current tax liability or asset for the amount of taxes payable or refundable for the current year, and a deferred tax liability or asset for the estimated future tax effects attributable to temporary differences.

Connors' Improper Accounting and Failure to Maintain Effective Internal Control

7. As head of Medifast's accounting department, Connors was responsible for selecting, applying, and implementing appropriate accounting policies to ensure that the Company's reported financial statements were prepared in accordance with GAAP. He was also

⁴ Upon the codification of GAAP, which became effective for periods ending after September 15, 2009, FAS 109 became part of Accounting Standards Codification (ASC) 740, *Income Taxes*.

one of the officials responsible for preparing the Company's financial statements and for devising and maintaining a system of internal accounting controls.

8. For the years 2006 through 2008, Connors calculated the Company's year-end income tax provision using a pre-existing spreadsheet that included entries for the calculation of deferred taxes and current taxes ("Tax Spreadsheet"). He used the Tax Spreadsheet to obtain the Company's income tax provision for reporting in the Company's financial statements. Connors, however, lacked the appropriate accounting expertise and knowledge to calculate the Company's tax provision in accordance with GAAP. He failed to properly account for the Company's deferred taxes, including failing to correctly record the deferred tax liability resulting from the depreciation of certain fixed assets for tax purposes faster than for financial statement purposes. He also failed to ensure that the Company had adequate in-house accounting personnel with the knowledge to prepare the Company's income tax provision in accordance with GAAP.

9. In addition, Connors' tax calculations as entered on the Tax Spreadsheets differed materially from the current and deferred income tax provisions that were reported in Medifast's Form 10-K filings. On the Tax Spreadsheet for 2007, for example, Connors calculated the Company's current tax provision as \$1,805,708 and a total deferred tax asset of \$1,079,321. In contrast to those numbers, however, Medifast's Form 10-K for 2007 reported the current income tax provision as \$1,233,000 and a deferred tax expense of \$473,000. On Medifast's Tax Spreadsheet for 2008, Connors calculated a current income tax provision of \$2,578,107 and a total deferred tax asset of \$1,321,072, but Medifast's Form 10-K for 2008 reported the current income tax provision as \$1,711,000 and a deferred tax expense of \$704,000.

10. In fact, both the reported figures for Medifast's income tax provision in its 2007 and 2008 Forms 10-K and the tax provision calculations prepared by Connors on the Company's Tax Spreadsheets for those years were wrong, and Medifast's income tax expense increased significantly as reported in its 2010 Restatement. Connors, who was responsible for preparing the tax disclosure in the Company's reported financial statements, included materially different numbers for the Company's tax provision in its 2007 and 2008 Form 10-Ks than the numbers he had calculated on the Tax Spreadsheets for those years. Connors also failed to ensure that the Company's prior-year income tax returns reconciled with its reported income tax provisions.

The 2010 Restatement

11. Because of Connors' improper tax accounting and failure to maintain adequate internal accounting controls, Medifast materially overstated its net income after tax for 2006, 2007, and 2008 by an average of 12.4% per year:

Period Ending	12/31/2006	12/31/2007	12/31/2008
Net Income as originally reported:	5,156,000	3,837,000	5,435,000
Adjustment to Tax Provision:	(583,000)	(411,000)	(601,000)
Net Income Restated:	4,573,000	3,426,000	4,834,000
Percentage Decrease in Net Income due to Restatement:	12.7%	12.0%	12.4%

12. In its 2010 Restatement, Medifast acknowledged that it had a material weakness in its internal controls over financial reporting because the preparation and review process for the calculation of its tax provision was inadequate, which led to errors in the computation of its deferred tax assets, deferred tax liabilities, and the income tax provision. Medifast's audit firm also expressed an adverse opinion in its report on the Company's internal control over financial reporting as of December 31, 2009, due to the material weakness in Medifast's accounting for income taxes.

13. Subsequently, in connection with the audit of Medifast's 2010 internal control over financial reporting, the Company's auditor found that Medifast had a material weakness in its internal control over income tax accounting, including a failure to reconcile its prior-year tax returns with its reported prior-year tax provisions.

Violations

14. Section 13(a) of the Exchange Act requires issuers that have securities registered pursuant to Section 12 of the Exchange Act to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rule 13a-1 requires issuers to file annual reports with the Commission. In addition to the information expressly required to be included in such reports, Rule 12b-20 under the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading. "The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate, and timely reports." *SEC v. Savoy Industries*, 587 F. 2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). A violation of the reporting provisions is established if a report is shown to contain materially false or misleading information. *SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975). As described above, Connors was responsible for preparing Medifast's financial statements for the years 2006 through 2008 and caused Medifast to issue annual reports on Form 10-K for those years which materially misrepresented the Company's financial results. Accordingly, Connors aided and abetted and was a cause of Medifast's violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder.

15. Section 13(b)(2)(A) of the Exchange Act and Rule 13b2-1 require issuers to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets, and prohibit any person from directly or indirectly causing to be falsified any book, record, or account subject to Section 13(b)(2)(A). Scierer is not required to establish a violation of Rule 13b2-1. See, e.g., *SEC v. Das, et al.*, No. 12-2780, slip op. at 17 (8th Cir. July 29, 2013); *SEC v. Softpoint*, 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997), *aff'd*, 159 F. 3d 1348 (2d Cir.1998). Instead, violations of this rule may be established by showing negligent conduct. As described above, Connors was responsible for the Company's improper accounting regarding its tax provision from 2006 through 2008 and caused Medifast's improper recording of its tax provision in its books and records. Accordingly, Connors violated Rule 13b2-1 and aided and abetted and was a cause of Medifast's violations of Section 13(b)(2)(A) of the Exchange Act.

16. Section 13(b)(2)(B) requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in accordance with GAAP. As discussed above, Connors failed to devise and maintain adequate internal accounting controls with regard to the Company's income tax accounting. As a result, Connors aided and abetted and was a cause of Medifast's violations of Section 13(b)(2)(B) of the Exchange Act.

Findings

17. Based on the foregoing, the Commission finds that Connors violated Rule 13b2-1 of the Exchange Act and willfully aided and abetted and was a cause of Medifast's violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

IV.

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

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

A. Connors shall cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder.

B. Connors is denied the privilege of appearing or practicing before the Commission as an accountant.

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

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

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

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

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

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

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

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

E. Connors shall, within 180 days of the entry of this Order, pay a civil money penalty in the amount of \$40,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Brendan N. Connors as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Gallagher
Commissioner Prower
Disapproved*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70448 / September 18, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3487 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15502

In the Matter of

MEDIFAST, INC.

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER AND A CIVIL
PENALTY**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Medifast, Inc. ("Medifast," "the Company," or "Respondent").

II.

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

44 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. In March 2010, Medifast restated its financial statements for 2006, 2007, and 2008 ("2010 Restatement"). The 2010 Restatement was required because Medifast had improperly accounted for its income tax provision for the affected years, which resulted in material understatements of its income tax expense and material overstatements of its net income after tax. Medifast's inaccurate financial statements resulted in part from improper accounting that did not comply with generally accepted accounting principles ("GAAP"), and from a deficient system of internal controls that failed to ensure the appropriate recording and reporting of its income tax expense.

2. Soon after its 2010 Restatement, Medifast engaged a new auditing firm. During Medifast's 2010 audit, this firm identified additional material errors related to Medifast's revenue recognition and expense recognition accounting. In April 2011, Medifast restated its financial statements for 2008 and 2009 to correct material misstatements of its revenue and expenses for those years ("2011 Restatement"). These material misstatements also resulted from improper accounting that did not comply with GAAP, and from a deficient system of internal controls that failed to ensure the appropriate recording and reporting of Medifast's revenue and expenses.

3. Medifast's improper accounting practices and internal controls deficiencies resulted in Medifast filing periodic reports with the Commission for the years 2006 through 2009 which materially overstated its income and understated its expenses. As a result, Medifast violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

Respondent

4. Medifast, Inc. is a Delaware corporation headquartered in Owings Mills, Maryland. Through its operating subsidiaries, Medifast manufactures, distributes, and sells weight loss and other health and diet products and supplements. Medifast's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and trades on the New York Stock Exchange.

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.

Facts

5. As a public company, Medifast is required to fairly, accurately, and timely report its financial results and condition. To ensure fair and accurate reports, the federal securities laws and the Commission's regulations require public companies such as Medifast to prepare and present their reports and financial statements in conformity with GAAP. Financial statements filed with the Commission that are not prepared in accordance with GAAP are presumed to be misleading or inaccurate.² Medifast represented in its Commission filings that its financial statements complied with GAAP in all material respects.

The 2010 Restatement

6. On March 31, 2010, Medifast filed its Form 10-K for the year ended December 31, 2009 and restated its financial statements for the years ended December 31, 2006, 2007, and 2008. This restatement was required to correct material errors in the Company's reported income tax expense that were caused by the Company's failure to account for its income tax provision in conformity with Statement of Financial Accounting Standards 109, *Accounting for Income Taxes* (FAS 109), and GAAP.

The Accounting Standard

7. FAS 109 establishes standards for companies to account for and report the effects of income taxes.³ Due to differences between tax laws and accounting standards for financial statements, some events are recognized for financial reporting purposes and for tax purposes in different years. This can give rise to temporary differences between the tax bases of assets or liabilities and their reported amounts in financial statements. The differences are temporary because the event will become taxable or deductible when the related asset is recovered or the related liability is settled. These temporary differences, or deferred taxes, are accounted for under FAS 109 using an asset and liability approach. A deferred tax asset exists when temporary differences will result in deductible amounts in future years. A deferred tax liability exists when temporary differences will result in taxable amounts in future years. Under FAS 109, a company must recognize both a current tax liability or asset for the amount of taxes payable or refundable for the current year, and a deferred tax liability or asset for the estimated future tax effects attributable to temporary differences.

² Regulation S-X, 17 C.F.R. 210.4-01(a)(1).

³ Upon the codification of GAAP, which became effective for periods ending after September 15, 2009, FAS 109 became part of Accounting Standards Codification (ASC) 740, *Income Taxes*.

Medifast's Improper Tax Accounting

8. Medifast's income tax accounting for the years 2006 through 2008 did not comply with FAS 109 because, among other things, the Company did not calculate a deferred tax liability to account for certain fixed assets that were being depreciated faster for tax purposes than for financial statement purposes.⁴ This failure caused Medifast's net income to be materially overstated by an average of 12.4% over the three affected years:

Period Ending	12/31/2006	12/31/2007	12/31/2008
Net Income as originally reported:	5,156,000	3,837,000	5,435,000
Adjustment to Tax Provision:	(583,000)	(411,000)	(601,000)
Net Income Restated:	4,573,000	3,426,000	4,834,000
Percentage Decrease in Net Income due to Restatement:	12.7%	12.0%	12.4%

9. Moreover, Medifast's reported income tax provision in its Form 10-Ks for the years 2007 and 2008 were not supported by Medifast's internal income tax provision worksheets for those years. These worksheets were used to calculate the Company's current and deferred taxes at year-end for financial statement and GAAP purposes. In 2008, the current income tax provision on Medifast's internal worksheet was calculated as \$2,578,107 and a total deferred tax asset was calculated as \$1,321,072. In its 2008 Form 10-K, Medifast instead reported a current income tax expense of \$1,711,000 and a deferred tax expense of \$704,000.

10. In 2007, Medifast's current tax provision was calculated on its internal worksheet as \$1,805,708 and a total deferred tax asset was calculated as \$1,079,321. In its Form 10-K for 2007, Medifast instead reported a current income tax expense of \$1,233,000 and a deferred tax expense of \$473,000.

⁴ Medifast gave the following explanation in its Form 10-K for 2010, note 17, for the 2010 Restatement: "Due to the Company's growth in past years, major infrastructure investments were made.... For financial statement purposes, these assets are depreciated over the assets [sic] useful life. However, for tax purposes, the depreciation can be accelerated which results in lower taxable income and potential tax refunds which were realized for the years in which accelerated tax depreciation was elected for the Company.... The resulting timing difference should have resulted in a deferred tax liability and additional income tax provision expense in the year's [sic] restated.... The Company is restating for errors identified in its deferred tax accounts pertaining to... differences between the income tax basis and the financial reporting basis of long-lived assets that were not reconciled to the deferred tax balances...."

11. In its 2010 Restatement, Medifast acknowledged that it had a material weakness in its internal controls over financial reporting because the preparation and review process for the calculation of its tax provision was inadequate, which led to errors in the computation of deferred tax assets, deferred tax liabilities, and the income tax provision. Medifast's audit firm also reported that the Company had not maintained effective internal control over financial reporting as of December 31, 2009 because of the material weakness in its accounting for income taxes.

The 2011 Restatement

12. Soon after filing its 2010 Restatement, Medifast engaged a new audit firm.⁵ During its audit of Medifast's 2010 financial statements, the audit firm identified additional accounting errors that required Medifast to again restate its financial statements, this time for the years 2008 and 2009. These additional errors related to the Company's use of improper accounting policies with regard to expense accrual and revenue recognition that were not in compliance with GAAP.⁶ These errors caused Medifast to materially overstate its income and understate expenses for the affected years.

Medifast's Improper Expense Accrual and Revenue Recognition

13. In 2008 and 2009, Medifast consistently deferred recording certain expenses that were charged to a credit card until the following month when the credit card payment was due, rather than at the time the card purchase was made. This deferral of expense recording was not in compliance with FAS Statement No. 5, *Accounting for Contingencies*, and resulted in certain expenses being improperly recorded on a cash basis rather than an accrual basis.

14. In 2008 and 2009, Medifast also failed to properly recognize revenue earned through its brick-and-mortar weight loss clinics in accordance with GAAP. See ASC 605, *Revenue Recognition*; AICPA Accounting Research Bulletin 43; FASB Statement of Concepts No. 5, *Recognition and Measurement in Financial Statements of Business Enterprises*, Staff Accounting Bulletin No. 104, *Revenue Recognition*. The Company's clinics, called Medifast Weight Control Centers ("MWCCs"), allow customers to pre-pay for weight loss programs that Medifast provides over a period of time, depending on the amount of weight to be lost. Medifast prematurely recognized the revenue associated with these weight loss programs at its MWCCs at the time its clients paid the program fee, rather than over the period of time the revenue was earned by Medifast, in contravention of GAAP.

15. Taken together, Medifast's accounting errors with regard to expense accrual and revenue recognition caused Medifast's 2008 and 2009 net income to be materially misstated. In 2009, Medifast improperly overstated its revenue by \$169,000 and understated its expenses by

⁵ Medifast Form 8-K, Item 4.01, filed with the Commission on April 16, 2010.

⁶ The Company also took a \$496,000 write-off in 2008 and 2009 related to an intangible asset for which it had no supporting documentation.

\$539,000. These errors, in combination with other adjustments, resulted in an overstatement of the Company's net income by \$606,000, or 5.1%. In 2008, the Company improperly overstated its revenue by \$143,000 and understated its expenses by \$588,000. These errors, in combination with other adjustments, resulted in an overstatement of the Company's restated net income by \$523,000, or 10.8%.

16. Medifast filed its Form 10-K for fiscal year 2010 in April 2011. The Form 10-K included the Company's 2011 Restatement as well as the report of Medifast's audit firm on the effectiveness of Medifast's internal control over financial reporting as of December 31, 2010. In its report, the audit firm identified material weaknesses in that Medifast did not maintain sufficient in-house accounting personnel with the technical accounting knowledge, training, and expertise in the selection, application and implementation of GAAP in the areas of revenue recognition and expense accrual, among other things, and that the Company had continued ineffectiveness in its internal controls over its accounting for income taxes.

17. Medifast acknowledged in its 2011 Restatement that, among other things: i) it failed to do a detailed review of ending liability balances for the costs and expenses affected by the 2011 Restatement, which resulted in certain expenses being recorded when they were paid rather than incurred; and ii) it had been improperly recording program fees for its MWCCs on a cash basis for customers who paid up-front.

18. Medifast also acknowledged in its 2011 Restatement that it had a material weakness in its internal control over financial reporting that resulted in incorrect accounting policies with regard to its revenue recognition and expense accrual. In addition, Medifast stated that a material weakness still existed in the preparation and review process for the calculation of its tax provision, due to the lack of internal tax expertise at the Company and the fact that the controls designed to remediate the weakness had not been in place for a sufficient period of time.

Violations

19. Under Section 21C of the Exchange Act, the Commission may impose a cease-and-desist order upon any person who is violating, has violated, or is about to violate any provision of the Exchange Act.

20. Section 13(a) of the Exchange Act requires issuers that have securities registered pursuant to Section 12 of the Exchange Act to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rule 13a-1 requires issuers to file annual reports with the Commission. In addition to the information expressly required to be included in such reports, Rule 12b-20 under the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading. "The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate, and timely reports." *SEC v. Savoy Industries*,

587 F. 2d 1149, 1165 (D.C. Cir. 1978). A violation of the reporting provisions is established if a report is shown to contain materially false or misleading information. *SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975).

21. Section 13(b)(2)(A) of the Exchange Act requires public companies "to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Section 13(b)(2)(B) requires public companies "to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded to permit the preparation of financial statements in conformity with generally accepted accounting principles.

22. By engaging in the conduct above, Medifast violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

23. In determining to accept the Offer, the Commission considered remedial acts undertaken by Medifast, including its enhancement of internal controls and retention of additional accounting personnel.

IV.

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

Accordingly, it is hereby ORDERED that:

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

B. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$200,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Medifast, Inc. as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Gallagher
Commissioner Flowers
Disapproved*

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70449 / September 18, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3488 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15503

_____	:	ORDER INSTITUTING PUBLIC
	:	ADMINISTRATIVE PROCEEDINGS
In the Matter of	:	PURSUANT TO SECTION 4C OF THE
	:	SECURITIES EXCHANGE ACT OF
Marc G. Nochimson, CPA	:	1934 AND RULE 102(e) OF THE
	:	COMMISSION'S RULES OF
Respondent.	:	PRACTICE, MAKING FINDINGS, AND
_____	:	IMPOSING REMEDIAL SANCTIONS
	:	

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted against Marc G. Nochimson ("Respondent" or "Nochimson") pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.¹

¹ Section 4C provides that:

The Commission may . . . deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have engaged in . . . improper professional conduct. . . .

Rule 102(e)(1)(ii) provides that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in . . . improper professional conduct. . . .

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 4C 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 finds² that:

A. SUMMARY

1. This matter concerns Respondent Marc Nochimson's improper professional conduct in connection with annual audits of the financial statements of Medifast, Inc. ("Medifast" or "the Company") from 2006 to 2008. As engagement partner with a now-defunct accounting firm, Nochimson supervised Medifast's audits and the firm issued unqualified opinions on the Company's December 31, 2006, December 31, 2007, and December 31, 2008 financial statements. Each of these audit reports stated that the underlying audit was conducted in accordance with the standards of the Public Company Accounting Oversight Board ("PCAOB Standards"),³ and that the Company's financial statements were presented fairly in conformity with U.S. generally accepted accounting principles ("GAAP"). In reality, Medifast's financial statements were not presented fairly in conformity with GAAP due to material errors resulting from Medifast's failure to properly account for its income tax provision and resulting income tax expense during the affected years, and Nochimson did not conduct Medifast's audits in accordance with PCAOB Standards.

2. As the auditor with final responsibility for the Medifast audits, Nochimson did not comply with PCAOB Standards when, in connection with deferred taxes and the income tax provision, he failed to exercise due professional care and professional

² The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

³ References to the PCAOB Standards are cited as "AU [section]" and refer to the specific sections of the codification of the American Institute of Certified Public Accountants ("AICPA") professional standards, known as the Statements on Auditing Standards, as issued by the Auditing Standards Board of the AICPA. These standards were adopted by the PCAOB following passage of the Sarbanes-Oxley Act of 2002 (the "SOX Act") and include generally accepted auditing standards ("GAAS") in place at the time of the SOX Act's passage. References in this order are to standards in effect at the time of the relevant conduct.

skepticism, failed to obtain the necessary training and proficiency in the area of income taxes, failed to adequately plan and supervise the audits, failed to obtain sufficient competent evidential matter, and failed to prepare and retain adequate work paper documentation. Nochimson thereby engaged in improper professional conduct in connection with the audits of Medifast's financial statements from 2006 through 2008 within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

B. RESPONDENT

3. **Nochimson**, 55, resides in Marlton, New Jersey. Until late 2009, Nochimson was an audit partner at a now-defunct accounting firm. Nochimson served as the engagement partner for the audits of Medifast's financial statements from fiscal years 2006 to 2009. He was the concurring partner on the 2005 Medifast audit and served as audit manager on the 2003 and 2004 Medifast audits. In 2010, Nochimson became a partner at another accounting firm. Nochimson is a certified public accountant licensed to practice in the states of New Jersey, New York, Delaware, and Maryland.

C. RELEVANT ENTITY

4. **Medifast** is a Delaware corporation headquartered in Owings Mills, Maryland. Medifast manufactures, distributes, and sells weight management and other health and diet products. The Company's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 and trades on the New York Stock Exchange.

D. FACTS

Medifast Improperly Accounted for its Income Tax Provision

5. On March 31, 2010, Medifast filed its 10-K for the year ended December 31, 2009 and restated its financial statements for the years ended December 31, 2006, 2007, and 2008 ("2010 Restatement"). This restatement was required to correct material errors in the Company's reported income tax expense that were caused by the Company's failure to account for its income tax provision in conformity with FASB Statement 109, *Accounting for Income Taxes* ("FAS 109").⁴ Medifast's income tax accounting for the years 2006 through 2008 did not comply with FAS 109 because,

⁴ FAS 109 establishes standards for companies to account for and report the effects of income taxes. Due to differences between tax laws and accounting standards for financial statements, some events are recognized for financial reporting purposes and for tax purposes in different years. This can give rise to temporary differences between the tax bases of assets or liabilities and their reported amounts in financial statements. These temporary differences, or deferred taxes, are accounted for under FAS 109 using an asset and liability approach. Under FAS 109, a company must recognize both a current tax liability or asset for the amount of taxes payable or refundable for the current year, and a deferred tax liability or asset for the estimated future tax effects attributable to temporary differences. The current and deferred portions are then combined to calculate the company's total income tax provision (also referred to as its income tax expense) for the reporting period. Upon the codification of GAAP, which became effective for periods ending after September 15, 2009, FAS 109 is now part of Accounting Standards Codification (ASC) 740.

among other things, the Company did not calculate a deferred tax liability to account for certain fixed assets that were being depreciated faster for tax purposes than for financial statement purposes. This failure caused Medifast's net income after tax to be materially overstated over the three affected years by an average of 12.4% per year.

6. Moreover, Medifast's reported income tax provisions in its Form 10-Ks were not properly supported by Medifast's internal income tax provision worksheets, nor by the audit work papers. The Company's worksheets were used to calculate its current and deferred taxes at year-end for financial statement purposes. In 2008, for example, the "current income tax provision" on Medifast's internal worksheet was calculated as \$2,578,107 and a "total deferred tax asset" was calculated as \$1,321,072. But Medifast reported in its Form 10-K a current income tax provision of \$1,711,000 and a deferred tax expense of \$704,000. In 2007, Medifast's "current income tax provision" was calculated on its internal worksheet as \$1,805,708 and a "total deferred tax asset" was calculated as \$1,079,321. But in its Form 10-K for 2007, Medifast reported a current income tax provision of \$1,233,000 and a deferred tax expense of \$473,000.

7. In its 2010 Restatement, Medifast acknowledged that it had a material weakness in its internal control over financial reporting because the preparation and review process for the calculation of Medifast's tax provision was inadequate, which led to errors in the computation of deferred tax assets, deferred tax liabilities, and the income tax provision.

Nochimson Engaged in Improper Professional Conduct

8. Nochimson was the engagement partner responsible for planning and conducting the audits of Medifast's financial statements for the years ended 2006 through 2008. Medifast's financial statements for those years, as filed with the Commission, contained audit reports with unqualified opinions. Those audit reports represented that Medifast's audits had been conducted in accordance with the standards of the PCAOB, and that Medifast's financial statements were presented fairly in conformity with GAAP. In fact, Nochimson did not conduct the audits of Medifast's financial statements in accordance with the Auditing Standards and Medifast's financial statements were not presented fairly in conformity with GAAP.

9. Nochimson engaged in improper professional conduct pursuant to Rule 102(e)(1) by failing, in several instances, to comply with the PCAOB Standards in conducting Medifast's 2006, 2007 and 2008 financial statement audits, as discussed below.

Nochimson Failed to Exercise Due Professional Care and Skepticism

10. The PCAOB Standards require that "[d]ue professional care is to be exercised in the planning and performance of the audit and the preparation of the report." AU § 230.01. Among other things, due professional care requires that "[a]uditors should be assigned to tasks and supervised commensurate with their level

of knowledge, skill and ability so that they can evaluate the audit evidence they are examining. The auditor with final responsibility for the engagement should know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client. The auditor with final responsibility is responsible for the assignment of tasks to, and supervision of, assistants." AU § 230.06. In addition, "[d]ue professional care requires the auditor to exercise professional skepticism. Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence." AU § 230.07.

11. Nochimson had only a limited understanding of FAS 109, and did not sufficiently understand Medifast's tax provision. In addition, by the 2008 audit, Nochimson knew that there was a problem with Medifast's tax provision because he could not reconcile the Company's internal calculations with the tax provision disclosures that the Company included in its Form 10-K for that year. Despite this awareness, Nochimson did not reconcile the differences. Instead, he dismissed the discrepancies as immaterial without conducting a proper materiality analysis. His firm then issued an unqualified opinion on Medifast's 2008 audited financial statements. Based on the foregoing, Nochimson therefore failed to exercise the due care and professional skepticism required of him under the PCAOB Standards.

Lack of Training and Proficiency

12. The PCAOB Standards require that the audit be performed by "a person or persons having adequate technical training and proficiency as an auditor." AU § 210.01. Nochimson lacked the necessary training and proficiency as an auditor to properly interpret the professional guidance under GAAP in FAS 109 related to deferred taxes. In addition, the staff auditor responsible for performing the audit steps related to Medifast's 2007 income tax provision told Nochimson on several occasions that tax accounting was his weakest area, and that he did not feel entirely comfortable auditing the Company's deferred taxes. Nevertheless, Nochimson allowed the staff auditor to remain on the engagement. Instead of continuing with the audit of Medifast's financial statements, Nochimson had a professional obligation to acquire the necessary knowledge and skills in this area, suggest someone else qualified to perform the work, or decline the engagement.

Nochimson Failed to Adequately Plan and Supervise the Audits

13. As the engagement partner, Nochimson was responsible for Medifast's audit planning and supervision. Proper audit planning and supervision under the PCAOB Standards requires that "the work is to be adequately planned and assistants, if any, are to be properly supervised." AU § 311.01. The PCAOB Standards further state that "[t]he extent of supervision appropriate in a given instance depends on many factors, including the complexity of the subject matter and the qualifications of persons performing the work." AU § 311.11.

14. Nochimson's supervision of Medifast's audits did not comply with these

PCAOB Standards. For example, the staff auditor responsible for performing the audit steps for Medifast related to its 2007 income tax provision told Nochimson that he did not feel entirely comfortable auditing the Company's deferred taxes. Instead of replacing the staff auditor with another professional who understood FAS 109, Nochimson proceeded with the audit and did not adjust his supervision of the audit accordingly.

Nochimson Did Not Maintain Adequate Work Paper Documentation and Did Not Obtain Sufficient Evidential Matter

15. The PCAOB Standards establish general requirements for documentation that an auditor should prepare and retain in connection with audits of financial statements. PCAOB Auditing Standard No. 3.1. Because it is the written record supporting the auditor's representations, audit documentation should, among other things, "[s]upport the basis for the auditor's conclusions concerning every relevant financial statement assertion, and ... [d]emonstrate that the underlying accounting records agreed or reconciled with the financial statements." PCAOB Auditing Standard No. 3.5. The PCAOB Standards also require an auditor to obtain sufficient competent evidential matter concerning the assertions in an issuer's financial statements, and state that an auditor's substantive procedures "must include reconciling the financial statements to the [underlying] accounting records." AU § 326.19.

16. Nochimson did not maintain adequate documentation in connection with the audits of Medifast's income tax provision, and did not obtain sufficient evidential matter concerning the assertions in Medifast's financial statements with regard to its income tax provision, in violation of the PCAOB Standards. For example, there was inadequate documentation in the audit work papers to support Medifast's deferred tax expense amount, deferred tax asset amount, or tax basis depreciation for the years 2006 through 2008. Nochimson also did not properly reconcile the tax provision work papers with the amounts contained in the Company's Form 10-K for the years 2007 and 2008, and the tax provision amounts in Medifast's work papers were materially different from the tax provision amounts that were ultimately reported in Medifast's Form 10-Ks.

E. VIOLATIONS

17. Rule 102(e)(1)(ii) provides that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." Such improper professional conduct includes, as applicable here, "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards that indicate a lack of competence to practice before the Commission." Rule 102(e)(1)(iv)(B).

18. As a result of his actions detailed above, Nochimson engaged in improper professional conduct with respect to the audits of Medifast's 2006, 2007 and 2008 financial statements.

F. FINDINGS

19. Based on the foregoing, the Commission finds that Respondent engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

Accordingly, it is hereby ORDERED that, effective immediately:

A. Respondent Nochimson is denied the privilege of appearing or practicing before the Commission as an accountant.

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

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

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70452 / September 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15510

In the Matter of

JOHN MORAITIS,

Respondent.

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 2002 until 2008, Respondent was associated with and employed as a proprietary trader by Joseph Stevens & Company, Inc., a broker-dealer registered with the Commission at the time. Respondent, 40 years old, is a resident of Jersey City, New Jersey.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On September 11, 2011, Respondent was convicted of: (1) one count of securities fraud in violation of New York General Business Law 0352-c(5); (2) two counts of securities fraud in violation of New York General Business Law 0352-c(6); and (3) two counts of criminal possession of stolen property in the third degree in violation of New York Penal Law 165.50. *People v. Joseph Stevens & Co., Inc., et al.*, Case No. 02394-2009 (N.Y. Ct. App. Sept. 11,

2011). Respondent was sentenced on January 6, 2012 to four months' incarceration, five years' probation, and ordered to make restitution in the amount of \$75,220.

3. In connection with his conviction, Respondent admitted that from January 2003 through November 2005, he participated in a firm-wide scheme while he was associated with Joseph Stevens & Company, Inc., at that time a broker-dealer registered with the Commission, to generate and charge customers excessive and undisclosed commissions in connection with the purchase and sale of securities.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 19, 2013

In the Matter of

Home System Group,

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 Home System Group because Home System Group has not filed any periodic reports for any reporting period subsequent to December 31, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, September 19, 2013, through 11:59 p.m. EDT, on October 2, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

47 of 90

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70456 / September 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15506

In the Matter of

Home System Group,

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 Home System Group.

II.

After an investigation, the Division of Enforcement alleges that:

1. Respondent Home System Group (CIK No. 1172319) is a Nevada corporation located in Guangdong Province, China as reflected in its last periodic filing. It has a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). As of August 23, 2013, Home System Group's common stock (symbol "HSYT") was quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group Inc., had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. The most recent reporting period with respect to which the company has filed a periodic report is the year ended December 31, 2011, for which it filed a Form 10-K on March 6, 2013.

3. On February 22, 2013, the Division of Corporation Finance sent a delinquency letter to Respondent.

48 of 90

4. On May 3, 2013, the Division of Corporation Finance sent a second delinquency letter to Respondent's registered agent in Nevada, who acknowledged receipt of the letter.

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

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

7. 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 Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondent registered pursuant to Section 12 of the Exchange Act, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

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

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

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and

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

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission 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

*Chair White
Commissioner Gallagher
not participating
Commissioner Rowan
Disapproved*

SECURITIES EXCHANGE ACT OF 1934
Release No. 70458 / September 19, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3490 / September 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15507

In the Matter of

JPMorgan Chase & Co.,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against JPMorgan Chase & Co. ("JPMorgan").

II.

In anticipation of the institution of these proceedings, JPMorgan has submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. JPMorgan admits the facts contained in Annex A attached hereto, the Commission's jurisdiction over it, and the subject matter of these proceedings; and consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

49 of 90

III.

On the basis of this Order, the Offer, and the facts contained in Annex A attached hereto, the Commission finds¹ that:

1. Public companies are responsible for devising and maintaining a system of internal accounting controls sufficient to, among other things, provide reasonable assurances that transactions are recorded as necessary to permit preparation of reliable financial statements. In addition, the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") established important requirements for public companies and their management with respect to corporate governance and disclosure. For example, public companies are obligated to maintain disclosure controls and procedures that are designed to ensure that important information flows to the appropriate persons so that timely decisions can be made regarding disclosure in public filings. Commission regulations implementing Sarbanes-Oxley therefore require management to evaluate on a quarterly basis the effectiveness of the company's disclosure controls and procedures and the company to disclose management's conclusion regarding their effectiveness in its quarterly filings.

2. On an investor call conducted in connection with the filing of its quarterly report on May 10, 2012, JPMorgan publicly disclosed a trading loss of approximately \$2 billion since the start of the second quarter in a large portfolio of credit derivatives known as the Synthetic Credit Portfolio ("SCP") held by the firm's Chief Investment Office ("CIO"). In the quarterly report, JPMorgan stated that, based upon management's evaluation at the time, its disclosure controls and procedures were effective as of the end of the quarter.

3. Over the next few months, as JPMorgan sought to bring down risk in the SCP, the losses in the SCP grew to nearly \$6 billion. Nevertheless, the full extent of the trading losses that had occurred during the first quarter was not detected and reported, in part, because of the ineffectiveness of an internal control function within CIO, known as the Valuation Control Group ("CIO-VCG"). Within JPMorgan and other financial institutions and investment firms, valuation control units frequently serve as an essential internal control by helping to ensure that traders and other market professionals record accurate valuations for trading positions. Valuation control units must be sufficiently independent from the trading desks, and clear and effective written policies are necessary in order to guard against the risk that a company's investment assets will be improperly valued—and its public filings misstated.

4. In the case of CIO, its VCG unit was unequipped to cope with the increase in the size and complexity of the SCP in early 2012, and did not function as an effective internal control in the first quarter of the year. The unit was understaffed, insufficiently supervised, and did not adequately document its actual price-testing policies. Moreover, the actual price-testing methodology employed by CIO-VCG in the first quarter of 2012 was subjective and insufficiently independent from the SCP traders, which enabled the traders to improperly

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

influence the VCG process. In addition, during the first quarter of 2012, CIO-VCG failed to escalate to CIO and JPMorgan management significant information that management required in order to make informed decisions about disclosure of the firm's financial results for the first quarter of 2012. As a result, JPMorgan did not timely detect or effectively challenge questionable valuations by the SCP traders as the portfolio's losses accumulated in the first quarter of 2012 and publicly misstated its financial results for that period.

5. JPMorgan's response to the CIO trading losses also was affected by inadequate communication between JPMorgan's Senior Management and the Audit Committee of JPMorgan's Board of Directors (the "Audit Committee"). In April 2012, after learning of large counterparty valuation disputes relating to SCP positions, JPMorgan Senior Management initiated several reviews of the SCP marks and of CIO-VCG. By early May 2012, the various reviews had alerted JPMorgan Senior Management to serious issues about CIO-VCG's effectiveness in price-testing the values SCP traders had assigned to positions in the SCP during the first quarter of 2012. These issues, among others, prompted JPMorgan Senior Management to take several actions, including recommending delaying the filing of the firm's quarterly report with the Commission, and substantially revising CIO-VCG policies in early May 2012 to eliminate what Senior Management believed was an undue amount of subjectivity in a control function.

6. Consistent with Sarbanes-Oxley's emphasis on the role that the audit committee of a public company's board of directors should play in corporate governance, JPMorgan's internal controls include a requirement that its management keep the Audit Committee informed of, among other things, the identification of any significant deficiencies or material weaknesses in the firm's internal control over financial reporting. Such updates are necessary for the Audit Committee to fulfill its oversight role and help to assure the integrity and accuracy of information JPMorgan discloses in its public filings.

7. Before JPMorgan filed its quarterly report on May 10, 2012, however, JPMorgan Senior Management did not adequately update the Audit Committee concerning the facts learned during the reviews of CIO-VCG. Nor did it adequately update the Audit Committee on important observations made by the management-commissioned reviews of control breakdowns at CIO-VCG that amounted to, at a minimum, a significant deficiency. Three primary issues relating to the sharing and synthesis of relevant information contributed to the inadequate communications with the Audit Committee. First, several employees involved in conducting the reviews of CIO-VCG failed to timely escalate important facts regarding control deficiencies at CIO-VCG. Second, JPMorgan Senior Management was concerned about the market sensitivity of the SCP positions and the confidential nature of the review, and required that the review teams keep their work strictly confidential, which had the effect of impeding the exchange of information among the review teams and their ability to analyze collectively the information generated by these reviews. Third, despite learning of important information concerning control deficiencies at CIO-VCG, JPMorgan Senior Management did not make a considered assessment of the significance of that information to determine if it revealed a significant deficiency or material weakness at CIO-VCG that had to be disclosed to the Audit Committee.

8. On July 13, 2012, JPMorgan announced that it would restate its results for the first quarter of 2012 because it was no longer confident that the SCP marks used to prepare the

first quarter results, which CIO-VCG was responsible for price testing, "reflect good faith estimates of fair value at quarter end." Also on this date, JPMorgan disclosed to investors that a material weakness in internal control over financial reporting had existed at CIO as of March 31, 2012 based on deficiencies in the CIO-VCG process.

9. On August 9, 2012, JPMorgan filed an amended Form 10-Q with restated results for the first quarter of 2012. The restatement had the effect of moving certain SCP losses from the second quarter to the first quarter. These misstated first quarter results were disclosed not only in the quarterly report filed on Form 10-Q on May 10, 2012, but also in JPMorgan's earnings release for the first quarter, which was filed on Form 8-K with the Commission on April 13, 2012. Also on August 9, 2012, JPMorgan disclosed that its disclosure controls and procedures as of March 31, 2012 were not effective and that management's prior conclusion in the firm's May 10, 2012 quarterly report that they were effective was incorrect.

10. As a result of its failure to maintain effective internal control over financial reporting as of March 31, 2012, and disclosure controls and procedures, and as a result of its filing of inaccurate reports with the Commission (specifically, the Form 8-K filed on April 13, 2012, and the Form 10-Q filed on May 10, 2012), JPMorgan violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-11, 13a-13, and 13a-15 thereunder.

11. In response to the Commission's investigation, JPMorgan provided substantial cooperation to Commission staff. JPMorgan has also voluntarily undertaken a comprehensive program of remediation to address, among other things, the internal control deficiencies that are the subject of this proceeding. Most notably, JPMorgan has substantially strengthened the valuation control function within CIO to ensure that price verification procedures are conducted with the appropriate degree of independence and supervision.

IV.

RELEVANT ENTITIES AND PERSONS

12. JPMorgan, a Delaware corporation headquartered in New York, New York, is a global banking and financial services firm whose common stock is registered with the Commission under Section 12(b) of the Exchange Act and traded on The New York Stock Exchange under the symbol "JPM."

13. CIO is a unit of JPMorgan and part of the firm's Corporate/Private Equity reporting segment. Among other things, CIO is responsible for investing excess deposits from JPMorgan's banking arm. CIO maintains offices in New York, New York and London, United Kingdom.

14. JPMorgan "Senior Management," as that term is used herein, refers to one or more of the following individuals who held the listed positions as of May 10, 2012: the JPMorgan Chief Executive Officer, the JPMorgan Chief Financial Officer, the JPMorgan Chief Risk Officer, the JPMorgan Controller, and the JPMorgan General Auditor.

THE MISMARKING OF JPMORGAN'S SYNTHETIC CREDIT PORTFOLIO

JPMorgan, CIO, and the Synthetic Credit Portfolio

15. In 2007, CIO created an investment portfolio, the SCP, which was designed to provide a hedge against adverse credit events. It invested in derivatives that could be expected to generate profit during adverse credit events, such as widespread corporate defaults. The positions in the SCP consisted of credit derivative indices and portions (or "tranches") of those indices, both of which were constructed to track a collection of credit default swaps ("CDS") referencing the debt of corporate issuers.

16. The SCP was invested in two primary index groups: CDX, a group of North American and Emerging Markets indices, and iTraxx, a group of European and Asian indices. Some indices referenced companies considered to be investment grade and others referenced companies considered to be high-yield (which generally means that their credit risk is viewed as higher). Investors in CDX and iTraxx indices, including CIO, can be "long" risk, which is equivalent to being a seller of CDS protection, or "short" risk, which is equivalent to being a buyer of CDS protection.

17. Beginning in 2008, the SCP's investment strategy generally consisted of holding a net short risk position in high-yield indices and tranches, which meant that the SCP was positioned to realize gains if high-yield companies were to default on their corporate debt. The composition of the book changed from time to time in response to CIO's assessment of market conditions.

18. In December 2011, in preparation for complying with the capital adequacy standards of the Third Basel Accord, the SCP traders were instructed to reduce the SCP's use of regulatory capital. To achieve this—and, in light of improving economic conditions, to reduce the SCP's credit protection profile—CIO management and the traders in charge of the SCP considered reducing the size of the SCP's short risk position in high-yield investments. There were substantial costs associated with this strategy. To avoid these costs, CIO management and traders therefore decided to add investments to the SCP's existing long risk investment-grade positions to offset the short risk high-yield position. However, as CIO built its long risk investment-grade positions, which included a large investment in an index known as the CDX North American Investment Grade Index Series 9 10-year, it also added substantially to its existing high-yield short position. JPMorgan did not have risk limits restricting the notional size of the SCP, and CIO's trading strategy led to a large increase in the notional size of the SCP. During the first quarter of 2012, CIO tripled the net notional amount of the SCP. As of March 31, 2012, the SCP contained 132 trading positions with a net notional amount of approximately \$157 billion.

Traders Mismatch the SCP as Losses Mount

19. Like many other public companies, JPMorgan reported its results, which incorporated the mark-to-market profit and loss of the SCP, at the end of each quarter in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). Under JPMorgan

policy, the SCP traders were required to assign valuations (or "marks") to the positions in the SCP at fair value. Both GAAP and JPMorgan's accounting policy required that the SCP traders do so by making a good-faith estimate of the fair value of each SCP position based on information available in the marketplace. Under GAAP, the positions in the SCP had to be marked "within the bid-ask spread" at the point that is "most representative of fair value in the circumstances," with a particular emphasis on the price where the traders could reasonably expect to transact. GAAP also allows for the use of mid-market pricing "as a practical expedient for fair value measurements within a bid-ask spread."

20. At the end of each business day, the SCP traders had to mark the positions in the SCP and report to CIO management a summary of the portfolio's mark-to-market profits and losses for the day. Additionally, the traders had to provide their valuations for the SCP to the middle office at CIO so that the information could be incorporated into the books and records of JPMorgan.

21. The SCP generated sizeable profits for JPMorgan over the period from 2007 to 2011. In the first quarter of 2012, however, it began experiencing substantial mark-to-market losses. By early March 2012, the most senior SCP trader, who was a managing director within CIO, instructed the other SCP traders to stop reporting losses to CIO management unless there was a market-moving event that could easily explain the losses. In response, a junior SCP trader changed his daily marking methodology for the SCP. Previously, he had derived for each SCP position a bid-offer spread from dealer quotes he had received and then assigned a mark that was generally equivalent to the mid-point in that spread. In response to the most senior trader's instruction, the junior trader began to assign marks that often were at the most aggressive point in the bid-offer spread received that day (*i.e.*, the point that resulted in higher valuations of the SCP positions). For some SCP positions, the junior trader assigned marks in March that were altogether outside every dealer's bid and offer received that day. As a result of these marking practices, the SCP traders intentionally understated mark-to-market losses in the SCP.

22. In March 2012, the junior trader began to maintain a spreadsheet which showed that, by March 15, 2012, the difference between the daily prices he had assigned to the SCP and the average mid-market point between the best bids and offers he had received from dealers had grown to \$292 million. Within a few days, the difference had grown further to \$432 million. The traders, however, revealed significantly smaller losses in daily reports to CIO management about the portfolio's performance than were indicated by mid-market pricing.

23. On March 30, 2012, the last trading day in the first quarter of 2012, the SCP traders informed the most senior trader in the morning that losses for that day alone could reach \$250 million. In response, the most senior trader directed the junior trader not to mark the SCP at the close of business in London, as JPMorgan policy required, but instead to wait for the markets in New York to close because trading information from New York might support higher valuations for the SCP positions.

24. The most senior trader also instructed the junior trader to use the "best" prices (*i.e.*, the most advantageous prices within the bid-offer spread) in marking the SCP. On March 30, the junior trader marked the SCP positions in accordance with these instructions, and reported to CIO management an estimated loss of \$138 million. Over the next several weeks, the

traders continued to understate mark-to-market losses in the SCP until their authority over the portfolio was taken away from them on or around April 29, 2012, when JPMorgan Senior Management asked a senior Investment Bank ("IB") trader and senior risk officer to take responsibility for the portfolio.

**JPMorgan Issues Its First Quarter
Results and Subsequently Issues a Restatement**

25. On April 13, 2012, JPMorgan issued its earnings release for the quarter ending March 31, 2012, which was filed on Form 8-K with the Commission. Also on April 13, JPMorgan Senior Management conducted an earnings call with analysts and investors. The earnings release disclosed that JPMorgan's consolidated quarterly income before income tax expense was \$7.641 billion. These results included the understated losses for the SCP, which was based on the SCP traders' marks as of March 30, 2012.

26. One month later, on May 10, 2012, JPMorgan filed on Form 10-Q its report for the first quarter, which ended on March 31, 2012, disclosing that CIO had experienced significant mark-to-market losses in the SCP during the second quarter to date. Also on May 10, 2012, JPMorgan Senior Management conducted a call with analysts, during which the firm disclosed that CIO had suffered losses of approximately \$2 billion during the second quarter to date and that there could be additional losses, that the trading strategy that resulted in the losses was "flawed, complex, poorly reviewed, poorly executed, and poorly monitored," that "we've had teams from audit, legal, risk, and various control functions... involved in extensive review of what happened," and that "[w]e have more work to do but it's obvious at this point that there are many errors, sloppiness, and bad judgment." The \$2 billion calculation was based on marks for positions in the SCP that were derived from independent pricing sources and not from the SCP traders; therefore, the full year-to-date loss figure was not affected by its subsequent conclusions concerning the integrity of the SCP traders' marks.

27. Two months later, on July 13, 2012, JPMorgan announced that it would restate its results for the first quarter of 2012 because it had discovered "information that raises questions about the integrity of the [SCP] marks" and was no longer confident that the marks used to prepare the first quarter results "reflect good faith estimates of fair value at quarter end." On August 9, 2012, JPMorgan filed an amended Form 10-Q with restated results for the first quarter. The restatement had the effect of moving certain SCP losses from the second quarter to the first quarter. Specifically, the restatement reduced the revenues of JPMorgan's Corporate/Private Equity reporting segment in the first quarter by \$660 million, from \$1.689 billion to \$1.029 billion, and the firm's consolidated quarterly income before income tax expense from the previously-reported \$7.641 billion to \$6.981 billion.

**JPMORGAN'S INEFFECTIVE INTERNAL ACCOUNTING CONTROLS
AND DISCLOSURE CONTROLS AND PROCEDURES**

28. JPMorgan's May 10, 2012 quarterly report on Form 10-Q contained its financial statements for the first quarter of the year, management's discussion of the firm's various businesses, and other information. In addition, the report stated that JPMorgan's management

evaluated the effectiveness of its disclosure controls and procedures and concluded that they were effective.

29. As discussed below, between late April and May 10, 2012, JPMorgan engaged in an extensive process involving work performed by the Controller's office, the Internal Audit department ("Internal Audit"), valuation experts from the Investment Banking Division ("IB"), and in-house and outside counsel in an effort to evaluate the SCP's quarter-end marks and to understand the CIO valuation control process and the differences between that process and the valuation control process of the IB. As a result, by May 10, various executives and employees of the firm had learned of deficiencies as of March 31, 2012 in CIO's internal controls. Due to failures to timely escalate information and instructions that had the effect of hindering the sharing of information, not all of these deficiencies had been escalated to JPMorgan Senior Management prior to May 10, 2012. And, as to the information that was escalated, JPMorgan Senior Management did not make a considered assessment as to whether critical facts existed—including any significant deficiency or material weakness in internal controls—that had to be disclosed to the Audit Committee. Consequently, JPMorgan Senior Management did not disclose the existence of any significant deficiencies or material weaknesses to the Audit Committee before JPMorgan filed its quarterly report on May 10, 2012.

30. On July 13, 2012, at the same time JPMorgan disclosed to investors that it would restate its results for the first quarter of 2012, the firm announced that a material weakness in internal control over financial reporting had existed at CIO as of March 31, 2012. As a result of the material weakness, JPMorgan also announced that its management had concluded that JPMorgan's disclosure controls and procedures were not effective as of March 31, 2012.

CIO Internal Controls in the First Quarter of 2012

31. As part of fulfilling the requirements to devise and maintain systems of internal accounting controls, financial institutions such as JPMorgan need to have internal controls that adequately monitor and test the accuracy and integrity of, among other things, the valuations of the firm's trading portfolios such as the SCP. CIO-VCG served as a significant control for ensuring that certain assets and liabilities of CIO, including the positions in the SCP, were measured at fair value in accordance with GAAP in JPMorgan's books and records and in the quarterly and annual reports the firm filed with the Commission.

32. For the SCP, CIO-VCG carried out its responsibility by price-testing the marks that the SCP traders assigned to the portfolio's positions on the last business day of every month. Under firm policy applicable during the first quarter of 2012, CIO-VCG performed this price-testing function by undertaking the following steps:

- a. First, CIO-VCG had to calculate, as a benchmark, an independent price for each of the SCP positions. A CIO-VCG policy and procedure document indicates that, for index positions, these independent prices were to be obtained from Markit Limited Group ("Markit"), a service that provides consensus-based prices for indices. For tranches, CIO-VCG obtained independent prices from dealer quotes, which it checked against Totem,

another consensus pricing service offered by Markit, for any significant discrepancies.

- b. After calculating an independent price for each SCP position, CIO-VCG had to establish and apply a threshold (or tolerance) around each price that represented the average bid-offer spread for the security based on quotes received from dealers. While it had authority to make an adjustment to trader marks that fell within these thresholds, CIO-VCG considered such marks to be presumptively marked at fair value and would not make any adjustment to those marks.
- c. If the SCP traders' mark for a given position fell outside of the threshold, CIO-VCG would record the excess as a loss (or profit) and make a corresponding adjustment to the mark-to-market profit and loss for the SCP.
- d. Finally, if CIO-VCG determined that the market for a particular position had become illiquid, CIO-VCG applied a pre-established formula to calculate and record a liquidity reserve to account for the risk that certain SCP positions could not be sold at fair value due to reduced liquidity in the marketplace.

33. The CIO-VCG staff actively involved in price-testing the SCP's 132 positions at the end of the first quarter of 2012 consisted of one person, who worked at CIO's London office. That person was also responsible for price testing all of CIO's other London-based portfolios.

34. On April 4, 2012, CIO-VCG completed its price-testing process for the SCP for the end of March 2012. It applied the relevant thresholds to adjust downward the fair value of the SCP by approximately \$17 million compared to the traders' marks and maintained the previous month's liquidity reserve of approximately \$31 million.

35. During its price-testing process for quarter-end marks, CIO-VCG observed that most of the SCP traders' marks migrated to the aggressive end of the bid/offer spread. CIO-VCG questioned one of the SCP traders about this shift. The trader did not explain the shift but merely stated, "Talk to management." CIO-VCG did not disclose to anyone its observations concerning the shift in the SCP traders' marking methodology until questions were being raised about a collateral dispute, which is summarized below, on April 20, 2012. CIO-VCG also did not share the details of its exchange with the SCP trader.

36. CIO-VCG calculated a significant difference between its independent prices and the SCP traders' marks. During its price-testing process, it calculated that the mid-market value of the SCP based on its independent prices was approximately \$192 million less than the value based on the SCP traders' marks. It subsequently identified an error in its calculations, which increased the difference from \$192 million to approximately \$275 million. A March 30, 2012 Internal Audit report on CIO-VCG contained an Action Plan under which CIO-VCG should disclose this discrepancy to CIO management. However, that action plan was not required to be fully implemented until June 30, 2012, and CIO-VCG only disclosed the \$17 million fair value

adjustment based on marks that fell outside of its thresholds. Consequently, CIO management was not alerted to the significant difference between the SCP traders' marks and the CIO-VCG calculated mid-market valuations, which warranted further analysis.

37. Shortly after April 4, 2012, CIO Finance, with the approval of CIO management and JPMorgan Senior Management, increased the existing \$31 million liquidity reserve by \$155 million, based on a determination that certain tranches in the SCP portfolio had become illiquid as of March 30. The traders' marks, as adjusted by CIO-VCG, were then incorporated in the financial information provided for CIO in JPMorgan's earnings release on April 13, 2012 and in the firm's May 10, 2012 report for the first quarter of 2012.

**Large Collateral Calls and Increasing Losses Prompt
Multiple Reviews of CIO-VCG and the Traders' Marks**

38. On April 20, 2012, JPMorgan Senior Management was informed that the firm had received several collateral calls—requests from trading counterparties for payment or the posting of collateral based on their differing views of the fair value—concerning positions in the SCP. The total amount in dispute was approximately \$520 million.

39. A collateral dispute with a CDS counterparty can sometimes be an indication that a firm's internal price for an instrument does not accurately reflect its fair value. Accordingly, in April 2012, the size of the collateral disputes over the SCP raised concerns by JPMorgan Senior Management about the pricing of the SCP positions. In an April 20, 2012 email, a member of JPMorgan Senior Management observed that the collateral disputes were not "a good sign on our valuation process" in the SCP.

40. At the same time that the collateral disputes were being escalated to JPMorgan Senior Management, the SCP was also sustaining large daily losses. This development was inconsistent with what CIO had told JPMorgan Senior Management to expect prior to the April 13 earnings release, and JPMorgan Senior Management was concerned about the losses and the traders' explanations of what was happening to the SCP positions and their strategy for dealing with the risks to the SCP. On or about April 27, JPMorgan Senior Management asked a senior trader from the IB and a senior risk officer to evaluate the portfolio on an urgent basis. Shortly afterwards, the IB trader and risk officer were put in charge of managing and reducing the risk in the SCP, and the SCP traders were relieved of all trading and pricing responsibilities. Additionally, on a going-forward basis, positions in the SCP were to be marked to consensus mid-market prices published by Markit.

41. In late April and early May, JPMorgan Senior Management mobilized resources from various parts of the firm—the IB's valuation experts, Internal Audit, which had prior experience with CIO-VCG's price-testing process, and the Controller's office, which included JPMorgan's fair value accounting experts—as well as the Legal Department and an outside law firm to conduct reviews of the SCP traders' marks and CIO-VCG's price-testing process. At the time, JPMorgan was planning to file with the Commission its report for the first quarter of 2012 in early May 2012. In part due to the questions being raised about the valuation of the SCP, JPMorgan Senior Management, with approval of the Audit Committee, decided to postpone the filing to May 10. JPMorgan Senior Management delayed the filing so that it had additional time

to assess whether CIO's first quarter results, which had been publicly released on April 13, were in fact compliant with GAAP and should be disclosed again in the quarterly report.

The Investment Bank's Review

42. On April 25, 2012, a member of JPMorgan Senior Management asked the Valuation Control Group in the firm's IB ("IB-VCG") to price-test the SCP traders' marks for March 30, 2012 as if the positions had been held by the IB. IB-VCG also reviewed the price-testing work that had been done by CIO-VCG at the end of March 2012. The IB-VCG review was conducted under the supervision of the IB's Chief Financial Officer.

IB-VCG Valuation "In Line with the Counterparties"

43. The next day, IB-VCG performed a preliminary analysis of the SCP traders' marks. On a conference call that day, IB-VCG staff informed CIO management and CIO-VCG that "[t]he rough initial result [of its analysis] . . . seems to, to be in line with the mark-to-market differences you see on the collateral calls. . . . In terms of dollar value, the number seems pretty much in line . . . with the counterparties." In other words, IB-VCG's preliminary valuation of the SCP positions was in line with those of CIO's trading counterparties, who had valued the SCP at several hundreds of millions of dollars less than the SCP traders did.

44. During the conference call, CIO-VCG explained to IB-VCG staff that in setting thresholds around independent prices during its month-end price-testing process, it often consulted with the SCP traders—whose valuations it was supposed to validate—"to see if they have any market input to decide whether, you know, if it's, that's wrong, that's correct, et cetera." CIO-VCG also informed IB-VCG that, when completing its price-testing process, it used dealer quotes selected by SCP traders. IB-VCG staff believed that this process of consulting the traders had the potential to significantly impair the independence and effectiveness of the CIO-VCG process.

45. On Saturday, April 28, 2012, at a meeting with members of JPMorgan Senior Management and CIO management, the IB's CFO presented IB-VCG's analysis of the SCP traders' marks. He reviewed with the attendees a spreadsheet that detailed IB-VCG's work to date ("IB-VCG Spreadsheet"). At that meeting, at least one of the positions in the IB-VCG Spreadsheet was reviewed on a column-by-column basis in order to describe the data included in each individual column.

46. As of this time, JPMorgan Senior Management and CIO management knew that the SCP traders' marks were \$275 million greater than independent mid-market prices computed by CIO-VCG based on a combination of broker quotes and data from consensus pricing services. IB-VCG relied exclusively upon consensus pricing services, and the IB-VCG Spreadsheet calculated that the SCP traders' marks were approximately \$767 million greater than the values placed on the SCP positions by consensus mid-market prices published by Markit and Totem.

47. As part of its analysis, IB-VCG staff calculated an approximate bid-offer spread, based on market information from March 30, 2012, for six SCP positions, including several of the largest positions and some with the greatest total dollar value differences between trader marks and IB-VCG's consensus pricing. The IB-VCG Spreadsheet contained data regarding 133

positions and reflected, among other things, that for the six positions for which it calculated an approximate bid-offer spread, the traders' quarter-end marks were outside the bid-offer spreads that IB-VCG had approximated.

48. After presenting IB-VCG's analysis, the IB's CFO began to calculate the profit-and-loss impact if CIO marked the SCP to the conservative end of the bid-offer spread, rather than to mid-market prices, as a price-taker would have done (since price-takers often buy and sell at prices that are inferior to the consensus, mid-market Markit or Totem prices). This analysis showed that adjusting marks to the conservative end of the bid-offer spread would have further reduced the value of the SCP by approximately \$250 million, resulting in an over \$1 billion difference between the traders' marks and a price-taker's marks at the conservative end of the bid-offer spread. JPMorgan Senior Management elected not to pursue this marking methodology with respect to the March 2012 quarter-end marks because, among other reasons, it understood that using mid-market prices was acceptable under GAAP.

Spreadsheet Errors

49. IB-VCG also reviewed the process that CIO-VCG had applied to the traders' quarter-end marks. During this review, IB-VCG learned that in March 2012 CIO-VCG used a spreadsheet in its price-testing process into which data had been manually entered, and that this spreadsheet contained certain errors and reflected differences from the IB-VCG methodology that may have had the effect of understating the difference between the traders' marks and the independent mid-market prices derived by CIO-VCG. On May 8, 2012, IB-VCG forwarded an email to one member of JPMorgan Senior Management explaining these issues. IB-VCG and CIO-VCG were instructed to work together to address the errors and other issues.

50. The next day, IB-VCG corrected one such error, which involved the calculation of the difference between the value of the SCP based on the traders' marks and CIO-VCG's independent prices. Before the correction, the difference was believed to be approximately \$275 million. After the correction, the difference increased to \$512 million. IB-VCG informed JPMorgan Senior Management of the correction and the quantitative impact it had.

51. Based on the price-testing work of IB-VCG and other information, the management of the IB expressed concerns to JPMorgan Senior Management about the potential for mismarking of the SCP and whether CIO VCG was an effective control over the SCP. On May 6, 2012, for example, a senior IB executive explained to a member of JPMorgan Senior Management that the securities in the SCP had "very good price discovery mechanisms" (*i.e.*, could effectively be priced in the marketplace) and that he could not recall a variance between trader marks and independent prices in the IB "greater than \$50mm that remained at any month end across the ENTIRE IB's positions."

52. In light of their concerns relating to CIO, two senior IB executives initially expressed some reservations regarding the scope of their sub-certifications that JPMorgan required officers in the various business lines to provide in connection with its quarterly and annual filings. One of the executives apprised JPMorgan Senior Management that in light of the CIO related information to which he was privy, he had a conversation with an outside lawyer concerning the scope of his certification obligations. After relaying that conversation to the

other Investment Bank executive with certification obligations, both executives signed their sub-certifications.

The Internal Audit Review

53. In addition to the IB-VCG review, on or around May 2, 2012, JPMorgan Senior Management instructed Internal Audit to review the CIO-VCG process, including whether it had been applied consistently over past quarters. Also on May 2, at the end of a meeting of the Audit Committee of JPMorgan's Board of Directors, the Audit Committee, having just been informed of the losses recently suffered, separately requested that Internal Audit review CIO.

54. The Internal Audit team discovered deficiencies with the thresholds CIO-VCG had applied at March 30. As noted above, JPMorgan policy required that CIO-VCG set a threshold around its independent price for each SCP position that was representative of the average spread between the bids and the offers received from dealers for the position. Because the threshold was applied on each side of the independent price, in order to reflect the bid-offer spread the threshold on each side would be one-half of the entire spread.

55. By May 9, 2012, the Internal Audit team learned that in validating the SCP traders' quarter-end marks in March 2012, CIO-VCG had in some cases applied the entire bid-offer spread (rather than one half of the spread) on each side of its independent prices. The result was a threshold that was twice the size of the bid-offer spread and beyond the range of reasonable fair value estimates. The Internal Audit team calculated that, had CIO-VCG applied the thresholds appropriately, it would have adjusted the traders' quarter-end marks downward by \$307 million—\$290 million more than the \$17 million adjustment CIO-VCG had actually made at month end.

56. On May 10, the Internal Audit team collected its work in a draft memo ("Internal Audit Draft Memo"), which stated, among other things, that CIO-VCG was "inconsistent in the application of [its] own thresholds."

57. Although Internal Audit completed this work in the days prior to May 10, it did not fully share this information with JPMorgan Senior Management and did not circulate the Internal Audit Draft Memo to JPMorgan Senior Management or the Audit Committee.

The Controller's Review

58. On April 28, 2012, JPMorgan Senior Management asked the Controller's staff to assess whether the traders' quarter-end marks complied with GAAP and to review the effectiveness of CIO-VCG's quarter-end internal control process.

59. The Controller's staff made several significant observations. One was that, as losses in the SCP increased in March 2012, the traders departed from their historical practice of marking the positions close to the mid-point between the bids and offers received from dealers. Instead, they marked many positions at the aggressive end of the bid-offer spreads, *i.e.*, they marked the positions in a manner that resulted in smaller mark-to-market losses. JPMorgan Senior Management was informed of this fact in late April 2012. The traders justified their marks to the Controller's staff by explaining that the market had become volatile and dislocated.

This volatility, the SCP traders claimed, caused significant intraday price movements that may help explain the difference between the SCP traders' marks and consensus pricing services. To test the volatility explanation, the Controller's staff analyzed intraday pricing information, and determined that the difference between the SCP traders' marks and the mid-market prices was less than the average daily price movement. While accepting the SCP traders' justification, however, the Controller's staff failed to adequately assess whether CIO could transact at the price where the SCP was marked.

60. For two quarter end marks assigned by the SCP traders, the Controller's staff also detected significant differences from mid-market consensus pricing that were not supported by pricing data received by the SCP traders on the date that the mark was assigned. When the Controller's staff questioned these marks, one of the SCP traders agreed that they were too wide as compared to the mid-market price. This fact had not been adequately considered by CIO-VCG during its actual price testing process in connection with the first quarter of 2012, nor was this fact given appropriate scrutiny by the Controller's staff. Consequently, the Controller's staff did not escalate this information to JPMorgan Senior Management.

The Special Review by Outside Counsel

61. In addition to the foregoing reviews, on or around May 1, 2012, JPMorgan retained an outside law firm to provide advice regarding disclosure and to review, among other things, whether the independence of the CIO-VCG process had been improperly compromised by the involvement of the SCP traders. By May 10, 2012, when JPMorgan filed its first quarter report, the law firm had interviewed the employee of CIO-VCG who had price-tested the SCP marks, the executive to whom he reported, and other members of CIO management. The law firm also had collected and reviewed a limited number of the relevant emails and Bloomberg chats from the first quarter of 2012.

The Process for Synthesizing and Escalating Information from the Various Reviews

62. JPMorgan Senior Management led a process that involved daily—sometimes twice daily—meetings and calls in which participants involved in the different reviews discussed what they and their teams were doing and learning. Despite that process, a number of significant facts learned in the course of the various reviews were not shared in these group meetings and calls and were not otherwise escalated to JPMorgan Senior Management. This in turn led to JPMorgan's incomplete understanding of deficiencies relating to the CIO-VCG process in March 2012.

63. JPMorgan Senior Management's emphasis on confidentiality and sharing information on a need-to-know basis contributed to this incomplete understanding. JPMorgan Senior Management was concerned about sensitive information relating to CIO's positions being widely distributed and imposed restrictions on the creation and sharing of work product relating to those positions. These instructions affected the ability of those conducting the reviews to share, learn from, and build upon each other's work.

64. On April 29, 2012, the Controller's staff was instructed not to "discuss [its work] with people outside the immediate group" and to exercise caution in committing its findings to writing.

65. A member of JPMorgan Senior Management also instructed IB-VCG to "keep [its] analysis in a relatively tight group." On April 29, 2012, an IB executive confirmed to the member of JPMorgan Senior Management that IB-VCG "speaks to no one," including the Controller's staff, "without getting my express approval first."

66. Finally, the Internal Audit team was instructed to maintain strict confidentiality in connection with its review.

67. JPMorgan Senior Management did not receive all relevant information for another reason: some employees conducting the reviews failed to appreciate the significance of certain of the facts they had learned and their relevance to the quarterly report that was about to be filed. For example, in looking back on his work after learning in late June that the integrity of the traders' marks was in question, a London-based employee primarily responsible for the Controller's review conducted an after-the-fact assessment, noting that he "[s]hould have better understood the \$767 [million] diff.," *i.e.*, IB-VCG's calculation of the disparity between the SCP traders' quarter-end marks and Markit and Totem consensus, mid-market prices. The employee further noted that he "[s]hould have pressed [CIO-VCG] more on how the tolerances (thresholds) were determined" and "should have picked up that the tolerances determined by adding whole bid-offer," a fact already known to members of the Internal Audit team prior to May 10, 2012. Although executives were in contact with those responsible for the various reviews, some of those employees failed to timely analyze and escalate to JPMorgan Senior Management important facts that they had discovered.

JPMorgan Senior Management's Response to the Information It Received

68. Despite the inadequate information sharing and escalation described above, significant information learned in the management-commissioned reviews was escalated to JPMorgan Senior Management. This information, which related to the adequacy of the CIO-VCG process that produced the \$17 million fair value adjustment to the traders' quarter-end marks, included the following:

- a. As losses began to mount, SCP traders began consistently marking at or near the very edge of the advantageous side of the bid-offer spread.
- b. There was a collateral dispute of over \$500 million.
- c. Independent analysis by IB-VCG of the SCP traders' quarter-end marks was "in line with . . . the counterparties." Specifically, the value of the SCP based on trader marks was approximately \$767 million more than the value based on mid-point consensus pricing.

69. Management also learned of the following facts that directly related to CIO-VCG and the processes it was using in March 2012:

- a. The CIO-VCG process relied on manual spreadsheets that contained errors, one of which caused CIO-VCG to understate the disparity between its independent prices and the traders' marks by \$237 million.
- b. The SCP traders provided some of the quotes that were used in CIO-VCG's price-testing process and this process "need[ed] to be enhanced to ensure independence."

70. In response to what it was learning prior to May 10, JPMorgan Senior Management decided to enhance CIO-VCG's valuation policies. To assist with this task, the persons conducting the reviews recommended certain changes, and a member of JPMorgan Senior Management drafted revisions to CIO-VCG procedures, which were shared with JPMorgan Senior Management and CIO management on May 5, 2012. On May 7, 2012, a senior CIO executive circulated a "proposed operational approach to VCG price testing" that contained additional policy revisions. Both sets of changes were implemented before May 10, 2012.

71. Collectively, the new policies were intended to remediate several of the issues discovered by the management-commissioned reviews of CIO-VCG and the traders' marks:

- a. Disparity between CIO-VCG independent prices and traders' marks. The revised policies significantly curtailed the size of thresholds that CIO-VCG could apply, directing that the difference between a trader's mark and CIO-VCG's independent price could not exceed \$500,000 for an index position and \$2,000,000 for a tranche position.
- b. Trader involvement in the VCG process. The revised policies required CIO-VCG to "source broker quotes independently from the market," rather than through the traders, thereby "eliminating any reliance on [the traders] for sourcing of market data."
- c. Variance between Markit and CIO-VCG's independent prices. The revised policies stated that, for positions where CIO-VCG could rely on dealer quotes in calculating independent prices, CIO-VCG must obtain at least two quotes and, if two are not available, it must use Markit or Totem as an input. The revised policies also provided that, even when dealer quotes are obtained, "mid prices derived from selected dealer quotes should be compared . . . to Markit/Totem sourced data and any material differences . . . must be reported to the CFO of CIO and must be reconciled."
- d. Inadequate oversight over sole CIO-VCG price-tester. The revised policies introduced a new protocol for escalating to management valuation disputes between CIO-VCG and the traders, requiring the involvement of JPMorgan risk personnel and the Chief Financial Officer of CIO.

72. In addition to these policy changes, in early May the staff of IB-VCG prepared a remedial plan to address the spreadsheet errors it had identified in CIO-VCG's price-testing process, and to ensure proper review of the spreadsheets. On May 8, 2012, after CIO finance

management and CIO-VCG concurred in the remedial plan, IB-VCG described it to JPMorgan Senior Management.

**The Reviews of CIO-VCG Are Not
Addressed with the Audit Committee**

73. The responsibility for overseeing JPMorgan's management on behalf of the firm's stockholders—including oversight of management's responsibilities for internal controls—ultimately rests with JPMorgan's Board of Directors. The Board, in turn, discharges its oversight function through several Board committees. One of the principal committees is the Audit Committee, which is charged with overseeing JPMorgan's efforts to assure that it has effective internal controls, which are critical to the integrity of the firm's financial reports and compliance with applicable policies and laws.

74. To assist the Audit Committee in carrying out its responsibility, the Audit Committee's Charter requires JPMorgan management to provide updates to the Committee on all "significant operating and control issues in internal audit reports," the "initiation and status of significant special investigations," the "identification and resolution status of material weaknesses" in controls, and any "reportable conditions in the internal control environment, including any significant deficiencies." These updates serve an important internal control function, allowing the Audit Committee to fulfill its oversight role by, among other things, keeping the Board up-to-date on significant matters, assessing whether to approve the filing of quarterly and annual reports, and evaluating whether the Committee should conduct its own independent investigation of any issues raised with it.

75. In late April and early May 2012, while JPMorgan's Senior Management was devoting daily attention to CIO-VCG and the SCP traders' quarter-end marks—in large measure to ensure that CIO results reported in its upcoming quarterly report would be accurate—it also was in contact with members of the Audit Committee.

76. However, while JPMorgan Senior Management was informed of, and was addressing, various issues with internal controls at CIO-VCG, JPMorgan Senior Management did not engage in a considered assessment, before the firm filed its first quarter report on May 10, 2012, to determine if these matters constituted a significant deficiency or material weakness in the firm's internal control over financial reporting and therefore had to be disclosed to the firm's Audit Committee. Nor, more broadly, did JPMorgan Senior Management disclose to the Audit Committee its concerns regarding the operation of CIO-VCG.

77. On May 2, 2012, the Audit Committee met with some members of JPMorgan Senior Management. The focus of the meeting was on the mounting losses in the SCP portfolio. Despite the requirement to keep the Audit Committee apprised of the significant control issues that were under review, there was no discussion of the IB-VCG or Controller reviews related to CIO-VCG and the traders' marks, although that work was underway. There was also no discussion of the fact that an outside law firm had been retained to advise on disclosures to be made in the first quarter Form 10-Q that related to CIO and to assess certain aspects of the CIO-VCG process, including whether the SCP traders exercised undue influence on the process.

78. During a full meeting of the Board of Directors hours before the filing of JPMorgan's first quarter report on May 10, 2012, JPMorgan Senior Management mentioned that reviews of what occurred in CIO were underway, including by Internal Audit, legal, the Controller's staff, and risk management. But, JPMorgan Senior Management did not discuss the details of or facts learned in the IB-VCG, Controller, or Internal Audit reviews.

79. Because the Audit Committee was not apprised of the initiation of the reviews or facts learned as a result of those reviews, it was unable to provide input on the issues before the filing of JPMorgan's first quarter report, and was unable to engage with those doing the work to ensure that it was sufficient from the perspective of the Audit Committee.

80. As noted above, the Audit Committee was not made aware before JPMorgan filed its first quarter report of the facts learned by various members of the review teams, including that CIO-VCG's March 2012 price-testing process was compromised by spreadsheet errors, that SCP traders may have exerted influence over that process, or that CIO-VCG applied valuation thresholds that were in some instances twice the applicable spread.

81. Other information learned by various members of the review teams that further called into question CIO-VCG's March 2012 quarter-end valuation process was not shared with the Audit Committee. At the end of the first quarter, CIO-VCG made a fair value adjustment of \$17 million to the traders' marks. However, certain facts raised issues as to the adequacy of this adjustment and the process through which it was made, including the \$520 million in collateral disputes over SCP positions, the \$767 million disparity between the SCP traders' marks and consensus, mid-market prices, the fact that the traders marked some of the largest notional SCP positions outside the bid-offer spread approximated by IB-VCG, and the fact that the traders began to mark the SCP at the aggressive end of the bid-offer spread when losses began to mount.

82. Finally, the Audit Committee was not apprised of, or included in, JPMorgan Senior Management's efforts to remedy the control issues at CIO-VCG by revising valuation policies to ensure proper oversight by CIO management. As a result, the Audit Committee did not have any input into the proposed changes or an understanding of the reasons that motivated them.

Subsequent Disclosures by JPMorgan

83. Based on the information available to it, the Audit Committee approved of the content of JPMorgan's quarterly report on Form 10-Q that was filed on May 10, 2012. On July 13, 2012, JPMorgan disclosed that a material weakness existed in its internal control over financial reporting stemming from the "effectiveness of CIO's internal controls over valuation of the synthetic credit portfolio." In its amended Form 10-Q for the first quarter of 2012 filed on August 9, 2012, JPMorgan disclosed that this material weakness finding "was the result of issues in certain interrelated and interdependent control elements comprising that process, including insufficient engagement of CIO senior finance management in the valuation control process in light of the increased size and heightened risk profile of the synthetic credit portfolio during the first quarter of 2012, and in the effectiveness of certain procedures employed during the first quarter of 2012 by the CIO Valuation Control Group in performing the price verifications."

84. JPMorgan also corrected prior statements concerning its disclosure controls and procedures. In its May 10 Form 10-Q, JPMorgan stated, "As of the end of the period covered by this report, an evaluation was carried out under the supervision and with the participation of the Firm's management, including its Chairman and Chief Executive Officer and its Chief Financial Officer, of the effectiveness of its disclosure controls and procedures (as defined in Rule 13a-15(e) under the Securities Exchange Act of 1934). Based on that evaluation, the Chairman and Chief Executive Officer and the Chief Financial Officer concluded that these disclosure controls and procedures were effective." On August 9, 2012, when JPMorgan disclosed that it had determined that a material weakness existed at CIO as of March 31, 2012, it also disclosed that, "[a]s a result of that determination, the Firm's Chairman and Chief Executive Officer and Chief Financial Officer also concluded that the Firm's disclosure controls and procedures (as defined in Rule 13a-15(e) under the Securities Exchange Act of 1934) were not effective at March 31, 2012."

V.

As a result of the conduct described above, JPMorgan violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-11, 13a-13, and 13a-15 thereunder.

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

Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that:

A. JPMorgan cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-11, 13a-13, and 13a-15 thereunder.

B. JPMorgan shall, within ten (10) business days of the entry of this Order, pay a civil money penalty in the amount of \$200,000,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

- (1) JPMorgan may transmit payment electronically to the Commission, which will provide detailed ACH transfer/ Fedwire instructions upon request;
- (2) JPMorgan may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) JPMorgan may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying JPMorgan Chase & Co. as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew M. Calamari, Regional Director – New York Regional Office, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281.

C. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended (“Fair Fund distribution”). Regardless of whether any 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, JPMorgan 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 JPMorgan’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related Investor Action grants such a Penalty Offset, JPMorgan agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

D. JPMorgan shall pay all reasonable administrative costs and expenses of any distribution, including the fees and expenses of a tax administrator, within thirty (30) days after receipt of an invoice for such services.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

ANNEX A

JPMorgan Chase & Co. ("JPMorgan") admits to the facts set forth below and acknowledges that its conduct violated the federal securities laws:

RELEVANT ENTITIES AND PERSONS

1. JPMorgan, a Delaware corporation headquartered in New York, New York, is a global banking and financial services firm whose common stock is registered with the Commission under Section 12(b) of the Exchange Act and traded on The New York Stock Exchange under the symbol "JPM."

2. CIO is a unit of JPMorgan and part of the firm's Corporate/Private Equity reporting segment. Among other things, CIO is responsible for investing excess deposits from JPMorgan's banking arm. CIO maintains offices in New York, New York and London, United Kingdom.

3. JPMorgan "Senior Management," as that term is used herein, refers to one or more of the following individuals who held the listed positions as of May 10, 2012: the JPMorgan Chief Executive Officer, the JPMorgan Chief Financial Officer, the JPMorgan Chief Risk Officer, the JPMorgan Controller, and the JPMorgan General Auditor.

THE MISMARKING OF JPMORGAN'S SYNTHETIC CREDIT PORTFOLIO

JPMorgan, CIO, and the Synthetic Credit Portfolio

4. In 2007, CIO created an investment portfolio, the SCP, which was designed to provide a hedge against adverse credit events. It invested in derivatives that could be expected to generate profit during adverse credit events, such as widespread corporate defaults. The positions in the SCP consisted of credit derivative indices and portions (or "tranches") of those indices, both of which were constructed to track a collection of credit default swaps ("CDS") referencing the debt of corporate issuers.

5. The SCP was invested in two primary index groups: CDX, a group of North American and Emerging Markets indices, and iTraxx, a group of European and Asian indices. Some indices referenced companies considered to be investment grade and others referenced companies considered to be high-yield (which generally means that their credit risk is viewed as higher). Investors in CDX and iTraxx indices, including CIO, can be "long" risk, which is equivalent to being a seller of CDS protection, or "short" risk, which is equivalent to being a buyer of CDS protection.

6. Beginning in 2008, the SCP's investment strategy generally consisted of holding a net short risk position in high-yield indices and tranches, which meant that the SCP was positioned to realize gains if high-yield companies were to default on their corporate debt. The composition of the book changed from time to time in response to CIO's assessment of market conditions.

7. In December 2011, in preparation for complying with the capital adequacy standards of the Third Basel Accord, the SCP traders were instructed to reduce the SCP's use of regulatory capital. To achieve this—and, in light of improving economic conditions, to reduce the SCP's credit protection profile—CIO management and the traders in charge of the SCP considered reducing the size of the SCP's short risk position in high-yield investments. There were substantial costs associated with this strategy. To avoid these costs, CIO management and traders therefore decided to add investments to the SCP's existing long risk investment-grade positions to offset the short risk high-yield position. However, as CIO built its long risk investment-grade positions, which included a large investment in an index known as the CDX North American Investment Grade Index Series 9 10-year, it also added substantially to its existing high-yield short position. JPMorgan did not have risk limits restricting the notional size of the SCP, and CIO's trading strategy led to a large increase in the notional size of the SCP. During the first quarter of 2012, CIO tripled the net notional amount of the SCP. As of March 31, 2012, the SCP contained 132 trading positions with a net notional amount of approximately \$157 billion.

Traders Mismark the SCP as Losses Mount

8. Like many other public companies, JPMorgan reported its results, which incorporated the mark-to-market profit and loss of the SCP, at the end of each quarter in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). Under JPMorgan policy, the SCP traders were required to assign valuations (or "marks") to the positions in the SCP at fair value. Both GAAP and JPMorgan's accounting policy required that the SCP traders do so by making a good-faith estimate of the fair value of each SCP position based on information available in the marketplace. Under GAAP, the positions in the SCP had to be marked "within the bid-ask spread" at the point that is "most representative of fair value in the circumstances," with a particular emphasis on the price where the traders could reasonably expect to transact. GAAP also allows for the use of mid-market pricing "as a practical expedient for fair value measurements within a bid-ask spread."

9. At the end of each business day, the SCP traders had to mark the positions in the SCP and report to CIO management a summary of the portfolio's mark-to-market profits and losses for the day. Additionally, the traders had to provide their valuations for the SCP to the middle office at CIO so that the information could be incorporated into the books and records of JPMorgan.

10. The SCP generated sizeable profits for JPMorgan over the period from 2007 to 2011. In the first quarter of 2012, however, it began experiencing substantial mark-to-market losses. By early March 2012, the most senior SCP trader, who was a managing director within CIO, instructed the other SCP traders to stop reporting losses to CIO management unless there was a market-moving event that could easily explain the losses. In response, a junior SCP trader changed his daily marking methodology for the SCP. Previously, he had derived for each SCP position a bid-offer spread from dealer quotes he had received and then assigned a mark that was generally equivalent to the mid-point in that spread. In response to the most senior trader's instruction, the junior trader began to assign marks that often were at the most aggressive point in the bid-offer spread received that day (*i.e.*, the point that resulted in higher valuations of the SCP positions). For some SCP positions, the junior trader assigned marks in March that were

altogether outside every dealer's bid and offer received that day. As a result of these marking practices, the SCP traders intentionally understated mark-to-market losses in the SCP.

11. In March 2012, the junior trader began to maintain a spreadsheet which showed that, by March 15, 2012, the difference between the daily prices he had assigned to the SCP and the average mid-market point between the best bids and offers he had received from dealers had grown to \$292 million. Within a few days, the difference had grown further to \$432 million. The traders, however, revealed significantly smaller losses in daily reports to CIO management about the portfolio's performance than were indicated by mid-market pricing.

12. On March 30, 2012, the last trading day in the first quarter of 2012, the SCP traders informed the most senior trader in the morning that losses for that day alone could reach \$250 million. In response, the most senior trader directed the junior trader not to mark the SCP at the close of business in London, as JPMorgan policy required, but instead to wait for the markets in New York to close because trading information from New York might support higher valuations for the SCP positions.

13. The most senior trader also instructed the junior trader to use the "best" prices (*i.e.*, the most advantageous prices within the bid-offer spread) in marking the SCP. On March 30, the junior trader marked the SCP positions in accordance with these instructions, and reported to CIO management an estimated loss of \$138 million. Over the next several weeks, the traders continued to understate mark-to-market losses in the SCP until their authority over the portfolio was taken away from them on or around April 29, 2012, when JPMorgan Senior Management asked a senior Investment Bank ("IB") trader and senior risk officer to take responsibility for the portfolio.

JPMorgan Issues Its First Quarter Results and Subsequently Issues a Restatement

14. On April 13, 2012, JPMorgan issued its earnings release for the quarter ending March 31, 2012, which was filed on Form 8-K with the Commission. Also on April 13, JPMorgan Senior Management conducted an earnings call with analysts and investors. The earnings release disclosed that JPMorgan's consolidated quarterly income before income tax expense was \$7.641 billion. These results included the understated losses for the SCP, which was based on the SCP traders' marks as of March 30, 2012.

15. One month later, on May 10, 2012, JPMorgan filed on Form 10-Q its report for the first quarter, which ended on March 31, 2012, disclosing that CIO had experienced significant mark-to-market losses in the SCP during the second quarter to date. Also on May 10, 2012, JPMorgan Senior Management conducted a call with analysts, during which the firm disclosed that CIO had suffered losses of approximately \$2 billion during the second quarter to date and that there could be additional losses, that the trading strategy that resulted in the losses was "flawed, complex, poorly reviewed, poorly executed, and poorly monitored," that "we've had teams from audit, legal, risk, and various control functions . . . involved in extensive review of what happened," and that "[w]e have more work to do but it's obvious at this point that there are many errors, sloppiness, and bad judgment." The \$2 billion calculation was based on marks for positions in the SCP that were derived from independent pricing sources and not from the

SCP traders; therefore, the full year-to-date loss figure was not affected by its subsequent conclusions concerning the integrity of the SCP traders' marks.

16. Two months later, on July 13, 2012, JPMorgan announced that it would restate its results for the first quarter of 2012 because it had discovered "information that raises questions about the integrity of the [SCP] marks" and was no longer confident that the marks used to prepare the first quarter results "reflect good faith estimates of fair value at quarter end." On August 9, 2012, JPMorgan filed an amended Form 10-Q with restated results for the first quarter. The restatement had the effect of moving certain SCP losses from the second quarter to the first quarter. Specifically, the restatement reduced the revenues of JPMorgan's Corporate/Private Equity reporting segment in the first quarter by \$660 million, from \$1.689 billion to \$1.029 billion, and the firm's consolidated quarterly income before income tax expense from the previously-reported \$7.641 billion to \$6.981 billion.

JPMORGAN'S INEFFECTIVE INTERNAL ACCOUNTING CONTROLS AND DISCLOSURE CONTROLS AND PROCEDURES

17. JPMorgan's May 10, 2012 quarterly report on Form 10-Q contained its financial statements for the first quarter of the year, management's discussion of the firm's various businesses, and other information. In addition, the report stated that JPMorgan's management evaluated the effectiveness of its disclosure controls and procedures and concluded that they were effective.

18. As discussed below, between late April and May 10, 2012, JPMorgan engaged in an extensive process involving work performed by the Controller's office, the Internal Audit department ("Internal Audit"), valuation experts from the Investment Banking Division ("IB"), and in-house and outside counsel in an effort to evaluate the SCP's quarter-end marks and to understand the CIO valuation control process and the differences between that process and the valuation control process of the IB. As a result, by May 10, various executives and employees of the firm had learned of deficiencies as of March 31, 2012 in CIO's internal controls. Due to failures to timely escalate information and instructions that had the effect of hindering the sharing of information, not all of these deficiencies had been escalated to JPMorgan Senior Management prior to May 10, 2012. And, as to the information that was escalated, JPMorgan Senior Management did not make a considered assessment as to whether critical facts existed—including any significant deficiency or material weakness in internal controls—that had to be disclosed to the Audit Committee. Consequently, JPMorgan Senior Management did not disclose the existence of any significant deficiencies or material weaknesses to the Audit Committee before JPMorgan filed its quarterly report on May 10, 2012.

19. On July 13, 2012, at the same time JPMorgan disclosed to investors that it would restate its results for the first quarter of 2012, the firm announced that a material weakness in internal control over financial reporting had existed at CIO as of March 31, 2012. As a result of the material weakness, JPMorgan also announced that its management had concluded that JPMorgan's disclosure controls and procedures were not effective as of March 31, 2012.

CIO Internal Controls in the First Quarter of 2012

20. As part of fulfilling the requirements to devise and maintain systems of internal accounting controls, financial institutions such as JPMorgan need to have internal controls that adequately monitor and test the accuracy and integrity of, among other things, the valuations of the firm's trading portfolios such as the SCP. CIO-VCG served as a significant control for ensuring that certain assets and liabilities of CIO, including the positions in the SCP, were measured at fair value in accordance with GAAP in JPMorgan's books and records and in the quarterly and annual reports the firm filed with the Commission.

21. For the SCP, CIO-VCG carried out its responsibility by price-testing the marks that the SCP traders assigned to the portfolio's positions on the last business day of every month. Under firm policy applicable during the first quarter of 2012, CIO-VCG performed this price-testing function by undertaking the following steps:

- a. First, CIO-VCG had to calculate, as a benchmark, an independent price for each of the SCP positions. A CIO-VCG policy and procedure document indicates that, for index positions, these independent prices were to be obtained from Markit Limited Group ("Markit"), a service that provides consensus-based prices for indices. For tranches, CIO-VCG obtained independent prices from dealer quotes, which it checked against Totem, another consensus pricing service offered by Markit, for any significant discrepancies.
- b. After calculating an independent price for each SCP position, CIO-VCG had to establish and apply a threshold (or tolerance) around each price that represented the average bid-offer spread for the security based on quotes received from dealers. While it had authority to make an adjustment to trader marks that fell within these thresholds, CIO-VCG considered such marks to be presumptively marked at fair value and would not make any adjustment to those marks.
- c. If the SCP traders' mark for a given position fell outside of the threshold, CIO-VCG would record the excess as a loss (or profit) and make a corresponding adjustment to the mark-to-market profit and loss for the SCP.
- d. Finally, if CIO-VCG determined that the market for a particular position had become illiquid, CIO-VCG applied a pre-established formula to calculate and record a liquidity reserve to account for the risk that certain SCP positions could not be sold at fair value due to reduced liquidity in the marketplace.

22. The CIO-VCG staff actively involved in price-testing the SCP's 132 positions at the end of the first quarter of 2012 consisted of one person, who worked at CIO's London office. That person was also responsible for price testing all of CIO's other London-based portfolios.

23. On April 4, 2012, CIO-VCG completed its price-testing process for the SCP for the end of March 2012. It applied the relevant thresholds to adjust downward the fair value of the SCP by approximately \$17 million compared to the traders' marks and maintained the previous month's liquidity reserve of approximately \$31 million.

24. During its price-testing process for quarter-end marks, CIO-VCG observed that most of the SCP traders' marks migrated to the aggressive end of the bid/offer spread. CIO-VCG questioned one of the SCP traders about this shift. The trader did not explain the shift but merely stated, "Talk to management." CIO-VCG did not disclose to anyone its observations concerning the shift in the SCP traders' marking methodology until questions were being raised about a collateral dispute, which is summarized below, on April 20, 2012. CIO-VCG also did not share the details of its exchange with the SCP trader.

25. CIO-VCG calculated a significant difference between its independent prices and the SCP traders' marks. During its price-testing process, it calculated that the mid-market value of the SCP based on its independent prices was approximately \$192 million less than the value based on the SCP traders' marks. It subsequently identified an error in its calculations, which increased the difference from \$192 million to approximately \$275 million. A March 30, 2012 Internal Audit report on CIO-VCG contained an Action Plan under which CIO-VCG should disclose this discrepancy to CIO management. However, that action plan was not required to be fully implemented until June 30, 2012, and CIO-VCG only disclosed the \$17 million fair value adjustment based on marks that fell outside of its thresholds. Consequently, CIO management was not alerted to the significant difference between the SCP traders' marks and the CIO-VCG calculated mid-market valuations, which warranted further analysis.

26. Shortly after April 4, 2012, CIO Finance, with the approval of CIO management and JPMorgan Senior Management, increased the existing \$31 million liquidity reserve by \$155 million, based on a determination that certain tranches in the SCP portfolio had become illiquid as of March 30. The traders' marks, as adjusted by CIO-VCG, were then incorporated in the financial information provided for CIO in JPMorgan's earnings release on April 13, 2012 and in the firm's May 10, 2012 report for the first quarter of 2012.

**Large Collateral Calls and Increasing Losses Prompt
Multiple Reviews of CIO-VCG and the Traders' Marks**

27. On April 20, 2012, JPMorgan Senior Management was informed that the firm had received several collateral calls—requests from trading counterparties for payment or the posting of collateral based on their differing views of the fair value—concerning positions in the SCP. The total amount in dispute was approximately \$520 million.

28. A collateral dispute with a CDS counterparty can sometimes be an indication that a firm's internal price for an instrument does not accurately reflect its fair value. Accordingly, in April 2012, the size of the collateral disputes over the SCP raised concerns by JPMorgan Senior Management about the pricing of the SCP positions. In an April 20, 2012 email, a member of JPMorgan Senior Management observed that the collateral disputes were not "a good sign on our valuation process" in the SCP.

29. At the same time that the collateral disputes were being escalated to JPMorgan Senior Management, the SCP was also sustaining large daily losses. This development was inconsistent with what CIO had told JPMorgan Senior Management to expect prior to the April 13 earnings release, and JPMorgan Senior Management was concerned about the losses and the traders' explanations of what was happening to the SCP positions and their strategy for dealing with the risks to the SCP. On or about April 27, JPMorgan Senior Management asked a senior trader from the IB and a senior risk officer to evaluate the portfolio on an urgent basis. Shortly afterwards, the IB trader and risk officer were put in charge of managing and reducing the risk in the SCP, and the SCP traders were relieved of all trading and pricing responsibilities. Additionally, on a going-forward basis, positions in the SCP were to be marked to consensus mid-market prices published by Markit.

30. In late April and early May, JPMorgan Senior Management mobilized resources from various parts of the firm—the IB's valuation experts, Internal Audit, which had prior experience with CIO-VCG's price-testing process, and the Controller's office, which included JPMorgan's fair value accounting experts—as well as the Legal Department and an outside law firm to conduct reviews of the SCP traders' marks and CIO-VCG's price-testing process. At the time, JPMorgan was planning to file with the Commission its report for the first quarter of 2012 in early May 2012. In part due to the questions being raised about the valuation of the SCP, JPMorgan Senior Management, with approval of the Audit Committee, decided to postpone the filing to May 10. JPMorgan Senior Management delayed the filing so that it had additional time to assess whether CIO's first quarter results, which had been publicly released on April 13, were in fact compliant with GAAP and should be disclosed again in the quarterly report.

The Investment Bank's Review

31. On April 25, 2012, a member of JPMorgan Senior Management asked the Valuation Control Group in the firm's IB ("IB-VCG") to price-test the SCP traders' marks for March 30, 2012 as if the positions had been held by the IB. IB-VCG also reviewed the price-testing work that had been done by CIO-VCG at the end of March 2012. The IB-VCG review was conducted under the supervision of the IB's Chief Financial Officer.

IB-VCG Valuation "In Line with the Counterparties"

32. The next day, IB-VCG performed a preliminary analysis of the SCP traders' marks. On a conference call that day, IB-VCG staff informed CIO management and CIO-VCG that "[t]he rough initial result [of its analysis] . . . seems to, to be in line with the mark-to-market differences you see on the collateral calls. . . . In terms of dollar value, the number seems pretty much in line . . . with the counterparties." In other words, IB-VCG's preliminary valuation of the SCP positions was in line with those of CIO's trading counterparties, who had valued the SCP at several hundreds of millions of dollars less than the SCP traders did.

33. During the conference call, CIO-VCG explained to IB-VCG staff that in setting thresholds around independent prices during its month-end price-testing process, it often consulted with the SCP traders—whose valuations it was supposed to validate—"to see if they have any market input to decide whether, you know, if it's, that's wrong, that's correct, et cetera." CIO-VCG also informed IB-VCG that, when completing its price-testing process, it

used dealer quotes selected by SCP traders. IB-VCG staff believed that this process of consulting the traders had the potential to significantly impair the independence and effectiveness of the CIO-VCG process.

34. On Saturday, April 28, 2012, at a meeting with members of JPMorgan Senior Management and CIO management, the IB's CFO presented IB-VCG's analysis of the SCP traders' marks. He reviewed with the attendees a spreadsheet that detailed IB-VCG's work to date ("IB-VCG Spreadsheet"). At that meeting, at least one of the positions in the IB-VCG Spreadsheet was reviewed on a column-by-column basis in order to describe the data included in each individual column.

35. As of this time, JPMorgan Senior Management and CIO management knew that the SCP traders' marks were \$275 million greater than independent mid-market prices computed by CIO-VCG based on a combination of broker quotes and data from consensus pricing services. IB-VCG relied exclusively upon consensus pricing services, and the IB-VCG Spreadsheet calculated that the SCP traders' marks were approximately \$767 million greater than the values placed on the SCP positions by consensus mid-market prices published by Markit and Totem.

36. As part of its analysis, IB-VCG staff calculated an approximate bid-offer spread, based on market information from March 30, 2012, for six SCP positions, including several of the largest positions and some with the greatest total dollar value differences between trader marks and IB-VCG's consensus pricing. The IB-VCG Spreadsheet contained data regarding 133 positions and reflected, among other things, that for the six positions for which it calculated an approximate bid-offer spread, the traders' quarter-end marks were outside the bid-offer spreads that IB-VCG had approximated.

37. After presenting IB-VCG's analysis, the IB's CFO began to calculate the profit-and-loss impact if CIO marked the SCP to the conservative end of the bid-offer spread, rather than to mid-market prices, as a price-taker would have done (since price-takers often buy and sell at prices that are inferior to the consensus, mid-market Markit or Totem prices). This analysis showed that adjusting marks to the conservative end of the bid-offer spread would have further reduced the value of the SCP by approximately \$250 million, resulting in an over \$1 billion difference between the traders' marks and a price-taker's marks at the conservative end of the bid-offer spread. JPMorgan Senior Management elected not to pursue this marking methodology with respect to the March 2012 quarter-end marks because, among other reasons, it understood that using mid-market prices was acceptable under GAAP.

Spreadsheet Errors

38. IB-VCG also reviewed the process that CIO-VCG had applied to the traders' quarter-end marks. During this review, IB-VCG learned that in March 2012 CIO-VCG used a spreadsheet in its price-testing process into which data had been manually entered, and that this spreadsheet contained certain errors and reflected differences from the IB-VCG methodology that may have had the effect of understating the difference between the traders' marks and the independent mid-market prices derived by CIO-VCG. On May 8, 2012, IB-VCG forwarded an email to one member of JPMorgan Senior Management explaining these issues. IB-VCG and CIO-VCG were instructed to work together to address the errors and other issues.

39. The next day, IB-VCG corrected one such error, which involved the calculation of the difference between the value of the SCP based on the traders' marks and CIO-VCG's independent prices. Before the correction, the difference was believed to be approximately \$275 million. After the correction, the difference increased to \$512 million. IB-VCG informed JPMorgan Senior Management of the correction and the quantitative impact it had.

40. Based on the price-testing work of IB-VCG and other information, the management of the IB expressed concerns to JPMorgan Senior Management about the potential for mismarking of the SCP and whether CIO VCG was an effective control over the SCP. On May 6, 2012, for example, a senior IB executive explained to a member of JPMorgan Senior Management that the securities in the SCP had "very good price discovery mechanisms" (*i.e.*, could effectively be priced in the marketplace) and that he could not recall a variance between trader marks and independent prices in the IB "greater than \$50mm that remained at any month end across the ENTIRE IB's positions."

41. In light of their concerns relating to CIO, two senior IB executives initially expressed some reservations regarding the scope of their sub-certifications that JPMorgan required officers in the various business lines to provide in connection with its quarterly and annual filings. One of the executives apprised JPMorgan Senior Management that in light of the CIO related information to which he was privy, he had a conversation with an outside lawyer concerning the scope of his certification obligations. After relaying that conversation to the other Investment Bank executive with certification obligations, both executives signed their sub-certifications.

The Internal Audit Review

42. In addition to the IB-VCG review, on or around May 2, 2012, JPMorgan Senior Management instructed Internal Audit to review the CIO-VCG process, including whether it had been applied consistently over past quarters. Also on May 2, at the end of a meeting of the Audit Committee of JPMorgan's Board of Directors, the Audit Committee, having just been informed of the losses recently suffered, separately requested that Internal Audit review CIO.

43. The Internal Audit team discovered deficiencies with the thresholds CIO-VCG had applied at March 30. As noted above, JPMorgan policy required that CIO-VCG set a threshold around its independent price for each SCP position that was representative of the average spread between the bids and the offers received from dealers for the position. Because the threshold was applied on each side of the independent price, in order to reflect the bid-offer spread the threshold on each side would be one-half of the entire spread.

44. By May 9, 2012, the Internal Audit team learned that in validating the SCP traders' quarter-end marks in March 2012, CIO-VCG had in some cases applied the entire bid-offer spread (rather than one half of the spread) on each side of its independent prices. The result was a threshold that was twice the size of the bid-offer spread and beyond the range of reasonable fair value estimates. The Internal Audit team calculated that, had CIO-VCG applied the thresholds appropriately, it would have adjusted the traders' quarter-end marks downward by \$307 million—\$290 million more than the \$17 million adjustment CIO-VCG had actually made at month end.

45. On May 10, the Internal Audit team collected its work in a draft memo ("Internal Audit Draft Memo"), which stated, among other things, that CIO-VCG was "inconsistent in the application of [its] own thresholds."

46. Although Internal Audit completed this work in the days prior to May 10, it did not fully share this information with JPMorgan Senior Management and did not circulate the Internal Audit Draft Memo to JPMorgan Senior Management or the Audit Committee.

The Controller's Review

47. On April 28, 2012, JPMorgan Senior Management asked the Controller's staff to assess whether the traders' quarter-end marks complied with GAAP and to review the effectiveness of CIO-VCG's quarter-end internal control process.

48. The Controller's staff made several significant observations. One was that, as losses in the SCP increased in March 2012, the traders departed from their historical practice of marking the positions close to the mid-point between the bids and offers received from dealers. Instead, they marked many positions at the aggressive end of the bid-offer spreads, *i.e.*, they marked the positions in a manner that resulted in smaller mark-to-market losses. JPMorgan Senior Management was informed of this fact in late April 2012. The traders justified their marks to the Controller's staff by explaining that the market had become volatile and dislocated. This volatility, the SCP traders claimed, caused significant intraday price movements that may help explain the difference between the SCP traders' marks and consensus pricing services. To test the volatility explanation, the Controller's staff analyzed intraday pricing information, and determined that the difference between the SCP traders' marks and the mid-market prices was less than the average daily price movement. While accepting the SCP traders' justification, however, the Controller's staff failed to adequately assess whether CIO could transact at the price where the SCP was marked.

49. For two quarter end marks assigned by the SCP traders, the Controller's staff also detected significant differences from mid-market consensus pricing that were not supported by pricing data received by the SCP traders on the date that the mark was assigned. When the Controller's staff questioned these marks, one of the SCP traders agreed that they were too wide as compared to the mid-market price. This fact had not been adequately considered by CIO-VCG during its actual price testing process in connection with the first quarter of 2012, nor was this fact given appropriate scrutiny by the Controller's staff. Consequently, the Controller's staff did not escalate this information to JPMorgan Senior Management.

The Special Review by Outside Counsel

50. In addition to the foregoing reviews, on or around May 1, 2012, JPMorgan retained an outside law firm to provide advice regarding disclosure and to review, among other things, whether the independence of the CIO-VCG process had been improperly compromised by the involvement of the SCP traders. By May 10, 2012, when JPMorgan filed its first quarter report, the law firm had interviewed the employee of CIO-VCG who had price-tested the SCP marks, the executive to whom he reported, and other members of CIO management. The law

firm also had collected and reviewed a limited number of the relevant emails and Bloomberg chats from the first quarter of 2012.

The Process for Synthesizing and Escalating Information from the Various Reviews

51. JPMorgan Senior Management led a process that involved daily—sometimes twice daily—meetings and calls in which participants involved in the different reviews discussed what they and their teams were doing and learning. Despite that process, a number of significant facts learned in the course of the various reviews were not shared in these group meetings and calls and were not otherwise escalated to JPMorgan Senior Management. This in turn led to JPMorgan's incomplete understanding of deficiencies relating to the CIO-VCG process in March 2012.

52. JPMorgan Senior Management's emphasis on confidentiality and sharing information on a need-to-know basis contributed to this incomplete understanding. JPMorgan Senior Management was concerned about sensitive information relating to CIO's positions being widely distributed and imposed restrictions on the creation and sharing of work product relating to those positions. These instructions affected the ability of those conducting the reviews to share, learn from, and build upon each other's work.

53. On April 29, 2012, the Controller's staff was instructed not to "discuss [its work] with people outside the immediate group" and to exercise caution in committing its findings to writing.

54. A member of JPMorgan Senior Management also instructed IB-VCG to "keep [its] analysis in a relatively tight group." On April 29, 2012, an IB executive confirmed to the member of JPMorgan Senior Management that IB-VCG "speaks to no one," including the Controller's staff, "without getting my express approval first."

55. Finally, the Internal Audit team was instructed to maintain strict confidentiality in connection with its review.

56. JPMorgan Senior Management did not receive all relevant information for another reason: some employees conducting the reviews failed to appreciate the significance of certain of the facts they had learned and their relevance to the quarterly report that was about to be filed. For example, in looking back on his work after learning in late June that the integrity of the traders' marks was in question, a London-based employee primarily responsible for the Controller's review conducted an after-the-fact assessment, noting that he "[s]hould have better understood the \$767 [million] diff.," *i.e.*, IB-VCG's calculation of the disparity between the SCP traders' quarter-end marks and Markit and Totem consensus, mid-market prices. The employee further noted that he "[s]hould have pressed [CIO-VCG] more on how the tolerances (thresholds) were determined" and "should have picked up that the tolerances determined by adding whole bid-offer," a fact already known to members of the Internal Audit team prior to May 10, 2012. Although executives were in contact with those responsible for the various reviews, some of those employees failed to timely analyze and escalate to JPMorgan Senior Management important facts that they had discovered.

**JPMorgan Senior Management's
Response to the Information It Received**

57. Despite the inadequate information sharing and escalation described above, significant information learned in the management-commissioned reviews was escalated to JPMorgan Senior Management. This information, which related to the adequacy of the CIO-VCG process that produced the \$17 million fair value adjustment to the traders' quarter-end marks, included the following:

- a. As losses began to mount, SCP traders began consistently marking at or near the very edge of the advantageous side of the bid-offer spread.
- b. There was a collateral dispute of over \$500 million.
- c. Independent analysis by IB-VCG of the SCP traders' quarter-end marks was "in line with . . . the counterparties." Specifically, the value of the SCP based on trader marks was approximately \$767 million more than the value based on mid-point consensus pricing.

58. Management also learned of the following facts that directly related to CIO-VCG and the processes it was using in March 2012:

- a. The CIO-VCG process relied on manual spreadsheets that contained errors, one of which caused CIO-VCG to understate the disparity between its independent prices and the traders' marks by \$237 million.
- b. The SCP traders provided some of the quotes that were used in CIO-VCG's price-testing process and this process "need[ed] to be enhanced to ensure independence."

59. In response to what it was learning prior to May 10, JPMorgan Senior Management decided to enhance CIO-VCG's valuation policies. To assist with this task, the persons conducting the reviews recommended certain changes, and a member of JPMorgan Senior Management drafted revisions to CIO-VCG procedures, which were shared with JPMorgan Senior Management and CIO management on May 5, 2012. On May 7, 2012, a senior CIO executive circulated a "proposed operational approach to VCG price testing" that contained additional policy revisions. Both sets of changes were implemented before May 10, 2012.

60. Collectively, the new policies were intended to remediate several of the issues discovered by the management-commissioned reviews of CIO-VCG and the traders' marks:

- a. Disparity between CIO-VCG independent prices and traders' marks. The revised policies significantly curtailed the size of thresholds that CIO-VCG could apply, directing that the difference between a trader's mark and CIO-VCG's independent price could not exceed \$500,000 for an index position and \$2,000,000 for a tranche position.

- b. Trader involvement in the VCG process. The revised policies required CIO-VCG to “source broker quotes independently from the market,” rather than through the traders, thereby “eliminating any reliance on [the traders] for sourcing of market data.”
- c. Variance between Markit and CIO-VCG’s independent prices. The revised policies stated that, for positions where CIO-VCG could rely on dealer quotes in calculating independent prices, CIO-VCG must obtain at least two quotes and, if two are not available, it must use Markit or Totem as an input. The revised policies also provided that, even when dealer quotes are obtained, “mid prices derived from selected dealer quotes should be compared . . . to Markit/Totem sourced data and any material differences . . . must be reported to the CFO of CIO and must be reconciled.”
- d. Inadequate oversight over sole CIO-VCG price-tester. The revised policies introduced a new protocol for escalating to management valuation disputes between CIO-VCG and the traders, requiring the involvement of JPMorgan risk personnel and the Chief Financial Officer of CIO.

61. In addition to these policy changes, in early May the staff of IB-VCG prepared a remedial plan to address the spreadsheet errors it had identified in CIO-VCG’s price-testing process, and to ensure proper review of the spreadsheets. On May 8, 2012, after CIO finance management and CIO-VCG concurred in the remedial plan, IB-VCG described it to JPMorgan Senior Management.

**The Reviews of CIO-VCG Are Not
Addressed with the Audit Committee**

62. The responsibility for overseeing JPMorgan’s management on behalf of the firm’s stockholders—including oversight of management’s responsibilities for internal controls—ultimately rests with JPMorgan’s Board of Directors. The Board, in turn, discharges its oversight function through several Board committees. One of the principal committees is the Audit Committee, which is charged with overseeing JPMorgan’s efforts to assure that it has effective internal controls, which are critical to the integrity of the firm’s financial reports and compliance with applicable policies and laws.

63. To assist the Audit Committee in carrying out its responsibility, the Audit Committee’s Charter requires JPMorgan management to provide updates to the Committee on all “significant operating and control issues in internal audit reports,” the “initiation and status of significant special investigations,” the “identification and resolution status of material weaknesses” in controls, and any “reportable conditions in the internal control environment, including any significant deficiencies.” These updates serve an important internal control function, allowing the Audit Committee to fulfill its oversight role by, among other things, keeping the Board up-to-date on significant matters, assessing whether to approve the filing of quarterly and annual reports, and evaluating whether the Committee should conduct its own independent investigation of any issues raised with it.

64. In late April and early May 2012, while JPMorgan's Senior Management was devoting daily attention to CIO-VCG and the SCP traders' quarter-end marks—in large measure to ensure that CIO results reported in its upcoming quarterly report would be accurate—it also was in contact with members of the Audit Committee.

65. However, while JPMorgan Senior Management was informed of, and was addressing, various issues with internal controls at CIO-VCG, JPMorgan Senior Management did not engage in a considered assessment, before the firm filed its first quarter report on May 10, 2012, to determine if these matters constituted a significant deficiency or material weakness in the firm's internal control over financial reporting and therefore had to be disclosed to the firm's Audit Committee. Nor, more broadly, did JPMorgan Senior Management disclose to the Audit Committee its concerns regarding the operation of CIO-VCG.

66. On May 2, 2012, the Audit Committee met with some members of JPMorgan Senior Management. The focus of the meeting was on the mounting losses in the SCP portfolio. Despite the requirement to keep the Audit Committee apprised of the significant control issues that were under review, there was no discussion of the IB-VCG or Controller reviews related to CIO-VCG and the traders' marks, although that work was underway. There was also no discussion of the fact that an outside law firm had been retained to advise on disclosures to be made in the first quarter Form 10-Q that related to CIO and to assess certain aspects of the CIO-VCG process, including whether the SCP traders exercised undue influence on the process.

67. During a full meeting of the Board of Directors hours before the filing of JPMorgan's first quarter report on May 10, 2012, JPMorgan Senior Management mentioned that reviews of what occurred in CIO were underway, including by Internal Audit, legal, the Controller's staff, and risk management. But, JPMorgan Senior Management did not discuss the details of or facts learned in the IB-VCG, Controller, or Internal Audit reviews.

68. Because the Audit Committee was not apprised of the initiation of the reviews or facts learned as a result of those reviews, it was unable to provide input on the issues before the filing of JPMorgan's first quarter report, and was unable to engage with those doing the work to ensure that it was sufficient from the perspective of the Audit Committee.

69. As noted above, the Audit Committee was not made aware before JPMorgan filed its first quarter report of the facts learned by various members of the review teams, including that CIO-VCG's March 2012 price-testing process was compromised by spreadsheet errors, that SCP traders may have exerted influence over that process, or that CIO-VCG applied valuation thresholds that were in some instances twice the applicable spread.

70. Other information learned by various members of the review teams that further called into question CIO-VCG's March 2012 quarter-end valuation process was not shared with the Audit Committee. At the end of the first quarter, CIO-VCG made a fair value adjustment of \$17 million to the traders' marks. However, certain facts raised issues as to the adequacy of this adjustment and the process through which it was made, including the \$520 million in collateral disputes over SCP positions, the \$767 million disparity between the SCP traders' marks and consensus, mid-market prices, the fact that the traders marked some of the largest notional SCP

positions outside the bid-offer spread approximated by IB-VCG, and the fact that the traders began to mark the SCP at the aggressive end of the bid-offer spread when losses began to mount.

71. Finally, the Audit Committee was not apprised of, or included in, JPMorgan Senior Management's efforts to remedy the control issues at CIO-VCG by revising valuation policies to ensure proper oversight by CIO management. As a result, the Audit Committee did not have any input into the proposed changes or an understanding of the reasons that motivated them.

Subsequent Disclosures by JPMorgan

72. Based on the information available to it, the Audit Committee approved of the content of JPMorgan's quarterly report on Form 10-Q that was filed on May 10, 2012. On July 13, 2012, JPMorgan disclosed that a material weakness existed in its internal control over financial reporting stemming from the "effectiveness of CIO's internal controls over valuation of the synthetic credit portfolio." In its amended Form 10-Q for the first quarter of 2012 filed on August 9, 2012, JPMorgan disclosed that this material weakness finding "was the result of issues in certain interrelated and interdependent control elements comprising that process, including insufficient engagement of CIO senior finance management in the valuation control process in light of the increased size and heightened risk profile of the synthetic credit portfolio during the first quarter of 2012, and in the effectiveness of certain procedures employed during the first quarter of 2012 by the CIO Valuation Control Group in performing the price verifications."

73. JPMorgan also corrected prior statements concerning its disclosure controls and procedures. In its May 10 Form 10-Q, JPMorgan stated, "As of the end of the period covered by this report, an evaluation was carried out under the supervision and with the participation of the Firm's management, including its Chairman and Chief Executive Officer and its Chief Financial Officer, of the effectiveness of its disclosure controls and procedures (as defined in Rule 13a-15(e) under the Securities Exchange Act of 1934). Based on that evaluation, the Chairman and Chief Executive Officer and the Chief Financial Officer concluded that these disclosure controls and procedures were effective." On August 9, 2012, when JPMorgan disclosed that it had determined that a material weakness existed at CIO as of March 31, 2012, it also disclosed that, "[a]s a result of that determination, the Firm's Chairman and Chief Executive Officer and Chief Financial Officer also concluded that the Firm's disclosure controls and procedures (as defined in Rule 13a-15(e) under the Securities Exchange Act of 1934) were not effective at March 31, 2012."

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70466 / September 20, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15511

In the Matter of

David Blech,

Respondent.

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

I.

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

III.

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

50 of 90

1. On May 9, 2012, Blech pleaded guilty before a magistrate to two counts of securities fraud in violation of Title 18 United States Code, Sections 1341 and 1342 before the United States District Court for the Southern District of New York, in United States v. David Blech, 1:12-CR-372 (S.D.N.Y.) (CM). On May 2, 2013, Blech was sentenced to 48 months of imprisonment, three years of supervised release, a \$200 special assessment and \$1,338,000 in forfeiture. Id.

2. The counts of the criminal information to which Blech pleaded guilty alleged, inter alia, that from in or about January 2007 through in or about May 2007, and from in or about February 2008 through in or about March 2008, Blech engaged in fraudulent schemes to manipulate the market of two publicly traded companies by using brokerage accounts under his control to sell off his holdings of each company's stock in a manner that disguised these sales for the purpose of creating an illusion of greater liquidity and so that the price of the two company's stock would not significantly drop.

IV.

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

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

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34-70468; File No. S7-19-10]

RIN 3235-AK69

Extension of Temporary Registration of Municipal Advisors

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; extension.

SUMMARY: The Securities and Exchange Commission (“Commission”) is amending interim final temporary Rule 15Ba2-6T, which provides for the temporary registration of municipal advisors under the Securities Exchange Act of 1934 (“Exchange Act”), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), to extend the date on which Rule 15Ba2-6T (and consequently Form MA-T) will sunset from September 30, 2013, to December 31, 2014. Under the amendment, all temporary registrations submitted pursuant to Rule 15Ba2-6T also will expire no later than December 31, 2014.

DATES: Effective Date: September 30, 2013. The expiration of the effective period of interim final temporary Rule 15Ba2-6T (17 CFR 240.15Ba2-6T) and Form MA-T (17 CFR 249.1300T) is delayed from September 30, 2013, to December 31, 2014.

FOR FURTHER INFORMATION CONTACT:

Office of Municipal Securities: John Cross, Director, at (202) 551-5839; Jessica Kane, Senior Special Counsel to the Director, at (202) 551-3235; Rebecca Olsen, Attorney Fellow, at (202) 551-5540; Mary Simpkins, Senior Special Counsel, at (202) 551-5683; at Office of Municipal Securities, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

57 of 90

registration requirement by completing Form MA-T⁵ through the Commission's public website.⁶ Rule 15Ba2-6T serves as a transitional step to the implementation of a permanent registration program, makes relevant information available to the public and municipal entities, and permits municipal advisors to continue their business after October 1, 2010.

Under Rule 15Ba2-6T, as initially adopted, all temporary registrations submitted pursuant to that rule would have expired on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on December 31, 2011. Also, as initially adopted, Rule 15Ba2-6T itself would have expired on December 31, 2011. On December 20, 2010, the Commission proposed for public comment rules for the permanent registration of municipal advisors.⁷ On December 21, 2011, the Commission amended Rule 15Ba2-6T to extend the date on which that rule and Form MA-T would sunset from December 31, 2011, to

⁵ 17 CFR 249.1300T.

⁶ See Securities Exchange Act Release No. 62824 (September 1, 2010), 75 FR 54465 (September 8, 2010) ("Interim Release"). The Commission received seven comment letters on the Interim Release. See letters from Brad R. Jacobsen, dated September 7, 2010; John J. Wagner, Kutak Rock LLP, dated September 28, 2010; Joy A. Howard, Principal, WM Financial Strategies, dated October 5, 2010; Steve Apfelbacher, President, National Association of Independent Public Finance Advisors, dated October 8, 2010; Carolyn Walsh, Vice President and Senior Counsel, Center for Securities, Trust and Investments, American Bankers Association, Deputy General Counsel, ABA Securities Association, dated October 13, 2010; Amy Natterson Kroll and W. Hardy Callcott, Bingham McCutchen LLP, on behalf of the National Association of Energy Service Companies, dated October 13, 2010; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 15, 2010.

⁷ See Securities Exchange Act Release No. 63576 (December 20, 2010), 76 FR 824 (January 6, 2011) ("Proposing Release").

registration number under Rule 15Ba2-6T and Form MA-T (“temporary registration number”).¹³ The first filing period will begin on July 1, 2014, and the last filing period will end on October 31, 2014.¹⁴ A municipal advisor that enters into the municipal advisory business on or after October 1, 2014, and does not have a temporary registration number as of October 1, 2014, must file a complete application for registration under the permanent registration regime on or after October 1, 2014, and be registered with the Commission before engaging in municipal advisory activities.¹⁵ In contrast, new municipal advisors who engage in municipal advisory activities before October 1, 2014, must continue to submit applications for temporary registration until September 30, 2014.

As explained in the Adopting Release, for a municipal advisory firm registered under the temporary registration regime that files a complete application for permanent registration during the applicable filing period, its temporary municipal advisor registration will continue to be in effect until the Commission grants or denies the application for permanent registration, unless the temporary registration is rescinded by the Commission or withdrawn by the municipal advisory firm.¹⁶ For a municipal advisory firm registered under the temporary registration regime that does not timely file a complete application for permanent registration, the firm’s temporary registration will expire forty-five days after the compliance date for permanent registration for the firm.¹⁷

¹³ See id.

¹⁴ See id. For purposes of this release, the “applicable filing period” is the appropriate filing period for a specific municipal advisor.

¹⁵ See id.

¹⁶ See id.

¹⁷ See id.

The Commission is adding new subsection (3) to Rule 15Ba2-6T(e), as indicated above, to coordinate the expiration date of the temporary registrations in light of the staggered compliance dates under the permanent registration regime and to clarify that the December 31, 2014 expiration date for Rule 15Ba2-6T is not meant to extend the date by which a municipal advisor must apply for registration under the permanent registration regime. Rule 15Ba2-6T(e)(3) also would help ensure an orderly transition from the temporary registration regime to the permanent registration regime.

As previously noted in the Extension Releases, the Commission has considered the seven comment letters received on the Interim Release and, given the limited nature of this extension and the upcoming compliance dates for the permanent registration regime, the Commission is not making any other changes to Rule 15Ba2-6T and Form MA-T.¹⁹ Making other changes to the temporary registration regime is unnecessary in light of the Commission's adoption of the permanent registration regime. The Commission also notes that the comment letters received in response to the Interim Release were addressed in the Proposing Release and were considered for purposes of the proposed and final rules for the registration of municipal advisors.

The amendments to Rule 15Ba2-6T will be effective on September 30, 2013. The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.²⁰ This requirement does not apply, however, if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable,

¹⁹ See 2011 Extension Release, supra note 8, at 80734; and 2012 Extension Release, supra note 9, at 59062-63.

²⁰ See 5 U.S.C. 553(b).

the Commission is also adopting the rules for the permanent registration of municipal advisors in a separate release.²⁵ This extension is being adopted to accommodate the staggered compliance dates for permanent registration established in the Adopting Release. For this reason, and the reasons discussed throughout this release, the Commission finds good cause not to delay the effective date of the extension.

In connection with the adoption of Rule 15Ba2-6T and Form MA-T, the Commission submitted to the Office of Management and Budget (“OMB”) a request for approval of the “collection of information” requirements contained in the temporary rule and form in accordance with the Paperwork Reduction Act of 1995.²⁶ OMB initially approved the collection of information on an emergency basis with an expiration date of March 31, 2011. The Commission subsequently submitted a request for extension of the approval, and OMB extended the approval to March 31, 2014.²⁷ The collection of information to which Rule 15Ba2-6T and Form MA-T relates is “Rule 15Ba2-6T and Form MA-T – Temporary Registration of Municipal Advisors.” The OMB control number for the collection of information is 3235-0659. Since the Commission is not amending Rule 15Ba2-6T or the disclosure requirements contained in Form MA-T other than to extend the expiration date for Rule 15Ba2-6T and Form MA-T, this amendment will not change the “collection of information” previously approved by the OMB.²⁸

²⁵ See supra note 10.

²⁶ 44 U.S.C. 3501 et seq.

²⁷ The Commission will submit a request for further extension of the OMB approval in light of this extension of the temporary registration regime.

²⁸ Consistent with the prior Extension Releases, the Commission recognizes that some new municipal advisors may register pursuant to Rule 15Ba2-6T during the extension period, and municipal advisors registered pursuant to Rule 15Ba2-6T may submit amendments and withdrawals during the extension period. See 2011 Extension Release, supra note 8, at 80735; and 2012 Extension Release, supra note 9, at 59063-64. Also, the Commission notes that the Adopting Release contains estimates of the reporting and recordkeeping

in the Adopting Release, the Commission discussed the costs and benefits of the temporary registration regime and the current state of the municipal advisor market.³⁴

Since the Commission is not amending Rule 15Ba2-6T and Form MA-T other than to extend their expiration date, the Commission believes the discussion of the temporary registration regime in the Adopting Release applies and the Commission does not expect additional significant costs or effects on efficiency, competition, or capital formation to result from the extension. The Commission also continues to believe that Rule 15Ba2-6T and Form MA-T, as extended, will not result in a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission, however, recognizes that allowing municipal advisors to continue to comply with the statutory registration requirement until a permanent registration regime becomes effective and preventing a regulatory gap from developing between the temporary and permanent registration regimes are important. The Commission also notes that not extending the expiration date of Rule 15Ba2-6T and Form MA-T could result in significant costs and burdens on efficiency, competition, and capital formation for municipal advisors who will be unable to comply with the statutory registration requirement.

II. Statutory Authority and Text of Rule and Amendments

Pursuant to the Exchange Act, and particularly Section 15B (15 U.S.C. 78o-4), the Commission is amending § 240.15Ba2-6T and restating § 249.1300T of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects in 17 CFR Parts 240 and 249

³⁴ See Adopting Release, *supra* note 10, at Section VIII.C.

(3) For a municipal advisor that has not applied for permanent registration with the Commission in accordance with the Act and the rules thereunder, forty-five days after the compliance date of such rules for the municipal advisor; or

(4) On December 31, 2014.

(f) This section will expire on December 31, 2014.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

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

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Subpart N, consisting of § 249.1300T, continues to read as follows:

Subpart N – Forms for Registration of Municipal Advisors

§ 249.1300T Form MA-T – For temporary registration as a municipal advisor, and for amendments to, and withdrawals from, temporary registration.

The form shall be used for temporary registration as a municipal advisor, and for amendments to, and withdrawals from, temporary registration pursuant to Section 15B of the Exchange Act, (15 U.S.C. 78o-4).

[Note: The text of Form MA-T does not, and the amendments will not, appear in the Code of Federal Regulations.]

By the Commission.



Elizabeth M. Murphy
Secretary

Date: September 23, 2013

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9454 / September 23, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70473 / September 23, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3674 / September 23, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30694 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS,

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT
TO SECTION 8A OF THE SECURITIES
ACT OF 1933, SECTIONS 15(b) AND
21C OF THE SECURITIES
EXCHANGE ACT OF 1934, SECTION
203(f) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND
SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940 AND
NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Company Act") against Donald J. Anthony, Jr.,

Frank H. Chiappone, Richard D. Feldmann, William P. Gamello, Andrew G. Guzzetti, William F. Lex, Thomas E. Livingston, Brian T. Mayer, Philip S. Rabinovich and Ryan C. Rogers ("Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Donald J. Anthony, Jr.**, 60 years old, is a resident of Loudonville, NY. He was registered with McGinn, Smith & Co., Inc. ("MS & Co.") from November 1997 to December 2009, and McGinn, Smith Advisors, LLC ("MS Advisors") from February 2006 to December 2009.

2. **Frank H. Chiappone**, 57 years old, is a resident of Clifton Park, NY. He was registered with MS & Co. from February 1989 to December 2009.

3. **Richard D. Feldmann**, 74 years old, is a resident of Delmar, NY. He was registered with MS & Co. from July 1987 to December 2009.

4. **William P. Gamello**, 49 years old, is a resident of Rexford, NY. He was registered with MS & Co. from April 2005 to December 2009.

5. **Andrew G. Guzzetti**, 66 years old, is a resident of Saratoga Springs, NY. He was registered with MS & Co. from September 2004 to December 2009.

6. **William F. Lex**, 67 years old, is a resident of Phoenixville, PA. He was registered with MS & Co. from January 1983 to December 2009.

7. **Thomas E. Livingston**, 55 years old, is a resident of Slingerlands, NY. He was registered with MS & Co. from October 1988 to December 2009, and became a 20% shareholder of MS Holdings in 2004.

8. **Brian T. Mayer**, 40 years old, is a resident of Princeton, NJ. Mayer was registered with MS & Co. from July 2001 to December 2009, and MS Advisors from February 2006 to April 2009.

9. **Philip S. Rabinovich**, 39 years old, is a resident of Roslyn, NY. He was registered with MS & Co. from July 2001 to December 2009, and with MS Advisors from August 2006 to December 2009.

10. **Ryan C. Rogers**, 40 years old, is a resident of East Northport, NY. He was registered with MS & Co. from July 2001 to December 2009, and with MS Advisors from February 2006 to April 2009.

B. RELEVANT ENTITIES¹ AND INDIVIDUALS

11. **MS & Co.**, a New York corporation founded in 1980 by David Smith and Timothy McGinn, had its principal place of business at 99 Pine Street, Albany, NY, and maintained branch offices at Clifton Park, NY, New York, NY, and King of Prussia, PA. MS & Co. was registered with the Commission as a broker-dealer beginning in 1980 and as an investment adviser in April 2009. It was owned by Smith (50%), McGinn (50%; 30% after 2004), and Thomas Livingston (20% after 2004). From 2003 to 2009, MS & Co. had about 55 employees, including about 35 registered representatives. On December 24, 2009, MS & Co. filed a partial BD-W. On March 9, 2010, MS & Co. also withdrew its investment adviser registration. FINRA terminated MS & Co.'s FINRA membership on August 4, 2010.

12. **MS Advisors** was a New York corporation formed in 2003 with its principal place of business at 99 Pine Street, Albany, New York. MS Advisors was owned by Smith (50%), McGinn (30%) and Livingston (20%). MS Advisors was registered as an investment adviser with the Commission from January 3, 2006 to April 24, 2009, and was the investment adviser to the Four Funds (defined below) until April 2009, when it was replaced by MS & Co.

13. **McGinn, Smith Holdings, LLC ("MS Holdings")** was owned by Smith (50%), McGinn (30%) and Livingston (20%).

14. **McGinn, Smith Capital Holdings Corp. ("MS Capital")** was a New York corporation formed in 1989 with its principal place of business at 99 Pine Street, Albany, New York. MS Capital was owned by MS Holdings (52%), McGinn (24%) and Smith (24%). MS Capital was the indenture trustee, the servicing agent and the collateral agent for the Four Funds, and the trustee for all the Trusts created between 2006 and 2009. Smith was president and McGinn was chairman of the board.

15. The **Four Funds** were New York limited liability companies, whose sole managing member was MS Advisors. MS & Co. served as the placement agent for the Four Funds offerings, and MS Capital acted as the Trustee. The Four Funds shared offices with MS & Co. and the other McGinn Smith entities at 99 Pine Street, Albany, NY. The Four Funds offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:

¹ On April 20, 2010, the United States District Court for the Northern District of New York granted the SEC's motion for a temporary restraining order and appointed a Receiver over numerous entities controlled or owned by Timothy McGinn and David Smith. See *SEC v. McGinn Smith & Co., Inc., et al.*, 10-CV-457 (N.D.N.Y.) (GLS/CFH) (Dkt. Nos. 4, 5, 96). All the McGinn Smith entities—including MS & Co., MS Advisors, MS Capital, MS Holdings, FIIN, FEIN, FAIN and TAIN—remain under the Receiver's control.

- (a) First Independent Income Notes, LLC ("FIIN"), 5%/7.5%/10.25% (\$20 million) (9/15/03);
- (b) First Excelsior Income Notes LLC ("FEIN"), 5%/7.5%/10.25% (\$20 million) (1/16/04);
- (c) Third Albany Income Notes, LLC ("TAIN"), 5.75%/7.75%/10.25% (\$30 million) (11/1/04); and
- (d) First Advisory Income Notes, LLC ("FAIN"), 6%/7.75%/10.25% (\$20 million) (10/1/05).

16. The **Trust Offerings** were offerings by special purpose entities, purportedly to invest in contracts for burglar alarm service, "triple play" (broadband, cable and telephone) service or luxury cruises. MS & Co. acted as a placement agent and MS Capital acted as Trustee for the Trust Offerings. The Trust Offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:

- (a) TDM Cable Trust 06, 7.75%/9.25% (\$3,550,000) (11/13/06)
- (b) TDM Verifier Trust 07, 8.25%/9% (\$3,475,000) (2/23/07)
- (c) Firstline Senior Trust 07, 9.25% (\$1,850,000) (5/19/07)
- (d) Firstline Trust 07, 11% (\$1,867,000) (5/19/07)
- (e) Firstline Senior Trust 07 Series B, 9.5% (\$1,435,000) (10/19/07)
- (f) TDM Luxury Cruise Trust 07, 10% (\$3,630,000) (7/16/07)
- (g) Firstline Trust 07 Series B, 11% (\$2,115,000) (10/19/07)
- (h) TDM Verifier Trust 08, 8.50%/10% (\$3,850,000) (12/17/07)
- (i) Cruise Charter Ventures Trust 08, 13% (\$3,250,000) (2/14/08)
- (j) Integrated Excellence Sr. Trust 08, 9% (\$900,000) (5/30/08)
- (k) Integrated Excellence Jr. Trust 08, 10% (\$580,000) (5/30/08)
- (l) Fortress Trust 08, 13% (\$3,060,000) (9/24/08)
- (m) TDM Cable Trust 06, 10% (\$1,380,000) (11/17/08)
- (n) TDM Verifier Trust 09, 10% (\$1,300,000) (12/15/08)
- (o) TDMM Cable Jr Trust 09, 11% (\$1,325,000) (1/19/09)
- (p) TDMM Cable Sr. Trust 09, 9% (\$1,550,000) (1/19/09)
- (q) TDM Verifier Trust 07R, 9% (\$2,100,000) (2/2/09)
- (r) TDM Verifier Trust 08R, 9% (\$2,005,000) (7/6/09)
- (s) TDMM Benchmark Trust 09, 8%, 9%, 10%, 11%, 12% (\$3,000,000) (8/20/09)
- (t) TDM Verifier Trust 11, 9% (\$1,550,000) (9/3/09)
- (u) Cruise Charter Ventures, LLC, 12% (\$400,000) (9/25/09)

17. **McGinn Smith Transaction Funding ("MSTF")** was a New York corporation formed in 2008. Like the Four Funds and Trust offerings, the \$10 million MSTF offering on April 22, 2008 was underwritten by MS & Co.

18. **Timothy M. McGinn**, 64 years old, was the chairman, secretary and co-owner of MS & Co. From July 2003 through May 2006, McGinn served as CEO of Integrated Alarm Services Group, Inc. ("IASG"), which went public in July 2003. In September 2011, FINRA permanently barred McGinn from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found McGinn guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. *United States v. Timothy M. McGinn & David L. Smith*,

12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, McGinn was sentenced to 15 years in prison and ordered to pay restitution of \$5,992,800.

19. **David L. Smith**, 67 years old, was the president and chief executive officer of MS & Co. and the manager of the Four Funds. Until 2007, Smith was also the chief compliance officer of MS & Co. In September 2011, FINRA permanently barred Smith from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found Smith guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. *United States v. Timothy M. McGinn & David L. Smith*, 12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, Smith was sentenced to 10 years in prison and ordered to pay restitution of \$5,989,736.

C. OVERVIEW

20. Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers were among the top-selling brokers at MS & Co. They sold millions of dollars of MS & Co. private placements in spite of numerous red flags, including a policy—which was clearly inconsistent with the terms of the offerings—that required them to “replace” customers seeking to redeem notes with new customers before the redemption would be honored. Guzzetti, a supervisor at MS & Co., failed to take any action despite knowledge of red flags. Based on their conduct, Respondents committed the following violations:

- a) Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Sections 5(a) and (c) of the Securities Act by offering and selling notes for which no registration statements were in effect;
- b) Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, by knowingly or recklessly, or negligently, failing to perform reasonable due diligence to form a reasonable basis for their recommendations to customers, and made misrepresentations and omissions in recommending the Four Funds and Trust Offerings; and
- c) Guzzetti failed reasonably to supervise the other Respondents, pursuant to Section 15(b)(6), incorporating by reference Section 15(b)(4)(E) of the Exchange Act.

D. THE MS & CO. OFFERINGS

21. David Smith and Timothy McGinn created and controlled the Four Funds and Trust Offerings. The offerings raised more than \$125 million from more than 750 investors. Investor losses exceed \$80 million.

22. The Four Funds offerings—FIIN (Sept. 2003), FEIN (Jan. 2004), TAIN (Nov. 2004) and FAIN (Oct. 2005)—raised at least \$85 million. Smith controlled the

issuers, prepared the private placement memoranda ("PPMs"), set the terms of the offerings, controlled the investor money, and made all the investment decisions. Four Funds investors were promised quarterly interest payments and a return of principal upon maturity. Each offering had three tranches: the five-year "secured junior" notes paid 10.25%; the three or five year "secured senior subordinated" paid 7.5% or 7.75%; and the one-year "secured senior" notes paid 5%, 5.75% or 6%.

23. Although the Four Funds PPMs labeled each tranche as "secured," there were no secured assets subject to forfeiture in the event that a particular Fund failed.

24. According to the PPMs, MS & Co., as the placement agent, was to receive a commission of 2% of the offering proceeds. In addition, according to the PPMs, the brokers were entitled to (and did receive) "incentive commissions . . . [paid] to our managing member's salesmen at the rate of 2% of the aggregate principal amount of the notes per year over the term of the notes."

25. Smith had no experience in making investment decisions and managing investments for entities like the Four Funds, and Smith had broad flexibility in making investment decisions. As the PPMs for the offerings stated, each of the Four Funds was:

formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferred, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio

26. The PPMs stated that the notes would be offered only to accredited investors, as defined in Rule 501(a) of Regulation D. To this end, the PPMs required that each investor "represent in writing that it qualifies as an 'accredited investor' . . . and must demonstrate the basis for such qualification." The subscription agreements similarly reiterated that the notes were offered to accredited investors only.

27. Despite these representations, each of the Four Funds offerings had more than 35 unaccredited investors. The Respondents sold the Four Funds to unaccredited investors.

28. In September 2003, just weeks after the launch of the FIIN offering, Smith began diverting millions of dollars to pay investors in pre-2003 MS & Co. offerings.²

² From 1990 through early 2003, Smith and McGinn orchestrated, through MS & Co. and related entities, dozens of note offerings secured by residential alarm contracts.

Overall, Smith used at least \$12.8 million of the Four Funds offering proceeds to pay investors in pre-2003 MS & Co. offerings.

29. Smith invested a majority of the Four Funds' proceeds in entities that were affiliated with MS & Co., even though the PPM did not disclose this, and in risky and highly speculative venture capital investments. For example, Smith invested \$8.8 million in alseT Management, a start-up partially-owned and controlled by Livingston and Smith himself, which never earned any revenue. The Four Funds' investments did not generate sufficient returns required to meet the issuers' obligations to investors.

30. In 2006, McGinn returned to MS & Co. on a full-time basis after nearly three years as CEO of IASG. McGinn created the twenty-one Trust Offerings, plus MSTF, that raised over \$41 million. The Trust Offerings ostensibly were created to fund entities engaged in specific areas, such as burglar alarm service, triple play service, or luxury cruises. These entities, however, were not funded directly by the issuer; instead, in most cases, the offering proceeds were first transferred to various conduit entities, primarily McGinn Smith Funding LLC (the "MSF Conduit") or TDM Cable Funding LLC (the "TDM Conduit").

31. The proceeds of the Trust Offerings were commingled and then used as needed by MS & Co., including infusing cash into the faltering Four Funds. The conduits and their corresponding Trust Offerings are listed below:

TDM Conduit

- TDM Cable Trust 06, 7.75%/9.25% (11/13/2006)
- TDM Verifier Trust 07, 8.25%/9.00% (2/23/2007)
- TDM Luxury Cruise, 10% (7/16/2007)
- TDM Cable Trust 06, 10% (11/17/2008)
- TDMM Cable Senior Trust 09, 9% (1/19/2009)
- TDMM Cable Jr. Trust 09, 11% (1/19/2009)
- TDM Verifier Trust 07R, 9% (2/2/2009)
- TDM Verifier Trust 08R (7/6/2009)

MSF Conduit

- Firstline Senior Trust 07, 9.25%/11% (5/19/2007)
- Firstline Trust 07 Series B, 9.5%/11% (10/19/2007)
- TDM Verifier Trust 08, 8.5%/10% (12/17/2007)
- TDM Verifier Trust 09, 10% (12/15/2008)

32. The Trust PPMs stated that they would "generally be offered only to accredited investors," but also provided for 35 or fewer unaccredited investors, supposedly under Rule 506. None of the Trust Offerings exceeded 35 unaccredited investors. When integrated according to their Conduit entity, however, Rule 506's limitation on unaccredited investors was breached: at least 69 investors in the Trusts tied to the TDM Conduit were unaccredited, and at least 59 investors in the Trusts linked to the MSF Conduit were unaccredited.

33. The Trust Offerings continued the egregious misuse of investor funds. Smith and McGinn, for example, took for personal use millions of dollars in offering proceeds from the TDM Cable 06, TDMM Cable, Integrated Excellence, MSTF and Fortress offerings, used investor funds to pay earlier noteholders, and used the Trust Offering proceeds to satisfy liquidity needs for other MS & Co. entities.

E. THE RESPONDENTS' ILLEGAL CONDUCT

34. The Respondents, as associated persons of a broker-dealer, had an obligation to conduct a reasonable investigation of the issuers in order to form a reasonable basis for any recommendation to customers regarding the MS & Co. offerings. By making a recommendation, the Respondents implicitly represented to their customers that they had an adequate basis for the recommendation. A broker has a duty to investigate the truth of the representations he makes to customers, because, by virtue of his title, customers are entitled to presume that the representations made were the result of reasonable investigation.

35. The Respondents blindly relied upon Smith and McGinn, even in the face of red flags. The Respondents, as licensed securities professionals, knew or should have known that securities issued by smaller companies of recent origin require more thorough investigation. They should not simply parrot the marketing information furnished by Smith and McGinn, particularly in the face of red flags. In addition, where Respondents lacked essential information about an issuer or its securities when making a recommendation, they failed to disclose this fact as well as the risks that arose from their lack of information.

36. The Respondents' due diligence, which at best consisted of reading the PPMs, was wholly inadequate, despite their knowledge that the issuers were completely controlled by Smith and McGinn. There were numerous red flags, moreover, that should have alerted the Respondents to the need for a thorough investigation. Instead, the Respondents blindly sold whatever private placement Smith and McGinn told them to sell.

37. The Respondents also made material misrepresentations and omissions when recommending the Four Funds and Trust Offerings to their customers.

The Respondents Knew of Red Flags Surrounding the Four Funds Offerings.

38. Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers performed inadequate due diligence prior to recommending the Four Funds to their customers. The PPMs for the Four Funds, which they read or were reckless in not reading, made disclosures that should have caused the Respondents, as associated persons of a broker-dealer, to conduct a searching inquiry prior to recommending the products to their customers. This heightened duty arose from the following factors:

- a. The PPMs made clear that Smith owned and controlled each of the issuers—which were new, single-purpose entities with no operating history—as well as the placement agent (MS & Co.) and the trustee. Smith also had

total control over the disposition of investor funds, with absolutely no oversight or control. As a result, the Respondents should have made specific inquiries as to how customer money would be invested before recommending the Four Funds to their customers.

- b. The Respondents knew or should have known that Smith had never before managed offerings of the size and scope of the Four Funds. The debt offerings that MS & Co. had done before 2003 were small-scale note offerings tied to the income streams from home alarm contracts, far different from the broad and non-specific investment mandate of Four Funds offerings.³ Given Smith's lack of experience in this area, and the Respondents' knowledge of this lack of experience, they should have made specific inquiries as to how Smith planned to invest the offering proceeds. This is particularly true given fact that the issuers' ability to make the relatively high interest payments, and to return the investors' principal, depended on the nature of the investments;
- c. The PPMs stated that the Four Funds could acquire investments "from our managing member [MS Advisors] or any affiliate," could "purchase securities from issuers in offerings for which [MS & Co.] is acting as underwriter or placement agent," and that "[a]ffiliates of the placement agent may purchase a portion of the notes offered hereby." As a result, the Respondents should have inquired whether Smith—who controlled without oversight the issuers, the placement agent and the disposition of investor funds—did engage in any transactions with affiliates. If they had, they would have discovered that nearly half of the offering proceeds had been invested in affiliates; and
- d. Despite the complete prohibition on sales to unaccredited investors in the Four Funds PPMs, the Respondents knew that sales were being made to unaccredited investors. The Respondents, therefore, knew that the PPMs' prohibition on sales to unaccredited investors was disregarded, which should have caused them to make inquiries.

³ The Respondents, when recommending the Four Funds and Trust Offerings, held out the pre-2003 alarm note offerings as indicative of Smith and McGinn's integrity and skill. These earlier offerings, however, were also mismanaged. In a handwritten letter from Smith to McGinn in 2000, Smith characterized the pre-2003 offerings as a "Ponzi Scheme" because the offering proceeds "for the most part are used to fulfill the investment promise to earlier investors . . . the new investments have no chance of being repaid in full." These offerings were eventually paid off not from the income stream generated by the investments, but rather through the IASG IPO in July 2003, as well as over \$12 million from the Four Funds offerings.

39. These factors should have prompted the Respondents to conduct a searching inquiry into the offerings. Instead, they essentially turned a blind eye and sold the Four Funds offerings with no specific knowledge of how investor funds were being used.

Smith's Refusal to Disclose to the Brokers How He Had Invested Four Funds Offering Proceeds Was a Red Flag.

40. From the commencement of the FIIN offering in September 2003 until January 2008, Smith provided his brokers with no specific information about how he had invested the offering proceeds. Any questions by the brokers were deflected with the claim that Smith had made loans to local Albany businesses with Four Funds proceeds, and those businesses desired anonymity. Indeed, Smith steadfastly refused to give the brokers any meaningful information about how he had invested the Four Funds offering proceeds. This refusal should have prompted the brokers to further question the propriety of the Four Funds.

41. The information blackout that Smith imposed was contrary to the PPMs, which stated that an "annual statement of the operations consisting of a balance sheet and income statement" would be provided to investors upon request. These reports, however, were never made available and it appears that no brokers requested this information before January 2008, when Smith disclosed that the Four Funds would be restructured.

42. MS & Co.'s compliance manual, moreover, stated that "it will make a reasonable investigation . . . [and] Paperwork recording the due diligence will be kept in the legal files." The Respondents also never asked to see the due diligence files, notwithstanding the red flags regarding the Four Funds.

The Respondents Continued to Recommend MS & Co. Offerings Despite Knowledge of the Redemption Policy – Another Major Red Flag.

43. By 2006, the Funds began having significant difficulty in meeting the redemption requests. Smith therefore instituted a policy that required brokers to "replace" customers seeking to redeem Four Funds notes, including maturing notes, with new customers (the "Redemption Policy"). The PPMs, however, did not state that a customer's right to redemption depended on finding a "replacement."

44. The Redemption Policy was another red flag that put the Respondents on notice that the Four Funds were being handled much differently from what the PPMs provided. None of the Respondents, however, undertook any investigation of the offerings; they also failed to disclose this material information to their customers; and they continued to recommend MS & Co. private placements to their customers for several more years.

45. The Respondents learned of the policy at different times beginning in late 2006. They were shocked by the policy and knew that it was contrary to the PPMs. The Respondents, however, did not disclose the Redemption Policy to customers, even those who sought to reinvest, or "roll over," Four Funds notes at maturity. Collectively, the Respondents raised millions of dollars in MS & Co. private placements after learning of the

policy. They stood to profit if a customer elected to roll over, and would receive their annual commission for the life of the note. The Respondents sought redemptions for current customers even knowing that the redemption would be paid not with investment returns, as the PPMs represented, but rather with new investor funds.

The Respondents Continued to Sell the Trust Offerings Despite Learning in January 2008 that the Four Funds Had Been Mismanaged.

46. On January 8, 2008, Smith and McGinn held an all-day meeting to inform the brokers, including the Respondents, that the Four Funds were in default, that payments to investors would be curtailed, and that the offerings would be restructured. Smith revealed that the Four Funds investment portfolios consisted of loans to small, local businesses, some of which had already filed for bankruptcy; risky venture capital investments; investments with sub-prime exposure; and other nonperforming investments. By contrast, the Four Funds each had made only one investment in a publicly-traded security: Exchange Boulevard.com, a risky venture capital company that was quoted on OTC Link, formerly known as the Pink Sheets.

47. None of the Respondents, despite the alarming disclosures in this meeting, requested any kind of probing investigation into what happened to the Four Funds or the ongoing Trust Offerings. After the January 2008 meeting, there were thirteen offerings by MSTF and the Trusts, which raised at least \$20 million. As a result of the accumulation of red flags since the launch of the Four Funds in September 2003, the Respondents should have conducted a searching inquiry regarding any MS & Co. private placement. Instead, they recommended the Trust Offerings to their customers based on insufficient due diligence.

48. During the three years of the Trust and MSTF Offerings, investor funds were being used in ways contrary to the uses described in the PPMs; for example, Smith and McGinn took at least \$4 million in offering proceeds for themselves and another MS & Co. officer. Offering proceeds also were used to pay investors in earlier offerings and MS & Co.'s payroll.

49. In the Trust Offerings, the amount actually invested pursuant to a particular PPM was far less than that PPM disclosed.

50. The Trust PPMs, moreover, like the Four Funds PPMs, raised red flags that should have been readily apparent to the brokers. For example, the August 2009 TDMM Benchmark Trust 09 ("Benchmark") PPM should have raised a red flag. Benchmark promised a high rate of return, which ranged from 8% to 12%, during a time when the prime rate was only 3.25%. The Respondents should have been skeptical of Benchmark's ability to meet the promised interest payments especially when considering that the PPM disclosed that only \$1,950,000 (approximately 65%) of the total \$3 million raised would actually be invested, with the remainder siphoned off in fees. The Respondents who recommended the Benchmark offering did so despite the exorbitant fees, and without questioning how MS & Co. planned to make 8 – 12% interest payments and redeem the principal upon maturity while taking over one-third of the money raised in fees.

51. The second Firstline Trust offering of October 19, 2007 raised \$3.2 million from investors (an earlier Firstline offering in May 2007 had raised \$3.7 million). In this offering, a McGinn Smith affiliate loaned the offering proceeds to Firstline Securities, Inc., a Utah corporation that sold residential alarm contracts. At the time of the October 2007 offering, McGinn had been informed of the threat of crippling litigation by one of Firstline's creditors, and McGinn was personally involved in trying to resolve the dispute. Litigation resulted and, on January 25, 2008, Firstline filed a voluntary petition for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Utah. If the Respondents had conducted due diligence in response to red flags, they would have discovered the legal issues, which should have caused them to stop selling the Firstline offering. Instead, they were unaware of the bankruptcy filing until McGinn finally disclosed it in September 2009. Lex, Feldmann, Chiappone, Rabinovich and Mayer sold Firstline trust certificates after the bankruptcy filing.

F. SALES AND COMMISSIONS

52. **Anthony** sold approximately \$2.2 million of the Four Funds, and approximately \$630,000 of the Trust Offerings. He earned approximately \$104,000 in commissions.

53. **Chiappone** sold approximately \$12 million of the Four Funds offerings and approximately \$3.4 million of the Trust Offerings. He earned approximately \$513,000 in commissions.

54. **Feldmann** sold approximately \$5.4 million of the Four Funds offerings and approximately \$595,000 of the Trust Offerings. Feldmann earned approximately \$299,000 in commissions.

55. **Gamello** sold approximately \$1.3 million of the Four Funds offerings and approximately \$1.6 million of the Trusts. He earned approximately \$74,500 in commissions.

56. **Lex** sold approximately \$38.5 million of the Four Funds offerings and approximately \$6.6 million of the Trust Offerings. He earned approximately \$1,523,000 in commissions.

57. **Livingston** sold approximately \$3.5 million of the Four Funds offerings and approximately \$380,000 of the Trust Offerings. His total commissions were approximately \$143,000.

58. **Mayer** sold approximately \$1.7 million of the Four Funds offerings and approximately \$1.9 million of the Trust Offerings. He earned approximately \$81,000 in commissions, plus an additional 2% of the gross commissions generated by the New York City office.

59. **Rabinovich** sold approximately \$20.3 million of the Four Funds offerings and approximately \$6.8 of the Trust Offerings. He earned approximately \$578,000 in commissions.

60. **Rogers** sold approximately \$2 million of the Four Funds and approximately \$5.2 million of the Trust Offerings. He earned approximately \$240,000 in commissions.

G. GUZZETTI FAILED REASONABLY TO SUPERVISE

61. Guzzetti was the managing director of the MS & Co. Private Client Group from 2004 until late 2009. During this period, Guzzetti supervised MS & Co. registered representatives with regard to the Four Funds and Trust Offerings.

62. Guzzetti, who also earned about \$6,000 in commissions, had direct supervisory responsibilities of the Respondents. He carried out numerous managerial duties, including recruiting and hiring MS & Co. employees; assigning and reassigning customers to brokers; evaluating employee performances and awarding commissions; addressing customer grievances; answering employee questions regarding the firm; and issuing instruction and guidance regarding specific financial products and transactions, administrative issues, and broader firm policy.

63. Guzzetti also sent regular e-mails summarizing MS & Co. products available for sale to customers. In a February 2006 email, for example, Guzzetti stated that "there are many investors sitting in money market accounts (fear of higher interest rates) who are losing return (cost of waiting). Our FAIN'S offer a way of locking in higher returns with \$ sitting in money markets waiting for the 'top' in interest rates."

64. Guzzetti learned of the Redemption Policy by December 2006, when he received an email from Smith stating that Rabinovich "needs to replace the \$100,000 before doing the trade. I am running on fumes with all of these redemptions and cannot afford any[.]more." In November 2007, Guzzetti received an email from Smith stating that "I do not have the liquidity. Any redemptions have to have replacement sales beforehand. . . My preference is for there to be no redemptions." Guzzetti instructed the brokers to adhere to the Redemption Policy.

65. Guzzetti had a duty to investigate red flags that suggest misconduct may be occurring and to take action when made aware of suspicious conduct. Had Guzzetti responded reasonably to the red flags, he would have prevented or detected the underlying violations committed by Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers.

H. VIOLATIONS

66. As a result of the conduct described above, Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Sections 5(a) and (c) of the Securities Act.

67. As a result of the conduct described above, Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

68. As a result of the conduct described above, Guzzetti failed reasonably to supervise Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers, pursuant to Section 15(b)(6), incorporating by reference Section 15(b)(4)(E) of the Exchange Act, with a view toward preventing and detecting their violations of Sections 5(a) and (c) and 17 of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

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

D. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

E. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a), (c) and 17(a) of the Securities Act, and Section 10(b) and Rule 10b-5 of the Exchange Act, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, Section 203(i) of the Advisers Act, and Section 9(d) of the Investment Company Act, and whether Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Roger should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, Section 203 of the Advisers Act, and Section 9 of the Investment Company Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not

later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

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

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

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

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

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 Prower
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70475 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15516

In the Matter of

Bonanza One, Inc.,
China Century Dragon Media, Inc.,
Farrallon, Inc.,
Ora Electronics, Inc.,
Tia I, Inc., and
Tia II, 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 Bonanza One, Inc., China Century Dragon Media, Inc., Farrallon, Inc., Ora Electronics, Inc., Tia I, Inc., and Tia II, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Bonanza One, Inc. (CIK No. 1411308) is a defaulted Nevada corporation located in Vero Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Bonanza One 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, 2011, which reported a net loss of over \$70,802 since the company's June 5, 2007 inception.

53 of 90

2. China Century Dragon Media, Inc. (CIK No. 1423242) is a void Delaware corporation located in Guangdong Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(b). China Century 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, 2010. As of July 25, 2013, the company's stock (symbol "CCDM") was traded on the over-the-counter markets.

3. Farrallon, Inc. (CIK No. 1423974) is a dissolved Nevada corporation located in Newport, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Farrallon 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, 2011, which reported a net loss of \$17,314 for the prior six months.

4. Ora Electronics, Inc. (CIK No. 1029182) is a forfeited Delaware corporation located in Chatsworth, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Ora Electronics is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2001, which reported a net loss of over \$1.1 million for the prior nine months. On April 16, 2002, Ora Electronics filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, which was terminated on January 17, 2003.

5. Tia I, Inc. (CIK No. 1377895) is a forfeited Delaware corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tia I is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2010, which reported a net loss of \$77,466 from the company's August 7, 2006 inception to December 31, 2010.

6. Tia II, Inc. (CIK No. 1377893) is a forfeited Delaware corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tia II is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2010, which reported a net loss of \$77,466 from the company's August 7, 2006 inception to December 31, 2010.

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/or 13a-13 thereunder.

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner P. Rowan
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70474 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15515

In the Matter of

Skyview Holdings Corp.,
Stonecrest One, Inc.,
Sunstates Corp.,
Tetragenex Pharmaceuticals, Inc.,
Tia III, Inc. (n/k/a PTL Energy, Inc.),
Tia IV, Inc.,
Ultimate Indoor Football League, Inc., and
United States Oil and Gas 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 Skyview Holdings Corp., Stonecrest One, Inc., Sunstates Corp., Tetragenex Pharmaceuticals, Inc., Tia III, Inc. (n/k/a PTL Energy, Inc.), Tia IV, Inc., Ultimate Indoor Football League, Inc., and United States Oil and Gas Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Skyview Holdings Corp. (CIK No. 1390028) is a delinquent Delaware corporation located in Cortez, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Skyview is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a

54 of 90

Form 10-K/A for the period ended December 31, 2010, which reported a net loss of \$20,500 since the company's January 11, 2007 inception.

2. Stonecrest One, Inc. (CIK No. 1439106) is a revoked Nevada corporation located in Charlotte, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Stonecrest is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2010, which reported a net loss of \$5.432 for the prior six months.

3. Sunstates Corp. (CIK No. 103575) is a void Delaware corporation located in Raleigh, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sunstates 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, 1995, which reported a net loss of over \$14 million for the prior nine months.

4. Tetragenex Pharmaceuticals, Inc. (CIK No. 1362659) is a void Delaware corporation located in Syosset, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tetragenex 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, 2010, which reported a net loss of \$746,054 for the prior nine months.

5. Tia III, Inc. (n/k/a PTL Energy, Inc.) (CIK No. 1377892) 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). Tia III 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 September 30, 2008, which reported a net loss of \$146,048 from the company's August 17, 2006 inception to December 31, 2010.

6. Tia IV, Inc. (CIK No. 1377889) is a forfeited Delaware corporation located in Staten Island, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tia IV 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, 2010.

7. Ultimate Indoor Football League, Inc. (CIK No. 1472374) is a dissolved Florida corporation located in Talmo, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Ultimate is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended August 31, 2011, which reported a net loss of \$5,150 for the prior twelve months.

8. United States Oil and Gas Corp. (CIK No. 1439154) is a delinquent Delaware corporation located in Brooklyn, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). United States Oil and Gas 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, 2011, which reported a net loss of over \$2.3 million for the prior nine months. As of September 17, 2013, the company's stock (symbol "USOG") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

9. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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. 70471 / September 23, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3673 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15513

In the Matter of

James R. Lanier,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934, SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against James R. Lanier ("Lanier" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. James R. Lanier, age 44, maintains a residence in Sylvester, Georgia. From August 2007 to April 2010, Lanier worked in Tallahassee, Florida as both a registered representative and investment adviser representative of Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), a dually registered broker-deal and investment adviser headquartered in New York, New York.

B. RESPONDENT'S CRIMINAL CONVICTION

1. On November 1, 2012, Lanier entered a guilty plea in U.S. District Court for the Northern District of Florida to 13 counts of wire fraud in violation of 18 U.S.C. §§1343 and 2, seven counts of mail fraud in violation of 18 U.S.C. §§1341 and 2, four counts of money

55 of 90

laundrying in violation of 18 U.S.C. §§ 1957 and 2, and two counts of aggravated identity theft in violation of 18 U.S.C. §§ 1028A and 2 (U.S. v. James Ryan Lanier, Crim. Case No. 4:12-CR-51-RH-CAS). On March 8, 2013, Lanier was sentenced to a term of one hundred six (106) months in prison and five (5) years of supervised release, and ordered to pay full restitution in the amount of \$887,931.00. Lanier began serving his prison sentence on March 15, 2013.

2. As alleged in Lanier's grand jury indictment, between September 2008 and March 2010, Lanier misappropriated \$887,931 from the advisory and/or brokerage accounts of Merrill Lynch clients and customers. Lanier forged letters purportedly authorizing the transfer of customer and/or client funds to bank accounts controlled by Lanier. Among other things, Lanier used customer and/or client funds to purchase a condominium, vehicles, and an interest in a cellular telecommunications business. In order to conceal his fraud, Lanier transferred a portion of the misappropriated funds to the bank accounts of customers and/or clients who requested liquidation of their Merrill Lynch accounts.

III.

In view of the foregoing, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act.

IV.

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

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

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

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

Commissioner Gallagher
Commissioner Prowder
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9453 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15512

In the Matter of

TD BANK, N.A.,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
8A OF THE SECURITIES ACT OF 1933,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against TD Bank, N.A. ("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 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

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

56 of 90

Summary

1. This matter involves TD Bank, N.A. ("TD Bank" or the "Bank"), a national banking institution, and the conduct of one of its former Regional Vice Presidents (the "RVP") in connection with Scott Rothstein ("Rothstein"), a now disbarred attorney. From 2005 to October 2009, Rothstein utilized his law firm, Rothstein, Rosenfeldt and Adler, P.A. ("RRA"), to perpetrate a Ponzi scheme through the sale of purported discounted settlements to investors. Rothstein claimed to represent plaintiffs who had reached confidential settlements to be paid out over time by large corporate defendants. Rothstein told investors that the purported plaintiffs were willing to sell their periodic payments to investors at a discount in exchange for one lump sum payment. Rothstein further told investors that the defendants had deposited the entire amount of the settlements into his attorney trust accounts. Rothstein first opened accounts at a bank in South Florida, and subsequently opened accounts at Commerce Bank, a national banking institution that was later acquired by, and merged into, TD Bank. As Rothstein's scheme began to unravel in late 2009, the RVP made material misstatements and omissions to investors and prepared false and misleading documents that he knew Rothstein would provide to investors. By the end of October 2009, Rothstein could no longer make payments to investors and the scheme collapsed.

2. The RVP falsely represented to several investors that TD Bank had restricted the movement of the settlement funds held in attorney trust accounts for the exclusive benefit of the investors. The RVP executed "lock letters" that stated that the particular trust accounts were irrevocably restricted such that TD Bank would distribute funds in those accounts only to the investor's bank account designated in the lock letter. These representations were false, as the RVP did not apply any TD Bank procedures to block the accounts so as to enforce the lock letters or implement any TD Bank system that would have restricted Rothstein from moving the money out of the trust accounts. Additionally, the RVP also provided false assurances to two investors that certain RRA trust accounts at TD Bank in which the Rothstein settlement funds were purportedly held, did in fact maintain the account balances that Rothstein represented to investors.

3. In reality the settlements Rothstein sold to investors were fake and the purportedly "locked" accounts generally held no more than \$100. The Ponzi scheme collapsed in October 2009 when Rothstein was unable to continue making payments to investors. Rothstein surrendered to federal criminal authorities shortly thereafter and revealed that the plaintiffs and defendants never existed and the settlements were not real. He had forged the settlement documents, and the trust accounts did not contain hundreds of millions of dollars.

Respondent

4. TD Bank is one of the ten largest banks in the United States, with more than 7.8 million customers at more than 1,280 locations. TD Bank is a member of TD Bank Group and is a subsidiary of The Toronto-Dominion Bank of Toronto, Canada. The Toronto-Dominion Bank trades on the NYSE Euronext under the ticker symbol "TD." TD Bank is a national banking association with its main offices in Wilmington, Delaware, and its principal place of business in

Cherry Hill, New Jersey. In March 2008, TD Bank acquired Commerce Bank and its legacy branches, systems, and customer accounts, including accounts opened by Rothstein. The Bank's integration of Commerce Bank was completed in September 2009.

Other Relevant Individual

5. The RVP was originally hired and employed by Commerce Bank from April 2006 until March 2008, when Commerce Bank was acquired and merged into TD Bank. He served as a Regional Vice President for TD Bank until the Bank terminated him in November 2009 shortly after learning of the Rothstein Ponzi scheme. The RVP was responsible for generating loans and deposit growth for TD Bank's branches within Broward County, Florida and Palm Beach County, Florida, as well as coordinating the efforts of TD Bank's lenders and branch managers within that region.

Background

A. Rothstein's Ponzi Scheme

6. Starting in or about 2005, Rothstein, a formerly licensed Florida attorney, began offering investors the opportunity to purchase purported legal settlements at a discount. Rothstein falsely claimed to represent plaintiffs who had threatened sexual harassment, whistleblower, and qui tam actions against large corporations. Rothstein explained to prospective purchasers that his clients reached confidential settlements with the corporations before the public filing of any lawsuits. Rothstein further explained that the confidentiality provisions prohibited him from identifying the parties and, because no actions had been filed, there were no court filings to verify the settlements.

7. Beginning in or about 2008, Rothstein told prospective investors that the defendants had deposited the full amount of the settlements in RRA trust accounts for the benefit of the plaintiffs, but to ensure compliance with the confidentiality terms of the settlements, the purported settlement funds had to remain in RRA's trust accounts and be paid out to investors according to the settlement schedule. Prospective purchasers did not have direct access to the RRA trust accounts or to any independent method to verify the amounts in those accounts. Rothstein claimed his clients were willing to assign their settlement payments from the RRA trust accounts in exchange for a discounted immediate cash payment. For example, Rothstein sold one individual the right to receive a \$450,000 settlement paid out in three monthly \$150,000 payments for an immediate payment of \$375,000.

8. Contrary to Rothstein's representations, there were no legal settlements and the plaintiffs and defendants did not exist. In classic Ponzi fashion, Rothstein simply used the funds paid to purchase the supposed settlements to make the purported settlement payments that were due to other investors and to support his lavish lifestyle. At the end of October 2009, Rothstein's scheme collapsed, and shortly thereafter, he surrendered to federal authorities. He pled guilty to federal charges related to the operation of the Ponzi scheme and was sentenced to fifty years in federal custody.

B. RRA's Trust and Operating Accounts at Commerce Bank and TD Bank

9. Between November 2007 and mid-October 2009, Rothstein opened 22 attorney trust accounts and four law firm operating accounts at Commerce Bank and then TD Bank, after Commerce Bank was acquired and merged into TD Bank in March 2008. Rothstein used accounts at Commerce Bank, and subsequently TD Bank, to receive money from investors in his purported legal settlements, and to make Ponzi payments to these investors. Rothstein used RRA's main operating accounts to receive funds from investors in his purported legal settlements, and to operate his law firm. Rothstein used the attorney trust accounts to receive money from purported settling defendants and to make payments to settlement investors. Rothstein led settlement investors to believe that he set up a separate trust account for each investor and that the defendants fully funded these trust accounts with the settlement proceeds prior to the investor's purchase. In reality, these trust accounts typically held less than \$100. When payments were due to settlement investors, Rothstein transferred enough money from RRA's main operating account into the investor's trust account to make the scheduled payment. Between RRA's law firm operations and Rothstein's Ponzi scheme, approximately \$1.2 billion flowed through these accounts over the life of Rothstein's Ponzi scheme. TD Bank earned customary fees and revenue through its banking relationship with Rothstein and his firm.

10. Following its acquisition of Commerce Bank in March 2008, TD Bank inherited Rothstein's accounts. Rothstein's main point of contact was the RVP who had primary responsibility for the management of Rothstein's accounts.

11. Because RRA owned the trust accounts at TD Bank, Rothstein controlled all the information relating to these accounts and investors had no independent way to verify the account balances. Several investors therefore sought assurances that the trust accounts were fully funded as Rothstein claimed and that their funds were protected. The RVP, through Rothstein, provided these assurances to numerous investors. At Rothstein's request, the RVP provided Rothstein with "lock letters" to give to investors that purported to irrevocably restrict the movement of the investors' funds from the TD Bank account despite his failure to apply any Bank procedures that would have effectively enforced such restrictions. Moreover, the RVP orally verified the trust account balances shown to investors that were false.

C. The RVP's Misrepresentations and Omissions to Investors

i. The RVP Provided Unenforceable Irrevocable "Lock Letters" to Rothstein

12. A key premise of Rothstein's Ponzi scheme was that investors were purchasing legal settlements that the settling defendants had paid in full, and the settlement proceeds were on deposit in one of several of his attorney trust accounts at TD Bank. Rothstein promised to make distributions from these accounts to his investors in accordance with their structured settlement purchases. Rothstein's investors had no direct access to RRA's trust accounts to verify his claims.

13. At the peak of Rothstein's Ponzi scheme in August 2009, several of Rothstein's investors wanted confirmation that the settlement funds they purchased in the TD Bank accounts could be paid only to them. These investors were looking for additional comfort that their investments were safe.

14. Acquiescing to investors' demands, Rothstein prepared at least four letters to investors on RRA letterhead that purported to "irrevocably restrict" certain trust accounts designated for investors. Rothstein provided these letters to the RVP who co-signed them on behalf of TD Bank. These letters, which Rothstein referred to as "lock letters," stated, "all funds contained in the above account shall only be distributed upon [Rothstein's] instructions and shall only be distributed to [the investor]" at the investor's designated bank account. The letter further emphasized that "the letter is not meant to convey ownership of the account or access to the account to any other party, but rather is meant to irrevocably restrict conveyances" from the referenced RRA account to the investor's bank account specified in the letter.

15. Subsequently, at Rothstein's request, the RVP prepared and executed at least seven additional lock letters for Rothstein on TD Bank letterhead. Rothstein emailed the draft language for the RVP to incorporate into the letters. In many instances, the RVP forwarded the language for the lock letters from Rothstein to his assistant and she prepared the letters for the RVP's signature. The language of these lock letters was nearly identical to the initial four lock letters on RRA letterhead in all material respects. When the RVP instructed his assistant to prepare the letters on TD Bank letterhead, the assistant questioned whether it was permissible for her to do so since she had never seen such a letter before. The RVP confirmed that she should prepare the letter for his signature.

16. The RVP knew that Rothstein planned to provide the lock letters to investors. When the RVP signed the letters, he either knew or was reckless in not knowing that the particular trust accounts he was purportedly restricting typically contained at most \$100, and in all instances contained far less than the investors' purchased settlements.

17. The RVP's representations in the lock letters were false, as he had not applied any TD Bank procedures to block the accounts so as to enforce the lock letters or implement any TD Bank system that would have restricted Rothstein from moving the money out of the trust accounts. The RVP also did not make use of any Bank system to restrict Rothstein from making transfers out of the trust accounts to anyone from anywhere as Rothstein had online computer access via TD Bank's internet customer banking systems. A TD Bank Assistant Vice President and Branch Manager (the "AVP") who worked at TD Bank's Weston, Florida branch and reported to the RVP, told the RVP shortly after the first lock letter dated August 17, 2009 that the "lock" instructions put onto an account would have no practical effect because Rothstein could still transfer the money without bank officials being alerted. The RVP dismissed the AVP's concerns.

18. On August 17, 2009, the same day the first lock letter was written and co-signed by the RVP, Rothstein and the RVP had a conference call with representatives of one investment partnership that had purchased purported settlements from Rothstein. The RVP and Rothstein prepared for the call by email. Specifically, Rothstein emailed the RVP a list of questions he would ask him during the call about the effectiveness of the lock letters and instructed the RVP to "just answer yes to all the questions and we are done." The RVP replied "no problem."

19. During this call, the RVP confirmed that he co-signed the lock letter and that the investment proceeds were in a restricted, segregated account that could only be disbursed directly to that investment partnership. The RVP knew or was severely reckless in not knowing these representations were false.

20. The RVP also misrepresented to Rothstein's investors that the lock letters were commonplace at TD Bank. Although the lock letters concept and its wording had never previously been utilized by the Bank, the RVP explained to a couple of Rothstein investors during in-person meetings and telephone conferences the mechanics of the lock letter and stated that the letter was not unusual at TD Bank and that many accounts at the Bank had similar restrictions in place. The RVP further stated to Rothstein's investors that TD Bank had systems in place to ensure compliance with the lock letters. The RVP knew or was severely reckless in not knowing that all of these representations were false.

21. On September 10, 2009, the RVP spoke with another investor and confirmed that he signed a lock letter, that such letters were routine and common at the Bank, and that the Bank was obligated to adhere to the restrictions in the letter, including the transfer restrictions. This information was false.

ii. The RVP Verified Phony Account Balances to Investors

22. The RVP also provided false assurances to at least two investor groups regarding the balances in the RRA trust accounts. First, on August 17, 2009, the RVP participated in a conference call with Rothstein and representatives of an investor group. When the investor group's representatives asked how much money was in a particular RRA trust account, the RVP told them that the account held \$22 million, which corresponded to the amount the investor was expecting. In fact, the account held no more than \$100 at the time. At all relevant times, the RVP had full access to the account information and knew or was severely reckless in not knowing the actual account balances.

23. Further, on September 25, 2009, the RVP met in person with representatives of the same investor group after it had made additional investments with Rothstein. The RVP represented that he was familiar with the transactions in their account, that the money in their account was safe, and that they had nothing to worry about since the provisions of the lock letter were in place restricting the movement of their money. The RVP's representations were again false. The RRA trust account that Rothstein had set up for this investor at TD Bank held only \$100 at the time.

24. Second, a different investor group purchased a purported \$20 million settlement from Rothstein in early September 2009. On September 10, 2009, one of the investor group's representatives obtained a TD Bank deposit slip dated for the particular RRA trust account that supposedly held the settlement funds for the investor to purchase. The investor group's representative observed that the account appeared to have a \$0 balance as of that morning, whereas Rothstein had claimed to the investor that this account held the investor's \$20 million settlement. Also on September 10, 2009, another representative of the same investor group asked Rothstein whether the \$20 million settlement payment from the purported defendant had been deposited into the account. Rothstein falsely stated that the funds were indeed in the account, but the funds would not appear as "available" on the deposit slip because they were in TD Bank's "Federal wire queue."

25. On Monday, September 14, 2009, Rothstein and representatives from the same investor group met with the RVP. The RVP falsely represented that the \$20 million did not appear as available funds because TD Bank was holding the funds in a Treasury Direct Wire queue for this account. The RVP also falsely represented that the lock letter issued for this account on Bank letterhead irrevocably restricted the movement of the money in the trust account to its bank account designated in the lock letter. In reality, TD Bank was not holding any amounts in a Treasury Direct Wire queue for this account and the account did not contain the investor's settlement funds.

Violations

26. Section 17(a)(2) of the Securities Act prohibits any person, in the offer or sale of any security, from obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Section 17(a)(3) of the Securities Act prohibits any person, in the offer and sale of any security, from engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. Sections 17(a)(2) and 17(a)(3) of the Securities Act do not require a showing of scienter. Aaron v. SEC, 466 U.S. 680 (1980). A showing of negligence is sufficient to establish violations of these provisions. Id. at 701-702.

27. As a result of the RVP's conduct described above, Respondent TD Bank violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

TD Bank's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent TD Bank cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. Respondent shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of \$15,000,000. This sum shall be paid to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Respondent's name as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Glenn S. Gordon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Miami Regional Office, 801 Brickell Avenue, Suite 1800, Miami, FL 33131.

C. The civil money penalty payment shall be held at the SEC for possible distribution until the Commission enters an order as to its disbursement. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that 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 Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

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. Williams, age 55, is and has been a certified public accountant licensed to practice in the State of California. He served as Chief Financial Officer of True North Finance Corporation ("True North"), f/k/a CS Financing Corporation, from 2007 until 2010.
2. True North was, at all relevant times, a Delaware corporation with its principal place of business in Corte Madera, California. True North was engaged in the business of real estate finance. At all relevant times, True North issued notes registered with the Commission pursuant to Section 6 of the Securities Act of 1933 ("Securities Act").
3. On September 21, 2010, the Commission filed a complaint against Williams in SEC v. True North Finance Corp., et al., Civil Action Number 10-cv-3995, in the United States District Court for the District of Minnesota. On September 11, 2013, the court entered an order permanently enjoining Williams, by consent, from future violations of Section 17(a)(2) of the Securities Act, Section 13(b)(5) of the Securities Exchange Act of 1934 and Rules 13b2-1, 13b2-2, and 15d-14 thereunder. Williams was also ordered to pay a \$40,000 civil money penalty.
4. The Commission's complaint alleged, among other things, that Williams caused True North to improperly recognize revenue on interest from borrowers where the borrowers were not paying True North and where the borrowers' impaired financial condition meant that collectability was not reasonably assured. The complaint alleged that this recognition of revenue departed from generally accepted accounting principles and also departed from True North's revenue recognition policy, which stated that the company would not recognize revenue when the payment of interest was 90 days past due.

IV.

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

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

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

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

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

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

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

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

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

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

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of

accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3678 / September 24, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30697 / September 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15519

In the Matter of

Timbervest, LLC,

Joel Barth Shapiro,
Walter William Anthony Boden, III,
Donald David Zell, Jr.,
and Gordon Jones II,

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 203(e), 203(f)
AND 203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND SECTION
9(b) OF THE INVESTMENT COMPANY ACT
OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Timbervest, LLC, pursuant to Sections 203(e) 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"), and against Joel Barth Shapiro, Walter William Anthony Boden, III, Donald David Zell, Jr., and Gordon Jones II (collectively, the "Principals"), pursuant to Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act.

II.

After an investigation, the Division of Enforcement alleges that:

58 of 90

A. RESPONDENTS

1. Timbervest, LLC ("Timbervest") is a Georgia limited liability company with its principal place of business in Atlanta, Georgia. Timbervest was established in 1995 and currently manages approximately \$1.2 billion in timber-related investments. Timbervest has been registered as an investment adviser with the Commission since October 5, 1995.

2. Joel Barth Shapiro ("Shapiro"), age 50, is a resident of Atlanta, Georgia. Shapiro is the Chief Executive Officer of Timbervest and a Managing Partner.

3. Walter William Anthony Boden, III ("Boden"), age 52, is a resident of Atlanta, Georgia. Boden is the Chief Investment Officer of Timbervest and a Managing Partner.

4. Donald David Zell, Jr. ("Zell"), age 53, is a resident of Atlanta, Georgia. Zell is the Chief Operating Officer of Timbervest and a Managing Partner.

5. Gordon Jones II ("Jones"), age 43, is a resident of Atlanta, Georgia. Jones is the President of Timbervest and a Managing Partner. He also served as Chief Compliance Officer from approximately January 2005 until August 2012. Jones is an attorney and a member of the bar in the state of Georgia.

B. TIMBERVEST ENGAGES IN THE UNAUTHORIZED SALE OF ASSETS TO AN AFFILIATED FUND

6. From approximately 1995 until 2012, Timbervest served as an investment adviser to its largest client (the "Client"). Timbervest also served, separately, as an investment adviser to a single-client investment fund ("Fund #1") holding the private pension plan assets of the Client.

7. The assets held by Fund #1 were governed by the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). Among other things, ERISA prohibited Timbervest from selling properties to other funds that it managed.

8. The operating agreement establishing Fund #1 – and signed by Timbervest – also prohibited Timbervest from engaging in any affiliated transactions without the prior written approval of the Client.

9. In or around 2005, the Client ordered Timbervest to reduce the size of Fund #1's portfolio by selling substantial amounts of timberland property. In order to circumvent the ERISA restrictions and satisfy the Client's disposition requirements, Timbervest and its Principals orchestrated the sale of a property from Fund #1 to another timberland fund managed by Timbervest ("Fund #2") by "parking" the property with a third party.

10. On or around September 15, 2006, Timbervest agreed to sell a timberland property located in Alabama (the "Alabama property") for \$13.45 million to a third-party real estate company (the "Real Estate Company"). The deal closed on October 17, 2006. Boden,

Timbervest's Chief Investment Officer and a Managing Partner, negotiated the deal directly with the principal of the Real Estate Company, and the sale was specifically reviewed and approved by each of the Principals.

11. At the time of the initial sale of the Alabama property, Boden told the principal of the Real Estate Company that Timbervest would repurchase the Alabama property for another Timbervest-managed fund at a profit to the Real Estate Company. Before the deal closed on October 17, 2006, Boden had agreed to a repurchase price of \$14.5 million.

12. Just six weeks after the closing of the sale, on November 30, 2006, Boden sent the Real Estate Company principal a draft sales contract offering to repurchase the same property on behalf of Fund #2, another Timbervest-managed fund, for \$14.5 million.

13. On December 15, 2006, the two parties entered an agreement to sell the Alabama property to Fund #2 for \$14.5 million, and the deal closed on February 1, 2007. Once again, each of the Timbervest Principals reviewed and approved the deal.

14. Neither Timbervest nor its Principals sought approval for, or otherwise disclosed the affiliated nature of the Alabama property sale and the "parking" arrangement with the Real Estate Company, to either Fund #1 or to Fund #2.

15. By structuring the sale of the Alabama property to another Timbervest-managed fund through the use of a middleman, Timbervest concealed the unauthorized nature of the transaction, while imposing an undisclosed \$1.05 million parking fee on a deal between Fund #1 and Fund #2. The unauthorized sale of the Alabama property therefore constituted a prohibited use of the assets of both funds.

C. BODEN COLLECTS UNAUTHORIZED, UNDISCLOSED REAL ESTATE COMMISSIONS AND SPLITS THE COMMISSIONS WITH SHAPIRO, ZELL, AND JONES

16. In connection with the sale of the Alabama property in October 2006, and the later sale of a timberland property in Kentucky (the "Kentucky property") in April 2007, Boden collected a total of \$1,156,236 in real estate commissions paid to him out of Fund #1's pension plan assets.

17. The payments were remitted to two companies – Fairfax Realty Advisors, LLC ("Fairfax") and Westfield Realty Partners, LLC ("Westfield"), respectively. Both companies were beneficially owned by Boden and incorporated by his personal attorney.

18. Fairfax and Westfield were shell companies, having no offices, no assets, and no employees. The companies performed no services and were established for the sole purpose of receiving these commission payments.

19. Upon receipt of the commission payments, Boden allowed his attorney to keep approximately \$115,000. Boden then split the remaining proceeds equally with Shapiro, Jones, and Zell, who received approximately \$260,000 each.

20. Each of the Principals knew, prior to the closing of each transaction, that Boden was to be paid a commission in connection with the sale of Fund#1's assets. Each of the Principals also knew, at the time they received their share of the proceeds, that the funds were derived from the commission payments that Boden had received on these transactions.

21. The Principals did not disclose the commission payments to the Client. Moreover, because Timbervest and its Principals were fiduciaries of Fund #1, collection of these payments was prohibited by ERISA and proscribed by the operating agreement. The undisclosed commissions therefore constituted a further prohibited use of Fund #1's assets.

22. The payments to Boden were structured in a manner that concealed the identities of the recipients. For example, although Boden was the beneficial owner of both companies, his name does not appear on any of the public filings or organizational documents of the two companies. Also, Fairfax and Westfield did not list their addresses as that of Timbervest, or of any of Boden's other personally-owned companies. Instead, the companies listed addresses in their organizational documents that turned out to be post office boxes at private mail stores in separate parts of Atlanta, and the "suite numbers" noted in the business addresses actually corresponded to the assigned post office boxes. At the deal closings, the commission payments were released by the escrow agents directly to Fairfax and Westfield, care of Boden's personal attorney, who then deposited the proceeds into his own Interest on Lawyer Trust Account ("IOLTA"), not into an account owned by or affiliated with Boden or with Timbervest. Boden's attorney then transferred the funds to Boden not by writing him a check, but rather by writing a check payable to one of Boden's personal holding companies. Boden then drew cashier's checks for his partners, which were subsequently deposited into their own personal accounts.

D. VIOLATIONS

23. As a result of the conduct described above Timbervest willfully violated Sections 206(1) and 206(2) of the Advisers Act, which make it unlawful for an investment adviser to employ any device, scheme or artifice to defraud clients or to engage in any transaction, practice or course of business that defrauds clients or prospective clients.

24. As a result of the conduct described above, Shapiro, Boden, Zell, and Jones willfully aided, abetted, or caused Timbervest's violations of Section 206(1) and 206(2) of the Advisers Act, which make it unlawful for an investment adviser to employ any device, scheme or artifice to defraud clients or to engage in any transaction, practice or course of business that defrauds clients or prospective clients.

III.

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

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

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

C. What, if any, remedial action is appropriate in the public interest against Respondents Shapiro, Boden, Zell, and Jones pursuant to Section 203(f) of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act; and

E. Whether, pursuant to Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and 206(2) of the Advisers Act, and whether Respondents should be ordered to pay disgorgement pursuant to Section 203 of the Advisers Act.

IV.

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

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

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70490 / September 24, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3679 / September 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15520

In the Matter of

PHILIP DAVID HORN,

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
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Philip David Horn ("Respondent" or "Horn").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From February 2006 to October 2011, Respondent was a registered representative with Wells Fargo Advisors, LLC, a dually registered broker-dealer and investment adviser. Respondent, 52 years old, is currently incarcerated at the Federal Correctional Institution – La Tuna in Anthony, Texas.

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTION

2. On September 20, 2012, Horn pleaded guilty to two counts of wire fraud in violation of Title 18 United States Code, Section 1343 before the United States District Court for the Central District of California. *United States v. Philip David Horn*, Case No. 2:12-CR-678-

GAF. On March 4, 2013, a judgment in the criminal case was entered against Horn. He was sentenced to a prison term of 24 months followed by three years of supervised release.

3. The counts of the criminal information to which Horn pleaded guilty alleged, *inter alia*, that Horn knowingly and with intent to defraud, devised, participated in, and carried out a scheme to defraud investors and to obtain money and property from them by means of materially false and fraudulent pretenses, representations, promises, and the concealment of material facts.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9455 / September 24, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70485 / September 24, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3677 / September 24, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30696 / September 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15518

In the Matter of

DIEGO F. HERNANDEZ,
THE WEALTH
MANAGEMENT PARTNERS,
LLC, WEALTH FINANCIAL,
LIMITED LIABILITY
COMPANY, DFHR
INVESTMENTS, INC., and
HD MILE HIGH
MARKETING, INC.

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTIONS 15(b)
AND 21C OF THE SECURITIES EXCHANGE
ACT OF 1934, SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940, AND NOTICE OF
HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are,

60 of 90

instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Diego F. Hernandez ("Hernandez"), pursuant to Section 8A of the Securities Act and Sections 15(b) and 21C of the Exchange Act against The Wealth Management Partners, LLC ("Wealth Management"), Wealth Financial, Limited Liability Company ("Wealth Financial"), and DFHR Investments, Inc. ("DFHR"), and pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act against HD Mile High Marketing, Inc. ("HD Mile High") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Between July 2011 and approximately April 2013, Hernandez, through Wealth Management, Wealth Financial, DFHR, and HD Mile High, willfully violated the antifraud provisions of the Securities Act and the Exchange Act by raising and misappropriating approximately \$921,000 from 13 Colorado investors through a fraudulent offering of securities. Hernandez carried out his fraudulent offering by meeting with each investor and telling them that he, through his entities, would invest their money in corporate bonds or another "safe" investment that would pay a guaranteed, above-market annual interest rate. In reality, Hernandez, through Wealth Management, Wealth Financial, DFHR, and HD Mile High, willfully misappropriated investor funds for (1) personal expenses, (2) business expenses, and (3) to repay other investors.

2. Between July 2011 and January 2013, in connection with his fraudulent offering and through Wealth Management, Wealth Financial, and DFHR, Hernandez and his entities also willfully operated as unregistered brokers.

B. RESPONDENTS

3. Diego Hernandez, age 39, is a Colombian national and a lawful permanent resident of the United States who resides in Lone Tree, Colorado. From 1998 to January 2013, Hernandez was a registered representative associated with three broker dealers registered with the Commission. Hernandez held a Series 6 license from 1998 until January 2013. Hernandez has no disciplinary history with the Commission.

4. The Wealth Management Partners, LLC is a Colorado limited liability company with its principal place of business in Lakewood, Colorado. Hernandez owns and controls Wealth Management. Wealth Management is not registered with the Commission in any capacity, but Wealth Management acted as an unregistered broker-dealer in connection with the offer and sale of securities to investors between April 2012 and January 2013. Wealth Management has never conducted a registered offering or registered a class of securities with the Commission. Wealth Management has no disciplinary history with the Commission.

5. Wealth Financial, Limited Liability Company is a Colorado limited liability company with its principal place of business in Lakewood, Colorado. Hernandez owns and controls Wealth Financial. Wealth Financial is not registered with the Commission in any capacity, but Wealth Financial acted as an unregistered broker-dealer in connection with the offer and sale of securities to investors between April 2012 and January 2013. Wealth Financial has never conducted a registered offering or registered a class of securities with the Commission. Wealth Financial has no disciplinary history with the Commission.

6. DFHR Investments, Inc. is a Colorado corporation that has been in delinquent status with the Colorado Secretary of State since May 1, 2011. Hernandez owns and controls DFHR. DFHR is not registered with the Commission in any capacity, but DFHR acted as an unregistered broker-dealer in connection with the offer and sale of securities to investors between July 2011 and January 2012. DFHR has never conducted a registered offering or registered a class of securities with the Commission. DFHR has no disciplinary history with the Commission.

7. HD Mile High Marketing, Inc. is a Colorado corporation with its principal place of business in Lakewood, Colorado. Hernandez owns and controls HD Mile High. HD Mile High has never conducted a registered offering or registered a class of securities with the Commission. HD Mile High has no disciplinary history with the Commission.

C. OTHER RELATED ENTITY

8. Peak Training Center, Inc. ("Peak Training") is a Colorado corporation with its principal place of business in Lakewood, Colorado. Hernandez is a 49% owner of Peak Training and he opened and controls its bank account. Peak Training received investor funds through transfers from the Respondents. Peak Training has never conducted a registered offering or registered a class of securities with the Commission, and has no disciplinary history with the Commission.

D. BACKGROUND REGARDING THE RESPONDENTS

9. From August 2005 to April 2012, Hernandez was a registered representative associated with a broker-dealer registered with the Commission. From April 12, 2012 to January 31, 2013, Hernandez was a registered representative associated with a dually-registered broker-dealer and investment adviser registered with the Commission. During his fraudulent offering, Hernandez was selling away from both firms, while also targeting their retail customers.

10. In 2009, Hernandez incorporated DFHR. During the relevant time, Hernandez controlled DFHR, including its bank accounts. Between July 2011 and January 2012, Hernandez instructed four investors to provide investment funds to DFHR.

11. In December 2011, Hernandez incorporated HD Mile High. During the relevant time, Hernandez controlled HD Mile High, including its bank accounts. In 2012, in connection with his fraudulent offering, Hernandez instructed three investors to provide investment funds to HD Mile High.

12. In March 2012, Hernandez organized Wealth Management. During the relevant time, Hernandez controlled Wealth Management, including its bank account. Between April 2012 and January 2013, Hernandez instructed 10 investors to provide investment funds to Wealth Management.

13. In March 2012, Hernandez incorporated Peak Training. During the relevant time, Hernandez controlled Peak Training's bank account. Hernandez, through his other entities, provided investor funds to Peak Training.

14. From approximately May 2012 to January 2013, Hernandez used "Wealth Financial, LLC" as his d/b/a for his brokerage business. In February 2013, Hernandez organized Wealth Financial. During the relevant time, Hernandez controlled Wealth Financial, including its bank account. Between approximately May 2012 and April 2013, Hernandez also used Wealth Financial in connection with his fraudulent securities transactions. In January 2013, one investor provided investment funds to Wealth Financial.

15. Hernandez failed to disclose adequately to the two broker-dealers with which he was associated his outside business activities at DFHR, HD Mile High, and Wealth Management. Hernandez also failed adequately to disclose to one broker-dealer with which he was associated from April 2012 to January 2013 his outside business activities at Wealth Financial.

E. THE RESPONDENTS ENGAGED IN A FRAUDULENT OFFERING OF SECURITIES AND A SCHEME AND FRAUDULENT PRACTICES OR COURSE OF BUSINESS

16. Hernandez generally carried out his fraudulent offering by meeting with the investors face-to-face and convincing them to invest their money with him based on numerous material false statements and omissions.

17. To generate funds for the fraudulent offering, Respondents targeted retail investors, almost all of whom were individuals.

18. Hernandez advised several investors to surrender out of their existing annuities, and he assisted investors with completing the paperwork necessary to complete the surrenders. Hernandez also advised various investors to provide him with their cash savings and funds they removed from a 401(k) plan.

19. Hernandez told at least two investors that he would provide them with a six to eight percent monetary "bonus" for agreeing to transfer their funds as he advised.

20. Investors provided Respondents with funds because they sought to make a profit from the above-market annual interest rates promised by Respondents.

21. Hernandez told investors that he would invest their funds and he instructed them to direct payment to one or more of his entities. The Respondents then pooled investor funds in the Respondents' bank accounts, which were controlled by Hernandez.

22. The investors had an expectation of profits to be derived solely from the efforts of the Respondents; after investing, the investors were passive and had no control over the use of their funds.

23. Respondents offered and sold securities.

The Respondents Made Material False Statements, Misrepresentations, and Omissions

24. Between July 2011 and January 2013, Hernandez, through his entities, made material misrepresentations, false statements, and omissions, both orally and in writing, when offering and selling securities to approximately 13 investors.

25. Hernandez falsely told investors that he, through his entities, would be investing their funds in corporate bonds. The account statements for Wealth Management and Wealth Financial, which were drafted by Hernandez and provided to some investors, also described the investment as a "corporate bond." The account statements also falsely stated that there was a "market" for the "corporate bonds," and that Wealth Management was a "fund."

26. Hernandez also told investors that he, through DFHR or Wealth Management, would be placing their money in another "safe" investment, such as mutual funds or annuities.

27. Hernandez failed to disclose to investors that the Respondents would be the sole recipients of their funds, that their funds would be treated as a "loan" to the Respondents, that their funds would be used to pay the business and personal expenses of the Respondents, and that their funds would be used to repay other investors.

28. Hernandez also falsely touted the safety of the investments, and he both misrepresented and failed to disclose the risks. He told numerous investors that the securities he offered and sold were "safe." Hernandez also assured investors that the securities he offered provided both flexibility and liquidity. For example, he told one investor that if she liquidated her 401(k) and provided the funds to him, he and his entities could liquidate her "corporate bond" account on demand so that she could use the funds for a down payment on a home. Similarly, he told another investor that at least \$10,000 of her \$50,000 would be available to her on demand and penalty free so that she could cover her school and living expenses.

29. Hernandez told investors that the securities he offered and sold would pay a guaranteed, above-market, annual interest rate. Numerous investors were assured by Hernandez that the investments he was putting them into would result in a higher rate of return than the investment products they currently held.

30. Hernandez knew that these statements were false because the Respondents did not have any means of generating interest on the investor funds, much less a "guaranteed" above-market interest rate.

31. Hernandez failed to inform investors that their funds would not be maintained in a separate "account," as was stated on their account statements. Instead, investor funds remained in

bank accounts controlled by the Respondents, where they were comingled with the funds of other investors, as well as other funds deposited by the proposed respondents.

32. All of these misrepresentations, false statements, and omissions were material to investors.

33. Hernandez knew that his statements regarding the use of investor proceeds were false because he controlled Wealth Management, Wealth Financial, DFHR, and HD Mile High, and he knew that neither he nor any of those entities were purchasing or issuing corporate bonds or using investor funds to purchase any other security or investment product for which there was a "market." Hernandez also knew that Wealth Management, which he owned and controlled, was not a "fund." Hernandez also knew that all of these statements were false because he and his entities were misappropriating investors' funds.

34. Hernandez knew that the investments were not safe, liquid, or risk-free, and that his statements regarding these material facts were false. Hernandez knew that the Respondents misappropriated investors' funds, that the Respondents took no measures to protect investor funds, and that, other than raising funds from other investors, and the Respondents had no means to generate sufficient revenue to repay investors on demand.

The Respondents Misappropriated Investor Funds

35. The Respondents spent investor funds on a variety of business and personal expenses; none of which provide any promise for protecting principal or generating "guaranteed" interest. Examples of such spending include tens of thousands of dollars in cash withdrawals, repayments of Hernandez's personal debts, payments to the Respondents' employees; payments to restaurants and bars, payments related to vehicles, residential rent payments, and payments to other investors.

The Respondents Lulled Investors and Continued Fraudulent Conduct after the Offering

36. After being terminated by a broker-dealer and investigated by the Commission, Hernandez attempted to characterize his receipt of investors' funds as being in connection with "promissory notes" or "loans." To re-characterize the investments in this manner, Respondents have engaged in additional fraudulent conduct, including editing account statements and providing those statements to investors and creating promissory notes for the investors and producing those notes to the Commission, but not to investors. After his fraudulent offering was uncovered, Hernandez also opened a new account in the name of Wealth Financial, at a financial institution that he had not previously used, and he deposited an investor check for over \$61,000, which was dated January 24, 2013 and made payable to Wealth Financial. Hernandez, through Wealth Financial, then misappropriated the investors' funds.

37. After his termination from a broker-dealer, Hernandez, through his entities, also engaged in lulling conduct and made additional false statements and misrepresentations, including assuring investors that funds were "safe" and would be returned in 45 days and sending a letter to investors that stated, among other things, "there has been a recent falling out between myself and [a broker-dealer] . . . there are allegations, assertions and other accusations that are being made against

me. I have every intention of facing these head on, and proving that I have not done, nor would I ever do, wrong by any of my clients.”

F. HERNANDEZ, WEALTH MANAGEMENT, WEALTH FINANCIAL AND DFHR, ACTED AS UNREGISTERED BROKERS

38. Hernandez, through Wealth Management, Wealth Financial, and DFHR, was involved throughout the entire investment process. He solicited investors, met with investors, explained the investments, drafted account statements, accepted investor deposits, and controlled the Respondents' bank accounts into which investor funds were placed and from which investor funds were spent.

39. Hernandez, Wealth Management, Wealth Financial and DFHR received transaction-based compensation in the form of investors' funds, which they misappropriated.

40. The investors relied upon Hernandez for all of their information about these investments. Hernandez, through Wealth Management, Wealth Financial, and DFHR, provided investment advice to the investors by stating that the investments were safe and good investments.

41. Wealth Management, Wealth Financial, and DFHR were not registered as broker-dealers at the time of the sales.

42. Hernandez was not registered as a broker or associated with a registered broker-dealer in connection with these sales. Hernandez was conducting a securities business beyond the scope of his employment at two broker-dealers; therefore, his affiliation with those broker-dealers does not exempt him from registering as a broker.

G. VIOLATIONS

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

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

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

45. As a result of the conduct described above, Hernandez, Wealth Management, Wealth Financial, and DFHR, also willfully violated Section 15(a) of the Exchange Act, which makes it unlawful for any broker or dealer 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 or associated with a registered broker-dealer.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondents Hernandez, Wealth Management, Wealth Financial, and DFHR pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent Hernandez pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act; and

D. What, if any, remedial action is appropriate in the public interest against Respondent Hernandez pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act;

E. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, and whether Respondents should be ordered to pay disgorgement, jointly and severally, pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act;

F. Whether, pursuant to Section 21C of the Exchange Act, Respondents Hernandez, Wealth Management, Wealth Financial, and DFHR should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act, whether Respondents Hernandez, Wealth Management, Wealth Financial, and DFHR should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondents Hernandez, Wealth Management, Wealth Financial, and DFHR should be ordered to pay disgorgement, jointly and severally, pursuant to Sections 21B(e) and 21C(e) of the Exchange Act; and

G. Whether, Respondent Hernandez should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act, and whether

Respondent Hernandez should be ordered to pay disgorgement pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company Act.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33-9456; 34-70491; File No. 265-27]

Advisory Committee on Small and Emerging Companies

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Federal Advisory Committee Report

SUMMARY: The Securities and Exchange Commission is publishing this notice to announce the renewal of the Securities and Exchange Commission Advisory Committee on Small and Emerging Companies.

FOR FURTHER INFORMATION CONTACT: Johanna Losert, Special Counsel, Office of Small Business Policy, Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549, (202) 551-3460.

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. – App., the Commission is publishing this notice that the Chair of the Commission, with the concurrence of the other Commissioners, has approved the renewal of the Securities and Exchange Commission Advisory Committee on Small and Emerging Companies (the “Committee”). The Chair of the Commission affirms that the renewal of the Committee is necessary and in the public interest.

The Committee’s objective is to provide the Commission with advice on its rules, regulations, and policies, with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

61 of 90

F
S-13-439-CF
9/16/13

- (1) capital raising by emerging privately held small businesses (“emerging companies”) and publicly traded companies with less than \$250 million in public market capitalization (“smaller public companies”) through securities offerings, including private and limited offerings and initial and other public offerings;
- (2) trading in the securities of emerging companies and smaller public companies; and
- (3) public reporting and corporate governance requirements of emerging companies and smaller public companies.

Up to 20 voting members will be appointed to the Committee who can effectively represent those directly affected by, interested in, and/or qualified to provide advice to the Commission on its rules, regulations, and policies as set forth above. The Committee’s membership will continue to be balanced fairly in terms of points of view represented and functions to be performed. Non-voting observers for the Committee from the North American Securities Administrators Association and the U.S. Small Business Administration may also be named.

The charter provides that the duties of the Committee are to be solely advisory. The Commission alone will make any determinations of action to be taken and policy to be expressed with respect to matters within the Commission’s authority as to which the Committee provides advice or makes recommendations. The Committee will meet at such intervals as are necessary to carry out its functions. The charter contemplates that the full Committee will meet three times annually. Meetings of subgroups or subcommittees of the full Committee may occur more frequently.

The Committee will operate for two years from the date it was renewed or such earlier date as determined by the Commission unless, before the expiration of that time period, it is renewed in accordance with the Federal Advisory Committee Act. A copy of the charter for the Committee has been filed with the Chair of the Commission, the Committee on Banking, Housing, and Urban Affairs of the United States Senate, and the Committee on Financial Services of the United States House of Representatives. A copy of the charter also was furnished to the Library of Congress and posted on the Commission's website at www.sec.gov.

By the Commission.



Elizabeth M. Murphy
Secretary

Dated: September 24, 2013

*Commissioner Gallagher
not participating*

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

September 25, 2013

IN THE MATTER OF :

Left Behind Games, 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 Left Behind Games, Inc. ("Left Behind") because it has not filed a periodic report since it filed its Form 10-Q for the period ending September 30, 2011, filed on November 21, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Left Behind. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Left Behind is suspended for the period from 9:30 a.m. EDT, September 25, 2013 through 11:59 p.m. EDT, on October 8, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

62 of 90

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70494 / September 25, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15522

In the Matter of

Left Behind Games, 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 and 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").

II.

After an investigation, the Division of Enforcement alleges that:

RESPONDENT

1. Left Behind Games, Inc. ("Respondent") is a former Nevada corporation headquartered in Honolulu, Hawaii. Respondent has a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Respondent's common stock (ticker "LFBG") is quoted on the OTC Link operated by OTC Markets Group, Inc.

63 of 90

DELINQUENT FILINGS

2. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

3. Respondent filed its last Form 10-K for the year ended March 31, 2011 on August 5, 2011, and its last Form 10-Q for the quarter ended September 30, 2011 on November 21, 2011. Since then, Respondent has not filed its required periodic reports.

4. As discussed above, Respondent is delinquent in its periodic filings with the Commission. The following periodic filings are delinquent.

<u>Form</u>	<u>Period Ended</u>	<u>Due on or about</u>
10-Q	December 31, 2011	February 15, 2012
10-K	March 31, 2012	June 30, 2012
10-Q	June 30, 2012	August 15, 2013
10-Q	September 30, 2012	November 15, 2012
10-Q	December 31, 2012	February 15, 2013
10-K	March 31, 2013	June 30, 2013
10-Q	June 30, 2013	August 15, 2013

5. As a result of the conduct described above, Respondent has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3680 / September 25, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15523

In the Matter of

YUSAF JAWED,

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 Yusaf Jawed ("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 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

64 of 90

III.

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

1. Yusaf Jawed, age 44, is a resident of Portland, Oregon. Jawed served as the principal of Grifphon Asset Management, LLC and Grifphon Holdings, LLC. Grifphon Asset Management and Grifphon Holdings are Oregon limited liability companies and investment advisers not registered with the Commission. They served as advisers to various hedge funds formed by Jawed, including Grifphon Alpha I Fund, L.P. and the Alpha Qualified Fund, L.P.

2. On September 20, 2012, the Commission filed a complaint against Jawed in the matter SEC v. Jawed, et al., Civil Case No. 3:12-cv-01696-PK, in the United States District Court for the District of Oregon. On September 11, 2013, a final judgment was entered by consent against Jawed, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, Section 17(a) of the Securities Act of 1933, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder. Jawed was also ordered to pay \$26,980,349 in disgorgement of ill-gotten gains from investors' funds, and \$6,929,625 in prejudgment interest.

3. The Commission's complaint alleged that, in connection with the offer and sale of hedge fund investments sold as interests in limited partnerships, Jawed made false and misleading statements to investors about how money was invested, sent out false account statements and other information indicating false performance, misappropriated investor money, and engaged in other conduct that operated as a fraud and deceit.

4. On April 16, 2013, the United States District Court for the District of Oregon, in United States v. Yusaf Jawed, Case No. 3:13-cr-00125-HA, entered an Order Entering Plea accepting Jawed's guilty plea to five counts of mail fraud in violation of Title 18 United States Code, Sections 2 and 1341, and twelve counts of wire fraud in violation of Title 18 United States Code, Sections 2 and 1343.

5. The counts of the criminal information to which Jawed pled guilty alleged, inter alia, that Jawed devised a scheme to defraud investors by means of materially false and fraudulent representations to induce them to invest, and that he used mail and wires to carry out the 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 Jawed's Offer.

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-9457; 34-70497; 39-2492; IC-30722]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual and related rules to reflect updates to the EDGAR system. The revisions are being made primarily to support updates to Form D and to submission form types 13F-HR and 13F-HR/A. The EDGAR system is scheduled to be upgraded to support this functionality on September 23, 2013.

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

FOR FURTHER INFORMATION CONTACT: In the Division of Corporation Finance, for questions concerning Form D contact Heather Mackintosh at (202) 551-3600; in the Division of Investment Management, for questions concerning Form 13F contact Heather Fernandez at (202) 551-6715; and in the Office of Information Technology, contact Vanessa Anderson at (202) 551-8800.

SUPPLEMENTARY INFORMATION: We are adopting an updated EDGAR Filer Manual, Volume II. The Filer Manual describes the technical formatting requirements for the preparation

65 of 90

and submission of electronic filings through the EDGAR system.¹ It also describes the requirements for filing using EDGARLink Online and the Online Forms/XML website.

The revisions to the Filer Manual reflect changes within Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 25 (September 2013). The updated manual will be incorporated by reference into the Code of Federal Regulations.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.² Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.³

The EDGAR system will be upgraded to Release 13.3 on September 23, 2013 and will introduce the following changes: Form D screens and instructions will be updated for Item 6 to replace the reference to "Rule 506" with "Rule 506(b)" and "Rule 506(c)", and to replace the reference to "Securities Act Section 4(5)" with "Securities Act Section 4(a)(5)", as per Release No. 33-9415.⁴ Additionally, Form D "Terms of Submission" in the Signature and Submission screen will be updated as per Release No. 33-9414.⁵

Submission form types 13F-HR and 13F-HR/A will be updated to allow a maximum of 16 digits in the Sole, Shared, and None columns in COLUMN 8 of the Information Table.

¹ We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on July 25, 2013. See Release No. 33-9433 (July 31, 2013) [78 FR 46256].

² See Rule 301 of Regulation S-T (17 CFR 232.301).

³ See Release No. 33-9433 in which we implemented EDGAR Release 13.2. For additional history of Filer Manual rules, please see the cites therein.

⁴ See Release No. 33-9415 (September 23, 2013) [78 FR 44771].

⁵ See Release No. 33-9414 (September 23, 2013) [78 FR 44729].

Along with the adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1543, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. We will post electronic format copies on the Commission's website; the address for the Filer Manual is <http://www.sec.gov/info/edgar.shtml>.

Since the Filer Manual and the corresponding rule changes relate solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).⁶ It follows that the requirements of the Regulatory Flexibility Act⁷ do not apply.

The effective date for the updated Filer Manual and the rule amendments is [Insert date of publication in the Federal Register]. In accordance with the APA,⁸ we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 13.3 is scheduled to become available on September 23, 2013. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

⁶ 5 U.S.C. 553(b).

⁷ 5 U.S.C. 601 - 612.

⁸ 5 U.S.C. 553(d)(3).

Statutory Basis

We are adopting the amendments to Regulation S-T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,⁹ Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,¹⁰ Section 319 of the Trust Indenture Act of 1939,¹¹ and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.¹²

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENT

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232 - REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

2. Section 232.301 is revised to read as follows:

§232.301 EDGAR Filer Manual.

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

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

¹¹ 15 U.S.C. 77sss.


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

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the EDGAR Filer Manual, Volume I: "General Information," Version 15 (May 2013). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 25 (September 2013). Additional provisions applicable to Form N-SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N-SAR Supplement," Version 2 (August 2011). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1543, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Electronic copies are available on the Commission's website. The address for the Filer Manual is

<http://www.sec.gov/info/edgar.shtml>. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

By the Commission.


Kevin M. O'Neill
Kevin M. O'Neill
Deputy Secretary

September 25, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70526 / September 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15524

In the Matter of

NOVA DEAN PACK, 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 Nova Dean Pack, Esq. ("Respondent" or "Pack").

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

¹ 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 (A) [p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or (B) [f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

66 of 90

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 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. Pack, age 64, is a California resident living in Highland, California. He is a lawyer licensed to practice law in the state of California. Pack has never held any securities licenses and is not registered with the Commission in any capacity.

2. On September 24, 2013, a final judgment was entered by consent against Pack, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act") and Section 15(a) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. Brian G. Elrod, et al., Civil Action Number 13-CV-02449 (WYD) (D. Colo.), in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that Pack, without being registered with the Commission as a broker or dealer and without being an associated person of a registered broker or dealer, participated in the offer and sale of promissory notes issued by CFS Holding Company LLC ("CFS") by, among other things, referring certain individuals, including his legal clients, to invest in CFS, a company owned and managed by Pack's friend, Brian G. Elrod, for commissions. The complaint also alleged that Pack participated in CFS's promissory note offering by drafting some of the promissory notes, acting as a witness for some of the promissory notes, and arranging for at least one investor's funds to be wired to CFS. Based on the foregoing, the complaint alleged that Pack acted as an unregistered broker in connection with, and improperly failed to register with the Commission, the CFS promissory note offering.

IV.

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Julie M. Peterson
By: Julie M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70527 / September 26, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3681 / September 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15525

In the Matter of

BRIAN G. ELROD,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Brian G. Elrod ("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.

67 of 90

III.

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

1. From at least March 2009 through May 2010 (the "Relevant Period"), Elrod was the owner and manager of CFS Holding Company LLC ("CFS"), which, in turn, wholly owned CFS Investment Group LLC ("CIG"). Elrod was the president and chief executive officer of CIG as well as CIG's financial service company subsidiaries (collectively, with CFS, the "Elrod Companies"). During the Relevant Period, Elrod was also a registered representative associated with a broker-dealer registered with the Commission and was associated with a registered investment adviser. Elrod, 54 years old, is a resident of Buffalo Creek, Colorado.

2. On September 24, 2013, a final judgment was entered by consent against Elrod, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Brian G. Elrod, et al., Civil Action Number 13-CV-02449 (WYD) (D. Colo.), in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that, in connection with the offer, purchase, and sale of promissory notes issued by CFS, Elrod misused and misappropriated investor funds, misrepresented that investor funds would be used to expand the Elrod Companies' businesses, misrepresented the risks associated with the CFS promissory notes, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors. The complaint also alleged that Elrod improperly failed to register the CFS promissory note offering with the Commission.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Elrod'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 Elrod 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. 70533 / September 26, 2013

INVESTMENT ADVISERS ACT OF 1940

Release No. 3682 / September 26, 2013

INVESTMENT COMPANY ACT OF 1940

Release No. 30736 / September 26, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15526

In the Matter of

GEORGE B. FRANZ III

and

RUBY CORPORATION,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 203(e), (f), AND
(k) OF THE INVESTMENT ADVISERS ACT
OF 1940, SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, AND SECTION
9(b) OF THE INVESTMENT COMPANY ACT
OF 1940

I.

The Securities and Exchange Commission ("Commission" or "SEC") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), (f), and (k) of the Investment Advisers Act of 1940 ("Advisers Act"), Section 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 George B. Franz III and Ruby Corporation (collectively, "Respondents").

68 of 90

II.

After an investigation, the Division of Enforcement alleges that:

1. From 2007 until 2011, Andrew J. Franz misappropriated over \$490,000 from about 50 accounts of clients of Respondent Ruby Corporation, a registered investment adviser owned and managed by his father, Respondent George Franz. George Franz ignored signs of his son's malfeasance and failed to take action to stop further thefts, thereby failing to protect Ruby clients. Moreover, George Franz not only declined to promptly tell Ruby's clients that Andrew Franz had stolen from them, but actively concealed from clients that they had been victimized. Ruby clients were therefore deprived the opportunity to decide whether, in light of Andrew Franz's thefts that Ruby had failed to prevent, they were comfortable remaining as clients of Ruby. George Franz impeded both the SEC's examination and investigation of Ruby, providing the SEC staff with misinformation and fabricated documents in an effort to mislead the staff as to his poor supervision of Andrew Franz and his failure to disclose thefts to Ruby clients. This misconduct violated, among other things, the antifraud provisions of the Advisers Act.

A. RESPONDENTS

2. George B. Franz III. George Franz founded Ruby Corporation, a registered investment adviser located in Beachwood, Ohio, in 2000 and is its sole owner and principal. George Franz had supervisory responsibility over Andrew Franz from at least 2006 through 2011. George Franz, age 70, is a resident of Moreland Hills, Ohio and Marco Island, Florida. George Franz received his Series 6 license in 1982 and was associated with various brokerage firms from 1991 until September 2006, when he ceased to be associated with any brokerage firm.

3. Ruby Corporation. Ruby Corporation ("Ruby") is an Ohio corporation with its principal place of business in Beachwood, Ohio. Ruby is registered with the Commission as an investment adviser. Since 2007, Ruby has had two or three part-time employees on its staff in addition to its owner George Franz. As of December 2012, Ruby had 99 clients with assets under management of \$21 million. Ruby's clients are typically middle-age and retirement-age individuals in the Cleveland, Youngstown, and Dayton, Ohio areas. Ruby's client accounts are discretionary and are invested exclusively in mutual funds and variable annuities.

B. OTHER RELEVANT INDIVIDUAL

3. Andrew J. Franz. Andrew Franz, age 40, is a resident of Aurora, Ohio. Andrew Franz received his Series 6 license in 2002 and was a registered representative with various broker-dealers until March 2011. Andrew Franz was a paid employee of Ruby from 2002 until 2007, after which he ceased receiving a salary but continued to manage Ruby's operations, specifically the billing of management fees on client accounts. At all times until his termination from Ruby in 2011, Andrew Franz maintained an office at Ruby.

4. In March 2012, the SEC filed an emergency action against Andrew Franz in U.S. District Court, alleging among other things, that he had misappropriated funds from Ruby clients by issuing fraudulent management fee requests, and obtained an emergency asset freeze and a permanent injunction. *SEC v. Andrew J. Franz*, 5:12-cv-00642 (N.D. Ohio). After an evidentiary hearing, in June 2012 the court made findings of fact, held that Andrew Franz had violated the antifraud provisions of the Exchange Act and the Advisers Act, and entered a permanent injunction against further violations of those provisions. On March 15, 2013, the Commission permanently barred Andrew Franz from the securities industry by declaring as final an initial decision by ALJ Cameron Elliot dated January 18, 2013.

5. On July 23, 2013, Andrew Franz pled guilty to charges of wire fraud, tax fraud, and violations of Section 10(b) of the Exchange Act and Sections 206(1) and (2) of the Advisers Act. *U.S. v. Andrew J. Franz*, 1:13-cr-00331 (N.D. Ohio). Andrew Franz is scheduled to be sentenced in October 2013.

C. FACTS

Andrew Franz misappropriated over \$490,000 from Ruby clients.

6. From 2007 through early 2011, Andrew Franz misappropriated over \$490,000 from approximately 50 Ruby client accounts via fraudulent management fee and redemption requests. The majority of these fraudulently withdrawn funds were initially deposited into Andrew Franz's bank accounts; a smaller portion of the stolen funds was initially deposited into Ruby's bank accounts.

7. Ruby clients' funds were primarily invested in variable annuities or mutual funds. Most Ruby clients signed limited powers of attorney permitting Ruby to request management fees directly from their securities accounts. Andrew Franz and Ruby's office manager were responsible for calculating and requesting Ruby's management fees directly from the securities custodians, which was performed

quarterly. These fees were calculated based on the ending balance of the client's account as of the last day of the previous quarter. Most Ruby clients were charged .5% of the quarterly ending balance once per quarter.

8. Andrew Franz's role in the fee request process allowed him to easily misappropriate client funds. In some instances, Andrew Franz provided false client account balances to the Ruby office manager who calculated fees. Sometimes, after the office manager calculated the appropriate management fees and prepared the fee request, Andrew Franz changed the amounts before submitting the request to the annuity or mutual fund company. In other instances, after the office manager prepared and submitted the legitimate management fee request, Andrew Franz submitted additional fraudulent management fee requests days or weeks later.

9. In some instances, Andrew Franz submitted fee requests that instructed that checks be mailed to his home address instead of Ruby's office address. In addition, Andrew Franz was able to easily intercept management fee checks mailed to Ruby because he was the primary person who opened mail at Ruby and because many checks were addressed "Attn: Andrew Franz."

10. Starting in approximately 2006, George Franz had Andrew Franz begin to take over Ruby's operations. George Franz intended to transfer the business to Andrew Franz, since George Franz expected to retire in the next few years.

11. From 2006 through 2011, George Franz spent approximately four months a year in Florida, where he had a residence. During those months, Andrew Franz was present at Ruby's offices and managed Ruby's daily operations. Even when George Franz was in Ohio, he often worked from home, and let Andrew Franz continue to manage Ruby's daily operations.

12. From at least 2006 through 2011, George Franz had sole supervisory responsibility over Andrew Franz as an associated person of Ruby.

From at least January 2007 through early 2011, George Franz became aware of numerous signs of, and instances of, fraud by Andrew Franz.

13. Andrew Franz's repeated misappropriation of client assets was made possible by George Franz's failure to supervise him or take any action to stop him. From January 2007 through early 2011, George Franz became aware of numerous indications of fraud by Andrew Franz.

14. By January 2007, George Franz was aware that in 2006, Andrew Franz had stolen approximately \$12,500 in management fee checks due to Ruby. In response, George Franz instructed Ruby's tax preparer to issue an IRS form 1099 from the company to Andrew Franz for these stolen funds. George Franz did not disclose this information to Ruby clients or take steps to prevent additional fraud by Andrew Franz.

15. In approximately April 2009, George Franz learned that Andrew Franz had stolen hundreds of thousands of dollars from the Marie Franz Trust, a family trust for which George Franz served as trustee. The trust assets had been invested in mutual funds. George Franz learned that Andrew Franz had caused the mutual fund company to issue checks to Ruby's address or to George Franz's home. Andrew Franz then obtained the checks from Ruby's mail or his father's mailbox.

16. In approximately August 2009, George Franz learned that Andrew Franz had also stolen numerous other management fee checks issued to Ruby. George Franz also learned that Andrew Franz had diverted a large portion of the stolen funds from management fee checks and the trust into Ruby's bank accounts disguised as revenue, in order to conceal Ruby's dwindling income from his father. George Franz never disclosed this information to Ruby clients.

17. In approximately August 2009, George Franz instructed Ruby's accountant and tax preparer to conduct a review of Andrew Franz's personal bank account to determine how much Andrew Franz had stolen and what he did with the stolen funds. George Franz asked for this review because the stolen funds deposited into Ruby's accounts, disguised as legitimate revenue, caused Ruby and George Franz to overreport income and thus to overpay income tax.

18. In or before December 2009, George Franz learned that Andrew Franz had stolen a total of about \$800,000 from the Marie Franz Trust from approximately August 2007 through April 2009, depositing these funds into his personal bank account.

19. In or before December 2009, George Franz also learned that from approximately November 2007 through June 2009, Andrew Franz had diverted a total of approximately \$170,000 in management fee checks issued from securities custodians to Ruby, depositing them into his personal bank account. George Franz did not disclose this information to Ruby clients.

20. In or before December 2009, Ruby's accountant told George Franz that someone should analyze whether the diverted checks withdrawn from client accounts were properly requested (and thus constituted thefts from Ruby) or fraudulently requested (and thus constituted thefts from Ruby clients). George Franz assured the

accountant that he would personally perform this analysis. Some of these checks had been fraudulently requested.

21. In or before December 2009, George Franz learned that from August 2007 through July 2009, Andrew Franz had written checks from his personal bank account to Ruby totaling approximately \$684,000, primarily from the stolen funds. These personal checks were reported as income in Ruby's accounting records, based on misrepresentations by Andrew Franz to Ruby personnel or Ruby's outside accountant.

22. In or before December 2009, George Franz also learned of various other suspicious transactions in Andrew Franz's personal bank account, including a check written to a mutual fund company for "overpayment of fees," various checks to Andrew Franz's company, Wingate, Inc., and checks written directly to Ruby clients.

23. In approximately December 2009, George Franz told Ruby's accountant that he was taking steps to ensure that Andrew Franz did not continue his misconduct. In particular, George Franz told the accountant that Andrew Franz was no longer permitted to touch incoming mail at Ruby and that he was no longer permitted to be involved in any deposits into Ruby's bank accounts. Despite these representations, Andrew Franz continued handling incoming mail at Ruby and making deposits into Ruby's bank accounts without consequence. George Franz did not disclose this information to Ruby clients.

24. Meanwhile, starting in approximately July 2009, George Franz became aware of numerous suspicious problems involving management fee checks withdrawn from Ruby client accounts. George Franz did not disclose this information to Ruby clients.

25. For example, in approximately July or August 2009, George Franz learned that Ruby was receiving management fee checks in the mail, drawn on client accounts, that Ruby had never requested. George Franz learned that some Ruby clients appeared to have been billed twice for management fees for the same quarter, when Ruby had only asked for fees once.

26. In approximately October 2009, George Franz learned that on several occasions, there were management fee checks that had not yet been received by Ruby but had somehow already been cashed according to the mutual fund company. George Franz also learned that Andrew Franz had falsely claimed that the mutual fund company had told him the checks had not yet been cashed. George Franz did not disclose this information to Ruby clients.

27. On numerous occasions in 2010, George Franz learned of other irregularities regarding the management fee billing process and checks drawn on Ruby client accounts.

28. For example, in August 2010, George Franz learned that a total of \$4,732.97 in unauthorized management fee checks had been recently withdrawn from four Ruby client accounts. George Franz also learned that these fee checks had subsequently gone missing. In September 2010, George Franz learned that three of these unauthorized checks had been deposited into Andrew Franz's bank accounts.

29. In October 2010, George Franz wrote checks from Ruby's checking account to these four clients' accounts to reimburse the clients for the \$4,732.97 in total unauthorized fees. On the same day, Andrew Franz wrote a check to Ruby for \$4,732.97. George Franz was aware of this check. Had George Franz not reimbursed these Ruby client accounts, these clients would have been more likely to discover that funds had been stolen. George Franz did not disclose this information to Ruby clients.

30. In January 2011, SEC examination staff conducted an examination of Ruby's offices and operations regarding Andrew Franz's May 2010 forgery of four client signatures on fee requests for the clients' accounts (for fees legitimately owed to Ruby). During this examination, Andrew Franz was present in Ruby's offices and George Franz was at his home in Florida. As part of this examination, George Franz participated in SEC interviews via telephone.

31. During the January 2011 examination, SEC examination staff asked George Franz if he was aware of any potential violations of the securities laws other than Andrew Franz's forgery of the four client signatures in May 2010. George Franz lied, claiming that he was not aware of any other potential violations. In reality, George Franz was aware of numerous other indications of fraud by Andrew Franz, including but not limited to those instances noted in paragraphs 14 through 29 above.

32. From approximately January 2011 through May 2011, George Franz became aware of numerous additional instances of management fee checks withdrawn from Ruby client accounts going missing, and numerous additional instances of Andrew Franz lying about missing management fee checks. George Franz did not disclose this information to Ruby clients.

33. From approximately January 2011 through March 2011, the Financial Industry Regulatory Authority ("FINRA") made attempts to schedule an "On the Record Interview" ("OTR") of Andrew Franz in connection with irregularities FINRA had discovered as part of their oversight of Andrew Franz's associated broker-dealer.

FINRA scheduled an OTR for Andrew Franz for March 4, 2011, but he did not appear. As a result, Andrew Franz's broker-dealer promptly terminated him. After George Franz learned this, he failed to disclose it to clients or remove Andrew Franz as the listed broker on Ruby's client accounts until many months later.

34. Andrew Franz finally appeared for a FINRA OTR on April 7, 2011 and admitted to numerous instances of fraud and theft from Ruby clients. On May 2, 2011, Andrew Franz signed an Acceptance, Waiver, and Consent ("AWC") with FINRA, in which he acknowledged some of his misconduct and consented to being barred from association with any FINRA broker-dealer. This AWC was accepted by FINRA on May 24, 2011.

35. On April 29, 2011, George Franz informed Andrew Franz that he was terminated from Ruby as of May 31, 2011, after which he would not be allowed entry into Ruby's offices. Andrew Franz continued to come in to the office and conduct Ruby business until approximately July 2011, without consequence.

36. Between April 29, 2011 and May 31, 2011, Andrew Franz misappropriated another \$15,000 from two Ruby clients. In June and July 2011, Andrew Franz misappropriated another nearly \$60,000 from one Ruby client.

Respondents took no steps to prevent further thefts by Andrew Franz.

37. At all relevant times, George Franz was the Chief Compliance Officer of Ruby. However, George Franz and Ruby failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act.

38. George Franz and Ruby failed to adopt written policies and procedures reasonably designed to prevent violations, even after learning that Andrew Franz had, among other things, stolen Ruby client funds. During the time that Andrew Franz worked at Ruby, the firm had no procedures reasonably designed to prevent violations of the Advisers Act in connection with the withdrawal of advisory client funds. Moreover, there were no compliance reviews of associated persons of Ruby or of Ruby's compliance procedures until January 2012.

39. Respondents owed a fiduciary duty to all Ruby clients to act in their best interest. Despite George Franz's knowledge of Andrew Franz's thefts, including but not limited to the instances described above, he did not disclose these issues to Ruby clients or take any meaningful steps to protect client assets from further thefts until at least approximately May 2011.

40. Until at least approximately May 2011, Respondents did not: (A) remove Andrew Franz and deny him access to Ruby's offices; (B) remove Andrew Franz's access to client accounts; (C) remove Andrew Franz as broker of record on client accounts; (D) inform securities custodians for client accounts to not accept instruction from Andrew Franz on behalf of client accounts; or (E) adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act specific to Andrew Franz's means of committing fraud.

41. After Andrew Franz was terminated from his broker dealer and barred from association with any FINRA broker-dealer, George Franz – to ensure that Ruby was paid its management fees – caused Andrew Franz's signature stamp to be used on management fee requests to securities custodians.

**George Franz failed to inform Ruby clients that
Andrew Franz had stolen from their accounts.**

42. On numerous occasions, George Franz became aware that Andrew Franz had caused fraudulent withdrawals out of numerous client accounts and misappropriated the stolen funds. Rather than disclose to clients that Andrew Franz had stolen from their securities accounts, George Franz instead concealed the thefts by secretly replenishing the victim clients' accounts. For example, from October 2010 through April 2012, George Franz wrote 7 checks totaling approximately \$28,000 into the accounts of 22 different Ruby clients.

**George Franz lied to Ruby clients about Andrew Franz's thefts
and Ruby's repayments of those stolen funds.**

43. From approximately May 2011 through approximately July 2013, George Franz affirmatively misrepresented to numerous Ruby clients that Andrew Franz had not taken any funds from Ruby clients. He knew that was false.

44. George Franz told certain victims that the withdrawals from their accounts were due to mistake, but he knew they had been taken intentionally by Andrew Franz. For example, Andrew Franz issued quarterly management fee requests eleven times during 2010 for the account of one Ruby client ("Client A"), diverting \$13,552 in fraudulent fee payments into his personal bank account. George Franz learned in March 2011 that these funds were taken fraudulently.

45. In approximately late March 2011, George Franz falsely told Client A that Andrew Franz had mistakenly caused the \$13,552 to be withdrawn from her account, and that the client's account was being reimbursed. George Franz knew that Andrew

Franz had intentionally caused the withdrawals. On March 30, 2011, George Franz mailed a check for \$13,552 from Ruby's bank account to the securities custodian for Client A's account, instructing that the funds be deposited into the client's account. That same day, Andrew Franz obtained a cashier's check from his bank payable to George Franz for \$13,552, reimbursing him for the funds repaid to Client A's account.

46. From at least 2007 through at least July 2013, George Franz also made numerous other material misrepresentations and omissions to Ruby clients regarding, among other things, Andrew Franz's fraud, George Franz's knowledge of that fraud, and the actions George Franz took after learning of that fraud.

During the SEC's August 2011 examination, George Franz lied to SEC examination staff about what he knew and when he knew it.

47. During the first week of August 2011, SEC examination staff conducted an examination of Ruby in connection with the misconduct uncovered by FINRA and its action against Andrew Franz, including Andrew Franz's thefts from Client A and other Ruby clients in 2010 and early 2011. During this examination, the SEC interviewed George Franz.

48. George Franz told SEC examination staff that he first learned of any potential misconduct by Andrew Franz (other than thefts from the Marie Franz Trust and the four forged client signatures in May 2010) in early 2011. George Franz also told SEC examination staff that once he learned of this misconduct, he immediately fired Andrew Franz from Ruby. These were lies.

49. During the August 2011 examination, the SEC examination staff interviewed George Franz regarding instances of fraud by Andrew Franz that were known to the SEC staff at the time. The SEC examination staff asked George Franz if he was aware of any other potential violations of the securities laws. George Franz said he was not. This was not true; he was aware of numerous other indications of fraud by Andrew Franz, including but not limited to the instances noted in paragraphs 14 through 46 above.

After the SEC's August 2011 examination and during the early stages of the SEC's subsequent investigation, George Franz destroyed evidence of Andrew Franz's thefts by shredding numerous Ruby Corporation records.

50. In mid-August 2011, George Franz and his attorney met with SEC enforcement and examination staff to discuss the SEC's investigation, which at that time had only involved instances of fraud by Andrew Franz in 2010 and 2011. During this

meeting, the SEC staff told George Franz that he had a fiduciary responsibility to Ruby clients and an obligation to investigate Andrew Franz's thefts to determine the full extent of his fraud. The SEC staff told George Franz that – at a minimum – he should investigate the prior five years of transactions, such as via a forensic accounting, to identify any additional thefts by Andrew Franz. The SEC staff also told George Franz that the SEC would continue to investigate Andrew Franz's fraud, including potential fraud prior to 2010.

51. At all relevant times, Ruby was obligated under Section 204(a) of the Investment Advisers Act of 1940 and Rule 204-2 thereunder to maintain and preserve all books and records relating to Ruby's operations, including revenue, for a total of five years after the end of the year to which the record relates. As of November 2011, Ruby was obligated to maintain and preserve all such books and records for the time frame January 1, 2006 through November 2011.

52. In November 2011, George Franz knowingly caused numerous Ruby documents to be shredded. Such records contained important evidence of Andrew Franz's thefts before 2010.

53. George Franz was aware that Ruby's records for the time period prior to 2010 contained evidence of additional fraud by Andrew Franz, as well as evidence of George Franz's knowledge of Andrew Franz's fraud prior to 2010. On various occasions in 2008 and 2009, Ruby's former office manager informed George Franz of these instances of potential fraud by Andrew Franz as she became aware of them, and showed George Franz documents reflecting such fraud.

**George Franz commissioned a sham "audit" that he
used to mislead numerous Ruby clients.**

54. From September 2011 through August 2012, Respondents engaged an accounting firm to perform an agreed-upon procedures engagement regarding management fees charged by Ruby ("engagement"), supposedly in an effort to identify all instances of misappropriation by Andrew Franz. This engagement was commissioned in response to the SEC's discussions with George Franz in mid-August 2011, as described in paragraph 50 above.

55. This engagement was not an audit, as explicitly stated in the final report. Rather, this engagement simply consisted of specified procedures, and included no attestation by the accounting firm as to whether Ruby clients were defrauded or overbilled.

56. George Franz knew that these procedures were unlikely to uncover the types of transactions by which Andrew Franz typically misappropriated funds from Ruby clients. For example, the engagement only covered the time period of January 1, 2010 through June 30, 2011. Moreover, George Franz substantially misled the accounting firm and withheld information material to their analysis to avoid detection of the extent of Andrew Franz's thefts. For example, George Franz provided the accounting firm with a fraudulently altered check and lied to the accounting firm about the check's purpose. As a result, the vast majority of Andrew Franz's fraud was not identified in the engagement. George Franz thus knew that the engagement was a sham.

57. Despite knowledge of the above facts and the sham nature of the exercise, George Franz told numerous Ruby clients that "an audit" had been performed of all Ruby client accounts. George Franz misled numerous Ruby clients, causing them to believe that if they had not been identified as a victim of in the "audit," they could rest assured that they had not been stolen from. George Franz even falsely told clients who he knew were victims of Andrew's fraud that they had not been victims.

During the Division's investigation, Respondents provided fabricated documents to the Division.

58. During a September 11, 2012 investigative testimony, George Franz testified that he had, either verbally or in writing, informed all known victims of Andrew Franz's fraud that they had been victimized.

59. In November 2012, in response to SEC subpoenas, Respondents produced to the SEC letters from George Franz to four Ruby clients who had funds stolen by Andrew Franz and whose accounts were later reimbursed by Ruby. These four letters stated that Andrew Franz had stolen the clients' funds and that the amounts were being repaid by Ruby. Three of these letters referenced specific conversations between George Franz and the client regarding Andrew Franz's misconduct.

60. None of these four clients ever received these letters, and the conversations referenced in three of the letters never took place.

61. In addition to these four letters, Respondents produced to the SEC a letter to another client ("Client B") that the client never received. In an April 14, 2011 letter, Client B complained to George Franz that in March 2010 her account had been transferred out of an existing variable annuity without her consent, causing an approximately \$6,000 early surrender charge to the account. In her complaint letter, Client B told George Franz that throughout 2010, Andrew Franz had repeatedly lied to

her about the surrender charge, falsely claiming it was a mistake that would be repaid.

62. In her complaint letter to George Franz, Client B threatened to report the matter to FINRA and the SEC if George Franz did not reimburse her for the surrender charge. In a response letter on April 29, 2011, George Franz claimed that in March 2010 he had previously informed Client B of the surrender charge, that he had thereafter sent Client B a letter disclosing the charge, and that the client had agreed to the account transfer despite being aware of the surrender charge. These were lies.

63. In reality, Andrew Franz had forged Client B's signature on the account transfer form. Client B never received the March 2010 disclosure letter, nor did she participate in any March 2010 meeting. George Franz simply fabricated a story in which Client B – with full knowledge of the surrender charge – had consented to the account transfer. He then fabricated a letter to support that story. George Franz took these steps to protect Andrew Franz and Ruby from a potential FINRA or SEC investigation as a result of Client B's complaint.

64. Client B's April 14, 2011 complaint letter, George Franz's April 29, 2011 response letter, and the fabricated March 2010 letter were produced to the SEC pursuant to subpoena as part of Client B's client file maintained at Ruby.

65. These five fabricated letters were not the only times that George Franz "papered the file" with fabricated letters to clients in order to defend against claims that he lied or withheld material facts. In 2004 and 2005, George Franz told three potential clients that Ruby only received a fee if the clients' securities account managed by Ruby gained in value, and that Ruby's fee would be a percentage of that gain. This was false; Ruby was paid 2% of the clients' portfolio value each year regardless of whether the account gained or lost value. A year later, after the clients complained about these undisclosed fees, George Franz claimed that he previously disclosed these fees, and specifically cited two letters he supposedly wrote to the clients. The clients never received these letters.

George Franz lied under oath during the investigation.

66. During investigative testimony before the SEC enforcement staff, George Franz lied under oath on numerous occasions.

67. For example, during investigative testimony on September 11, 2012, George Franz testified that he had disclosed to all known victims of Andrew Franz's fraud the fact that they had been victims of misappropriation from their accounts. This testimony was false.

68. Further, during investigative testimony on March 6, 2013, George Franz testified that he had mailed the letters referenced in paragraphs 59 through 63 above, and that he had made the disclosures to clients referenced in those letters. This testimony was false.

Respondents filed a false SEC Form ADV Part II.

69. On or around April 16, 2012, Ruby filed a Form ADV Part II (dated November 30, 2011), disclosing that Andrew Franz was a former associated person of Ruby, but was removed from the firm because he had consented to a FINRA bar based on allegations of misappropriation, and stating, in Item 9:

[Andrew] Franz: (1) misappropriated funds belonging to Ruby Corporation and its clients in violation of NASD Conduct Rule 2110 and (2) forged an investor's signature and misappropriated his funds in violation of FINRA Rule 2010. This conduct was unknown to George B. Franz III and Ruby Corporation.

70. This Form ADV Part II was filed with the Commission and provided to Ruby clients.

71. The claim that "this conduct was unknown to George B. Franz III and Ruby Corporation" was false at the time this Form ADV Part II was filed. At the time this form was filed, George Franz knew that this claim was false.

D. VIOLATIONS

1. As a result of the conduct described above, Andrew Franz violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with any purchase or sale of security.

2. As a result of the conduct described above, Andrew Franz violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

3. As a result of the conduct described above, George Franz and Ruby Corporation failed reasonably to supervise Andrew Franz.

4. As a result of the conduct described above, Ruby Corporation willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

5. As a result of the conduct described above, George Franz and Ruby Corporation willfully violated Sections 206(1) and (2) of the Advisers Act.

6. As a result of the conduct described above, George Franz willfully aided and abetted and caused Andrew Franz's and Ruby Corporation's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and 206(2) of the Advisers Act.

7. As a result of the conduct described above, Ruby Corporation willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which among other things require that investment advisers registered with the Commission adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act.

8. As a result of the conduct described above, George Franz willfully aided and abetted and caused Ruby Corporation's violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

9. As a result of the conduct described above, Ruby Corporation willfully violated Section 204(a) of the Advisers Act and Rule 204-2 thereunder, which require that investment advisers registered with the Commission maintain and preserve certain books and records.

10. As a result of the conduct described above, George Franz willfully aided and abetted and caused Ruby Corporation's violation of Section 204(a) of the Advisers Act and Rule 204-2 thereunder.

11. As a result of the conduct described above, Ruby Corporation willfully violated Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

12. As a result of the conduct described above, George Franz willfully violated, and aided and abetted and caused Ruby Corporation's violation of, Section 207 of the Advisers Act.

III.

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

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

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

C. What, if any, remedial action is appropriate in the public interest against Respondents George Franz and Ruby Corporation pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

D. Whether, pursuant to Section 21C of the Exchange Act and Section 203(k) of the Advisers Act, Respondents George Franz and Ruby Corporation should be ordered to cease and desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Sections 206(1) and 206(2) of the Advisers Act, Section 204(a) of the Advisers Act and Rule 204-2 thereunder, Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, and Section 207 of the Advisers Act.

IV.

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

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

If any Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against that Respondent 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 mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.360.

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. 70534 / September 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15527

In the Matter of

ALAN FERRARO,

Respondent.

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 1997 until 2006, Ferraro was a registered representative associated with Joseph Stevens & Company, Inc., a broker-dealer registered with the Commission at the time. Respondent, 43 years old, is a resident of Manalapan, New Jersey.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On June 22, 2012, Respondent pled guilty to one count of grand larceny in the third degree in violation of New York Penal Law Section 155.35. *People v. Joseph Stevens & Co., Inc., et al.*, Case No. 02394-2009 (N.Y. Ct. App. June 22, 2012). Respondent was sentenced on the same day to three years' probation, 70 hours of community service, and he was ordered to make restitution in the amount of \$201,572.

3. In connection with his guilty plea, Respondent admitted that from 1997 until 2006, he participated in a firm-wide scheme while he was associated with Joseph Stevens & Company, Inc., a broker-dealer registered with the Commission at the time, to generate and charge customers excessive and undisclosed commissions in connection with the purchase and sale of securities.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness

or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70536 / September 27, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15528

In the Matter of

Universal Travel Group,

Respondent.

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

I.

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

II.

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

III.

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

1. UTG (CIK No. 0001336644) is a Nevada corporation headquartered in Shenzhen, People's Republic of China ("China"). UTG's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and was listed and traded on the New York Stock Exchange, until UTG voluntarily delisted its stock on April 26, 2012. Subsequent to the

70 of 90

delisting, UTG common stock has had no market makers and has been quoted on an unsolicited basis in the over the counter market.

2. UTG has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended September 30, 2011.

IV.

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Aguilar
Disapproved*

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230 and 239

Release No. 33-9458; Release No. 34-70538; Release No. IC-30737; File No. S7-06-13

RIN 3235-AL46

Re-opening of Comment Period for Amendments to Regulation D, Form D and Rule 156

AGENCY: Securities and Exchange Commission.

ACTION: Re-opening of comment period.

SUMMARY: On July 10, 2013, the Securities and Exchange Commission issued for comment a number of proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act in Release No. 33-9416 (July 10, 2013) [78 FR 44806 (July 24, 2013)]. In light of the public interest in the proposed amendments, the Commission is re-opening the comment period to permit interested persons additional time to analyze and comment on the proposed amendments.

DATES: The comment period is re-opened until [insert date that is 30 days after publication in the Federal Register].

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an email to rule-comments@sec.gov. Please include File Number S7-06-13 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

7/16/13

Paper comments:

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

All submissions should refer to File Number S7-06-13. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Charles Kwon, Special Counsel, Office of Chief Counsel, or Karen C. Wiedemann, Attorney Fellow, Office of Small Business Policy, Division of Corporation Finance, at (202) 551-3500; or, with respect to private funds, Melissa Gainor or Alpa Patel, Senior Counsels, Investment Adviser Regulation Office, Division of Investment Management, at (202) 551-6787, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

In July 2013, the Commission issued for comment a number of proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act.¹ These proposed amendments are

¹ See Amendments to Regulation D, Form D and Rule 156, Release No. 33-9416 (July 10, 2013) [78 FR 44806 (July 24, 2013)].

intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation and general advertising under new paragraph (c) of Rule 506. Specifically, the proposed amendments to Regulation D would require the filing of a Form D in Rule 506(c) offerings before the issuer engages in general solicitation; require the filing of a closing amendment to Form D after the termination of any Rule 506 offering; require written general solicitation materials used in Rule 506(c) offerings to include certain legends and other disclosures; require the submission, on a temporary basis, of written general solicitation materials used in Rule 506(c) offerings to the Commission; and disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering. The proposed amendments to Form D would require an issuer to include additional information about offerings conducted in reliance on Regulation D. Finally, the proposed amendments to Rule 156 would extend the antifraud guidance contained in the rule to the sales literature of private funds.

II. Re-opening of Comment Period

The proposed amendments have generated a large amount of public interest. The Commission believes that providing the public additional time to consider thoroughly the matters addressed by the release and comments submitted to date and to submit comprehensive responses would benefit the Commission in its consideration of final rules. The Commission, therefore, is re-opening the comment period for "Amendments to Regulation D, Form D and

Rule 156" (Release No. 33-9416 (July 10, 2013)) [78 FR 44806 (July 24, 2013)] until [insert date that is 30 days after publication in the Federal Register].

By the Commission.

A handwritten signature in cursive script that reads "Elizabeth M. Murphy".

Elizabeth M. Murphy
Secretary

September 27, 2013

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70536 / September 27, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15528

In the Matter of

Universal Travel Group,

Respondent.

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

I.

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

II.

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

III.

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

1. UTG (CIK No. 0001336644) is a Nevada corporation headquartered in Shenzhen, People's Republic of China ("China"). UTG's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and was listed and traded on the New York Stock Exchange, until UTG voluntarily delisted its stock on April 26, 2012. Subsequent to the

72 of 90

delisting, UTG common stock has had no market makers and has been quoted on an unsolicited basis in the over the counter market.

2. UTG has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended September 30, 2011.

IV.

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


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

*Commissioner Kingma
Disapproved*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70549 / September 27, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3496 / September 27, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15530

In the Matter of

SCOTT LONDON, CPA,

Respondent.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Scott London, CPA ("Respondent" or "London") pursuant to Sections 4C¹ and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 102(e)(1)(ii) and 102(e)(1)(iii) of the Commission's Rules of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. SUMMARY

These proceedings involve multiple auditor independence rule violations by an accountant, London, who accepted cash and other things of value as compensation for tips he provided to a friend concerning five audit clients. On at least 18 occasions between October 2010 and February 2013, Respondent, a partner at KPMG LLP ("KPMG") disclosed material non-public information concerning five of KPMG's corporate clients to Bryan Shaw ("Shaw"), who traded in the companies' securities prior to several corporate announcements. KPMG issued audit reports to and reviewed quarterly financial statements for the five corporate clients in connection with and following these announcements. The clients filed with the Commission annual reports, quarterly reports, as well as proxy or information statements which incorporated financial statements. Respondent's conduct caused KPMG to violate the independence rules with respect to the five clients. These violations in turn caused the five clients to make filings with the Commission that did not comply with the issuers' reporting requirements. After KPMG learned of Respondent's conduct, it resigned from two audit engagements, withdrew previously issued audit reports for these clients, and withdrew reports on the effectiveness of their internal control over financial reporting.

B. RESPONDENT

Scott London, age 50, of Agoura Hills, California, is a certified public accountant licensed to practice in the states of California and Nevada. London was employed at KPMG LLP and its predecessor, KPMG Peat Marwick LLP ("KPMG") from 1984 until his termination on April 5, 2013. During the time period relevant to this proceeding, London was the Partner-in-Charge of KPMG's Pacific Southwest business unit audit practice that served clients in California, Arizona and Nevada, and was the Lead Audit Engagement Partner on the Herbalife, Ltd. ("Herbalife") and Skechers USA, Inc. ("Skechers") engagements. London also served as the Account Executive for Deckers Outdoor Corp. ("Deckers") from 2009 through the 2011 audit engagement period. Due to his position at the firm, London routinely had access to material non-public information regarding many of KPMG's audit clients.

C. FACTS

1. Affected Issuers

a) Herbalife, Ltd. ("Herbalife") is a Cayman Islands corporation headquartered in the Cayman Islands, with corporate offices in Los Angeles, California. During the time period relevant to this proceeding, Herbalife's stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and traded on the New York Stock Exchange. KPMG was Herbalife's auditor during the time period relevant to this proceeding. On April 9, 2013, Herbalife filed a Form 8-K announcing that KPMG resigned as its auditor on April 8, 2013. The Form 8-K stated that KPMG "concluded it was not independent because of alleged insider trading in [Herbalife's] securities by one of KPMG's former partners, who until April 5, 2013, was the KPMG engagement partner on [Herbalife's] audit." As a result, the Form 8-K disclosed, "KPMG notified [Herbalife] its independence has been impaired and [it] had no option but to withdraw its audit report on [Herbalife's] financial statements for the fiscal years ended December 31, 2010, 2011 and 2012 and the effectiveness of internal control over financial reporting as of December 31, 2010, 2011 and 2012. . . ."

b) Skechers USA, Inc. ("Skechers") is a Delaware corporation headquartered in Manhattan Beach, California. During the time period relevant to this proceeding, Skechers' stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and traded on the New York Stock Exchange. KPMG was Skechers' auditor during the time period relevant to this proceeding. On April 10, 2013, Skechers filed a Form 8-K announcing that KPMG resigned as its auditor on April 8, 2013. The Form 8-K stated that KPMG "concluded it was not independent because of alleged insider trading in [Skechers'] securities by one of KPMG's former partners who was the KPMG engagement partner on [Skechers'] audit for the 2011 and 2012 fiscal years." As a result, the Form 8-K disclosed, "KPMG notified [Skechers] its independence has been impaired and it had no option but to withdraw its audit report on [Skechers'] financial statements for the fiscal years ended December 31, 2011 and 2012 and the effectiveness of internal control over financial reporting as of December 31, 2011 and 2012. . . ."

c) Deckers Outdoor Corp. ("Deckers") is a Delaware corporation headquartered in Goleta, California. During the time period relevant to this proceeding, Deckers' stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and traded on the Nasdaq Global Select Market. KPMG was Deckers' auditor during the relevant time period.

d) RSC Holdings, Inc. ("RSC Holdings") was a Delaware corporation headquartered in Scottsdale, Arizona. During the time period relevant to this proceeding, RSC Holdings' stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its shares were traded on the New York Stock Exchange. On May 15, 2012, RSC Holdings filed a Form 15 terminating its securities registration with the Commission pursuant to Rules 12g-4(a)(1) and 12h-3(b)(1)(i) of the Exchange Act. KPMG was RSC Holdings' auditor during the relevant time period.

e) Pacific Capital Bancorp. ("Pacific Capital") was a Delaware corporation and a bank holding company headquartered in Santa Barbara, California. During the time period relevant to this proceeding, Pacific Capital's stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its shares were traded on The Nasdaq Stock Market. On December 19, 2012, Pacific Capital filed a Form 15 terminating its securities registration with the Commission pursuant to Rules 12g-4(a)(1) and 12h-3(b)(1)(i) of the Exchange Act. KPMG was Pacific Capital's auditor during the relevant time period.

2. **Lack of Independence**

a) KPMG is a Delaware limited liability partnership and the U.S. member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative, a Swiss entity. KPMG is registered with the Public Company Accounting Oversight Board ("PCAOB"). At all relevant times and continuing to the present, KPMG has provided auditing services to a variety of companies, including companies whose securities are registered with the Commission and traded in the U.S. markets.

b) During the time period relevant to this proceeding, KPMG performed annual audits and quarterly reviews of financial statements for Herbalife, Skechers, Deckers, RSC Holdings, and Pacific Capital (collectively, the "Audit Clients").

c) During the time period relevant to this proceeding, London was KPMG's Lead Audit Engagement Partner on the Herbalife and Skechers engagements. London was also KPMG's Partner-in-Charge of the firm's Pacific Southwest business unit audit practice that served each of the above-referenced Audit Clients. As the Partner-in-Charge, London was responsible for the financial performance of the audit practice, and involved in the annual client continuance process with respect to all audit clients of the Pacific Southwest business unit. London was also responsible for assigning the Lead Audit Engagement Partners in the Pacific Southwest business unit (including the Lead Audit Engagement Partners for Deckers and RSC Holdings during the relevant period). London evaluated the performance of, and provided input into, the compensation decisions for most of the audit partners in the business unit. Specifically, he evaluated the Lead Audit Engagement Partners for audits and interim reviews of Deckers' and RSC Holdings' annual and quarterly financial statements during the relevant period. London further served as the Account Executive for Deckers from 2009 through the 2011 audit engagement period.

d) London provided Shaw with material non-public information that London received in the course of his employment with KPMG, concerning financial results, earnings, guidance and/or merger announcements by the Audit Clients, with the knowledge or belief that Shaw intended to use the information to trade in the companies' securities in advance of the following public announcements:

Issuer	Date	Event
Deckers	10/28/10	Financial results for fiscal third quarter
Herbalife	11/1/10	Financial results for fiscal third quarter
Skechers	2/16/11	Financial results for fiscal fourth quarter and year end
Herbalife	2/22/11	Financial results for fiscal fourth quarter and year end
Skechers	4/27/11	Financial results for fiscal first quarter
Herbalife	5/2/11	Financial results for fiscal first quarter
Skechers	7/27/11	Financial results for fiscal second quarter
Herbalife	8/1/11	Financial results for fiscal second quarter
Skechers	10/26/11	Financial results for fiscal third quarter
Deckers	10/27/11	Financial results for fiscal third quarter
RSC Holdings	12/15/11	Agreement to be acquired by United Rentals, Inc.
Skechers	2/15/12	Financial results for fiscal fourth quarter and year end
Herbalife	2/21/12	Financial results for fiscal fourth quarter and year end
Deckers	2/23/12	Financial results for fiscal fourth quarter and year end
Pacific Capital	3/9/12	Agreement to be acquired by UnionBanCal Corporation
Deckers	4/26/12	Financial results for fiscal first quarter
Herbalife	2/19/13	Financial results for fiscal fourth quarter and year end
Deckers	2/28/13	Financial results for fiscal fourth quarter and year end

e) London accepted cash and other valuable items, including jewelry, concert tickets and a Rolex Daytona Cosmograph, as compensation for the inside information he provided to Shaw.

f) London knew that passing material non-public information to Shaw was wrong and understood that KPMG explicitly prohibited employees from disclosing inside information regarding clients.

g) KPMG represented that it was independent and had conducted audits "in accordance with the standards of the Public Company Accounting Oversight Board (United States)" in each Report of Independent Registered Public Accounting Firm ("audit reports") it provided to the Audit Clients, for the years listed below:

- (1) Herbalife for its fiscal years ended December 31, 2010, 2011 and 2012.
- (2) Deckers for its fiscal years ended December 31, 2010, 2011 and 2012.
- (3) Skechers for its fiscal years ended December 31, 2010, 2011 and 2012.
- (4) RSC Holdings for its fiscal year ended December 31, 2011.
- (5) Pacific Capital for its fiscal year ended December 31, 2011.

h) KPMG conducted interim reviews of financial statements for Herbalife and Deckers for the quarter ended September 30, 2010. KPMG also conducted interim reviews of financial statements for Herbalife, Deckers and Skechers for the quarters ended March 31, June 30, and September 30, in the fiscal years ended December 31, 2011 and 2012. Additionally, KPMG

conducted interim reviews of financial statements for Pacific Capital for the quarters ended March 31, June 30, and September 30, 2012.

i) KPMG represented to each of the Audit Clients during the affected periods that it was “independent” within the meaning of the federal securities laws and therefore able to serve as each client’s external auditor. These written confirmations did not disclose London’s receipt of compensation in exchange for providing inside information to Shaw concerning the Audit Clients as detailed above.

j) The Audit Clients filed with the Commission annual financial statements that included KPMG’s audit reports on Forms 10-K. The Audit Clients, additionally, filed with the Commission quarterly financial statements that had been reviewed by KPMG on Forms 10-Q.

k) RSC Holdings also filed a proxy statement which incorporated by reference a Form 10-K filed for the fiscal year ended December 31, 2011, that contained KPMG’s audit report. Pacific Capital, similarly, filed a Schedule 14C information statement with the Commission that incorporated by reference a Form 10-K filed for the fiscal year ended December 31, 2011, that contained KPMG’s audit report.

3. Violations

a) Rule 2-01 of Regulation S-X codifies accountant qualification requirements, and Rule 2-01(b) articulates the general standard of auditor independence. Preliminary Note 3 to Rule 2-01 states that the Commission will consider all relevant facts and circumstances in determining whether an accountant is independent. Rule 2-01(b) provides that “[t]he Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant’s engagement.”

b) Rule 2-01(c)(1) of Regulation S-X provides in pertinent part that “[a]n accountant is not independent if, at any point during the audit and professional engagement period, the accountant has a direct financial interest or a material indirect financial interest in the accountant’s audit client. . .” Similarly, the professional independence standards for accountants and auditors, as set forth in AICPA ET Rule 101.02, and adopted by the PCAOB as its interim ethical standards under Rule 3600T, state, in part, that “[i]ndependence shall be considered to be impaired if during the period of the professional engagement a covered member had . . . any direct or material indirect financial interest in the client. . . .”

c) Rule 2-01(f)(11) of Regulation S-X defines covered persons to include partners, principals, shareholders, and employees of an accounting firm who are on the “audit engagement team” or in the “chain of command,” as well as any other partner, principal, or shareholder from an “office” of the accounting firm in which the lead audit engagement partner primarily practices in connection with the audit. Rule 2-01(f)(7)(i), in turn, defines the “audit engagement team” as including “all partners . . . participating in an audit, review, or attestation engagement of an audit client, including audit partners. . . .”; Rule 2-01(f)(7)(ii) defines the “audit

partner” as including the “lead or coordinating audit partner having primary responsibility for the audit or review”; and Rule 2-01(f)(8) provides that persons in the “chain of command” include individuals who “(i) [s]upervise or have direct management responsibility for the audit, including at all successive senior levels through the accounting firm’s chief executive; (ii) [e]valuate the performance or recommend the compensation of the audit engagement partner; or (iii) [p]rovide quality control or other oversight of the audit.”

d) London was a covered person as to all of the Audit Clients during the relevant period. London was the Lead Audit Engagement Partner on the Herbalife and Skechers engagements, and in the chain of command with respect to each of the Audit Clients as a result of his role as the partner in charge of KPMG’s Pacific Southwest business unit audit practice.

e) London had prohibited financial interests in the Audit Clients, as a result of his receipt of cash and other valuable consideration in exchange for the material non-public information he provided Shaw concerning financial results, earnings, guidance and/or merger announcements that London either knew or believed Shaw intended to use to trade in the companies’ securities prior to public announcements. London therefore lacked independence with respect to the Audit Clients under Rules 2-01(b) and (c)(1) of Regulation S-X, PCAOB Rule 3600T, and AICPA ET Rule 101.02.

f) Rule 2-02(b)(1) of Regulation S-X requires accountants’ reports to state “whether the audit was made in accordance with generally accepted auditing standards.” “[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS or to specific standards under GAAS, as they relate to issuers, should be understood to mean the standards of the PCAOB plus any applicable rules of the Commission.” SEC Release No. 34-49708. Thus, an auditor violates Rule 2-02(b)(1) of Regulation S-X if it issues a report stating that it had conducted its audit in accordance with PCAOB standards when it had not.

g) As a result of London’s conduct described above, KPMG violated Rule 2-02(b)(1) of Regulation S-X. KPMG’s audits and interim reviews of the Audit Clients’ financial statements were not conducted in accordance with PCAOB standards because London, a covered person in KPMG, lacked independence as to the Audit Clients. As a result of his conduct, London willfully aided and abetted and caused KPMG’s violation of Rule 2-02(b)(1) of Regulation S-X.

h) KPMG’s failure to comply with Rule 2-02(b)(1) of Regulation S-X in turn caused the Audit Clients to file annual reports with the Commission on Forms 10-K that failed to include independently audited financial statements as required by Exchange Act Section 13(a) and Rule 13a-1 thereunder. KPMG’s lack of independence, additionally, caused the Audit Clients to file interim financial statements on Forms 10-Q, pursuant to Rule 13a-13 under the Exchange Act, that had not been reviewed by an independent public accountant prior to filing, as required under Rule 10-01(d) of Regulation S-X. As a result of his conduct, London willfully aided and abetted and caused the Audit Clients’ violations of Section 13(a) of the Exchange Act, and Rules 13a-1 and 13a-13 thereunder during the aforementioned fiscal years.

i) KPMG’s failure to comply with Rule 2-02(b)(1) of Regulation S-X also caused the Audit Clients to file proxy or information statements on Schedules 14A and 14C that

failed to comply with the requirements of Sections 14(a) and 14(c) of the Exchange Act and Rules 14a-3 and 14c-2 thereunder. Specifically, the proxy statements filed by the Audit Clients in connection with annual meetings of shareholders were neither accompanied nor preceded by audited financial statements prepared in accordance with Regulation S-X, as required pursuant to Rules 14a-3 and 14c-2. Furthermore, the proxy statement filed by RSC Holdings and the information statement filed by Pacific Capital in connection with the announced acquisitions incorporated each company's Form 10-K containing KPMG's improperly issued audit report. As a result of his conduct, London willfully aided and abetted and caused the Audit Clients' violations of Section 14(a) and 14(c) of the Exchange Act and Rules 14a-3 and 14c-2 thereunder.

j) As a result of the conduct described above, London engaged in improper professional conduct. For accountants, improper professional conduct includes "intentional or knowing conduct, including reckless conduct that results in a violation of applicable professional standards." Rule 102(e)(1)(iv)(A). London intentionally and knowingly violated a duty of trust and confidence owed to KPMG and the Audit Clients when he tipped Shaw while a covered person and thus failed to comply with Rules 2-01(b) and (c)(1) of Regulation S-X, and violated PCAOB Rule 3600T and AICPA ET Rule 101.02.

4. Findings

a) Based on the foregoing, the Commission finds that London (a) willfully aided and abetted and caused KPMG's violations of Rule 2-02(b)(1) of Regulation S-X; and (b) willfully aided and abetted and caused the Audit Clients' violations of Sections 13(a), 14(a) and 14(c) of the Exchange Act, and Rules 13a-1, 13a-13, 14a-3 and 14c-2 promulgated thereunder.

b) Based on the foregoing, the Commission finds that London engaged in improper professional conduct pursuant to Rules 102(e)(1)(ii) and 102(e)(1)(iii) of the Commission's Rules of Practice.

IV.

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

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

A. London shall cease and desist from committing or causing any violations and any future violations of Sections 13(a), 14(a) and 14(c) of the Exchange Act and Rules 13a-1, 13a-13, 14a-3 and 14c-2 promulgated thereunder, and of Rule 2-02(b)(1) of Regulation S-X.

B. London is denied the privilege of appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 9459 / September 27, 2013

SECURITIES EXCHANGE ACT OF 1934

Release No. 70547 / September 27, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15529

In the Matter of

COMMONWEALTH INCOME
& GROWTH FUND, INC. and
KIMBERLY SPRINGSTEEN-
ABBOTT,

Respondents.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Commonwealth Income & Growth Fund, Inc. ("CIGF") and Kimberly Springsteen-Abbott ("Springsteen-Abbott") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act and Section 21C of the

74 of 90

Exchange Act, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

From 2006 through 2011, CIGF made misleading disclosures concerning the expenses that it charged to nine equipment leasing funds that were sponsored by CIGF's parent company (the "Commonwealth Funds" or the "Funds"). CIGF represented in the Funds' offering documents, which were reviewed and approved by its chief executive officer ("CEO") Springsteen-Abbott, that the salary expenses of CIGF's and its parent's "Controlling Persons" would not be charged to the Funds. The offering documents describe ten to fifteen individuals for each Fund that serve as directors or executive and senior management for CIGF and its parent. The offering documents further describe the various functions and activities of these individuals and refer to them as CIGF's key management and the persons responsible for making all of the Funds' investment decisions.

CIGF and Springsteen-Abbott negligently failed to disclose that she was the sole Controlling Person under their interpretation of the definition and that CIGF and its corporate parent routinely expensed a portion of the salaries of all other employees, executive officers, and directors to the Commonwealth Funds. Each Fund's documentation and each public Funds' Forms 10-K and 10-Q filed with the Commission between 2006 and 2011 disclosed the aggregate amount of reimbursable expenses charged to the Funds, including all salaries charged to the Funds; however, the documentation and filings did not break down those expenses such that an investor or prospective investor in a Fund necessarily would know that those expenses charged to that Fund included a portion of the salaries of all CIGF employees, executive officers, and directors other than its CEO.

Respondents

1. CIGF is a Pennsylvania corporation established in 1993 with its principal place of business in Chadds Ford, Pennsylvania. Since 2006, CIGF has served as the general partner or managing member of nine public and private equipment leasing funds: (i) Commonwealth Income & Growth Fund IV, LP; (ii) Commonwealth Income & Growth Fund V, LP; (iii) Commonwealth Income & Growth Fund VI, LP; (iv) Commonwealth Income & Growth Fund VII, LP; (v) Commonwealth Opportunity Fund, LLC; (vi) Commonwealth Income & Growth Private Fund I, LLC; (vii) Commonwealth Income & Growth Private Fund II, LLC; (viii) Commonwealth Income & Growth Private Fund III, LLC; and (ix) Commonwealth Income & Growth Private Fund IV, LLC. CIGF is not registered with the Commission in any capacity.

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

2. Springsteen-Abbott, age 53, is a resident of Garnet Valley, Pennsylvania and Holiday, Florida. Since April 2006, Springsteen-Abbott has been the 100% owner, chairman, and CEO of CIGF and its parent company, Commonwealth Capital Corporation ("Commonwealth").

Background

The Commonwealth Funds

3. CIGF and Commonwealth are in the business of sponsoring both publicly and privately offered equipment leasing funds, including the Commonwealth Funds. The Commonwealth Funds purchase medical and technological equipment and lease it to corporations and institutions for periods generally ranging from one to four years. The Funds are structured as limited partnerships or limited liability companies and generally have 10-year lifespans, after which the Funds sell or otherwise dispose of any remaining equipment, make final distributions to investors, and dissolve.

4. Investors in the Commonwealth Funds share in the profits and losses generated by the leases of equipment purchased with the Funds' assets. Investors receive quarterly distributions throughout the life of the Funds and at the end of each Fund's life, the Fund returns all remaining capital to its investors.

5. CIGF serves as the general partner or managing member for each of the Funds, handling all operations, including purchasing equipment, and negotiating, executing, and administering the leases. CIGF also prepares the Funds' offering documents and public filings. Springsteen-Abbott, CIGF's CEO, reviewed and approved the offering documents and public filings that are the subject of this action. CIGF and Commonwealth each have a board of directors with five members in addition to Springsteen-Abbott. The Funds have no employees, directors, or executive officers.

6. CIGF receives a variety of fees from the Commonwealth Funds including organization fees, equipment acquisition fees, and lease management fees. Each of the Funds' prospectuses, private placement memoranda, limited partnership agreements, and/or limited liability company operating agreements (collectively, the "Fund Documents") states that CIGF is also entitled to reimbursement by the Funds for certain costs of goods, supplies, services, and expenses in connection with the administration and operation of the Funds.

7. However, certain salary and related expenses incurred by CIGF are not reimbursable by the Funds. The Fund Documents for each of the Funds specify that "salaries, fringe benefits, travel expenses and other administrative items incurred or allocated to any Controlling Person of the General Partner [or Manager]" cannot be charged to the Funds. The Fund Documents define a "Controlling Person" as:

any person, whatever his or her title, performing functions for the General Partner [or Manager] or its Affiliates [expressly defined to include Commonwealth] similar to those of chairman or member of the Board of Directors or executive management (such as the president, vice president, or senior vice president, corporate secretary or treasurer), senior management (such as the vice president of an operating division who reports directly to executive management), or any person holding a five percent or more equity interest in the General Partner [or Manager] or its Affiliates or having the power to direct or cause the direction of the General Partner [or Manager] or its Affiliates, whether through the ownership of voting securities; by contract, or otherwise.

The Fund Documents further note that “[t]he same individuals that control and manage [CIGF] also manage Commonwealth [its parent company].” Based on this definition, the Controlling Person salaries of CIGF and its parent cannot be charged to the Funds.

8. The Fund Documents identify ten to fifteen individuals for each fund, including Springsteen-Abbott, who serve as CIGF’s and Commonwealth’s directors, officers, executive management, and senior management. The Fund Documents describe these individuals as CIGF’s “key management” and the “individuals responsible for making all of [the Funds’] investment decisions.” The Fund Documents and public Funds’ Forms 10-K and 10-Q disclose the existence of the CIGF and Commonwealth boards of directors. The Fund Documents further indicate that five people in addition to the CEO sit on Commonwealth’s and CIGF’s boards of directors. The public Funds’ Forms 10-K and 10-Q also describe the various activities of the boards, including their review of management’s assessment of a Fund’s internal control over financial reporting and pre-approval of independent audit and tax planning services.

9. Between 2006 and 2010, CIGF and Springsteen-Abbott deemed only Springsteen-Abbott to be a Controlling Person, and routinely charged the Funds for the salary expenses of persons identified in the Fund Documents and public filings as CIGF’s and its parent company’s executive management, senior management, officers, and members of their advisory boards of directors.

10. The fact that CIGF charged the Funds for these salaries is not otherwise apparent from the Funds’ individual financial statements, which the Funds publicly filed on Forms 10-Q and 10-K, or issued to private fund investors in annual reports between 2006 and 2011. These salary amounts are included in a single figure in the footnotes to the financial statements representing all “reimbursable expenses,” without any detail as to the nature and amount of the expenses, although the aggregate amounts are fully disclosed.

Violations

11. As a result of the conduct described above, CIGF and Springsteen-Abbott violated Sections 17(a)(2) and (3) of the Securities Act between 2006 and 2011 by their negligent

misrepresentations and omissions in the Fund Documents and public Funds' Forms 10-K and 10-Q filed during those Funds' offering periods.

12. Also as a result of the conduct described above, CIGF and Springsteen-Abbott caused Commonwealth Income & Growth Fund IV, LP's, Commonwealth Income & Growth Fund V, LP's, Commonwealth Income & Growth Fund VI, LP's, and Commonwealth Income & Growth Fund VII, LP's violations of Section 15(d) of the Exchange Act and Rules 12b-20, 15d-1, and 15d-13 thereunder, which require every issuer who has filed a registration statement which becomes effective pursuant to the Securities Act to file with the Commission, information, documents, and annual and quarterly reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in CIGF's and Springsteen-Abbott's Offers.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents CIGF and Springsteen-Abbott cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act and Section 15(d) of the Exchange Act and Rules 12b-20, 15d-1, and 15d-13 thereunder.

B. Respondents CIGF and Springsteen-Abbott shall pay, on a joint and several basis, disgorgement of \$1,548,688, less a credit of \$1,408,598 for reimbursements, contributions, and fee waivers already made to the Funds. Respondents shall also pay prejudgment interest of \$77,566 and a civil money penalty of \$150,000, both on a joint and several basis. Respondents shall satisfy these obligations by disbursing the foregoing disgorgement, prejudgment interest, and civil monetary penalty as follows:

1. Respondents shall satisfy the disgorgement and prejudgment interest by making a total payment of \$217,656 to and for the benefit of the Funds. Payment shall be made in the following installments: (1) \$18,138 shall be due and payable within 10 days of the entry of this Order; and (2) eleven equal payments each in the amount of \$18,138 shall be made within 11 months of the entry of this Order, each such payment to be made on the first day of each month following the first payment. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement and prejudgment interest, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717 shall be due and payable immediately without further application. Respondents shall simultaneously transmit a copy of such payment and notification to Chad Alan Earnst, Assistant

Regional Director, Miami Regional Office, 801 Brickell Avenue, Suite 1800, Miami, FL 33131. Respondents shall cooperate with the staff of the Commission to obtain evidence of receipt of the payment by the Funds. In the event that Respondents fail to complete the disbursement under the terms set forth in this Order, payment of the full disbursement amount (or balance thereof) shall be due and payable immediately to the Commission, without further application. The Commission shall then disburse that payment to the Funds. Further, Respondents agree to be responsible for all tax compliance responsibilities associated with the disbursement of the \$217,656 to the Funds. The costs and expenses relating to Respondents' respective responsibilities for tax compliance shall be borne solely by Respondents and shall not be paid out of the \$217,656 payment to the Funds or the civil penalty paid pursuant to part two below.

2. Respondents shall pay, on a joint and several basis, a civil money penalty in the amount of \$150,000 to the Commission for transfer to the United States Treasury. Payment shall be made in the following installments: (1) \$12,500 shall be due and payable within 10 days of the entry of this Order; and (2) eleven equal payments each in the amount of \$12,500 shall be made within 11 months of the entry of this Order, each such payment to be made on the first day of each month following the first payment. If any payment is not made by the date payment is required by this Order, the entire outstanding balance plus any additional interest accrued pursuant to 31 U.S.C. 3717 shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

- (a) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (b) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying CIGF and Springsteen-Abbott as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Chad Alan Earnst, Assistant Regional Director, Miami Regional Office, Securities and Exchange Commission, 801 Brickell Avenue, Suite 1800, Miami, Florida 33131.

C. Amounts ordered to be paid as a civil money penalty pursuant to this Order shall be treated as a penalty paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they 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 either or both Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in this 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. 70554/September 30, 2013

WHISTLEBLOWER AWARD PROCEEDING
File No. 2013- 4

In the Matter of the Claim for Award

in connection with

Redacted

Redacted

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

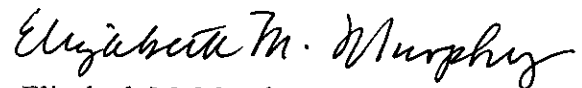
On September 5, 2013, the Claims Review Staff issued a Preliminary Determination related to Notice of Covered Action Redacted (the "Covered Action"). The Preliminary Determination recommended that Claimant (the "Claimant") receive a whistleblower award because the Claimant voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to Section 21F(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-6(b)(1), and Rule 21F-3(a) thereunder, 17 C.F.R. § 240.21F-3(a). Further, the Claims Review Staff recommended that such award be set in the amount of Redacted, in total, of the monetary sanctions collected or to be collected in the Covered Action. In arriving at this recommendation, the Claims Review Staff considered the factors set forth in Rule 21F-6, 17 C.F.R. § 240.21F-6, in relation to the facts and circumstances of the Claimant's application. The Claims Review Staff determined that the expected dollar amount of the Redacted award – which will exceed \$14 million in light of the monetary sanctions already collected – appropriately recognizes the significance of the information that the Claimant provided to the Commission, the assistance the Claimant provided in the Commission action, and the law enforcement interest in deterring violations by granting awards.

75 of 90

On September 6, 2013, the Claimant provided written notice to the Commission of the Claimant's decision not to contest the Preliminary Determination within the 60-day deadline set out in Rule 21F-10(e) under the Exchange Act, 17 C.F.R. § 240.21F-10(e), and, pursuant to Rule 21F-10(f) thereunder, 17 C.F.R. § 240.21F-10(f), the Preliminary Determination became the Proposed Final Determination of the Claims Review Staff.

Upon due consideration under Rule 21F-10(f) and (h), 17 C.F.R. § 240.21F-10(f) and (h), and for the reasons set forth in the Proposed Final Determination, it is hereby ORDERED that Claimant shall receive an award of Redacted of the monetary sanctions collected in this Covered Action, including any monetary sanctions collected after the date of this Order.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70553 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3497 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15531

In the Matter of

RICK D. SNOW, 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 Rick D. Snow ("Snow") 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. Snow, age 49, was a certified public accountant licensed to practice in the State of Ohio (currently inactive). From 2002 until November 2009, Snow was the Chief Financial Officer of Fair Finance Company, an Ohio-based consumer finance company. Prior to joining Fair Finance Company, Snow was a senior manager for a regional accounting firm, as well as an accountant for Grant Thornton LLP.

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."

76 of 90

2. On December 12, 2012, a judgment of conviction was entered against Snow in *United States v. Snow*, Case No. 1:11-Cr-00042-003, in the United States District Court for the Southern District of Indiana, finding him guilty of one count of conspiracy to commit wire fraud and securities fraud, three counts of wire fraud, and one count of securities fraud.

3. As a result of this conviction, Snow was sentenced to 120 months imprisonment in a federal penitentiary and ordered to pay restitution in the amount of \$208,830,082.27.

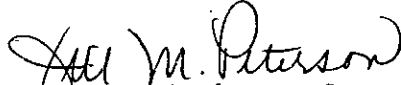
III.

In view of the foregoing, the Commission finds that Snow 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 Rick D. Snow 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

September 30, 2013

IN THE MATTER OF
CHINA RUITAI INTERNATIONAL
HOLDINGS CO., LTD.

ORDER OF SUSPENSION
OF TRADING

File No. 500-1

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Ruitai International Holdings Co., Ltd. ("China Ruitai") because of questions regarding the accuracy of assertions by China Ruitai, concerning the characterization of certain liabilities in its periodic reports, and because it has not filed any periodic reports since the period ended September 30, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on September 30, 2013 through 11:59 p.m. EDT, on October 11, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

76a of 90

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 70580 / September 30, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15545

In the Matter of

CHINA RUITAI
INTERNATIONAL
HOLDINGS CO., LTD.,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against China Ruitai International Holdings Co., Ltd., ("China Ruitai" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondent

1. **China Ruitai International Holdings Co., Ltd.** (CIK No. 0000076348) is a Delaware corporation located in Shandong in the People's Republic of China ("PRC") with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. China Ruitai has not filed any current or periodic reports since it filed its September 30, 2011 Form 10-Q on November 14, 2011. The common stock of China Ruitai (symbol "CRUI") is quoted on OTC Link operated by OTC Markets Group, Inc. and formerly known as the Pink Sheets ("OTC Link").

77 of 90

B. Illegal Activity and Delinquent Current and Periodic Filings

1. Marcum Bernstein & Pinchuk LLP ("Marcum"), a New York Certified Public Accounting firm with offices in the PRC was engaged as China Ruitai's independent registered public accounting firm and completed quarterly reviews for each of the first three quarters of 2011. Marcum also performed audit procedures in preparation for filing China Ruitai's December 31, 2011 Form 10-K.

2. As part of the December 31, 2011 audit procedures, Marcum discovered activity in possible violation of PRC law, in which China Ruitai used forged documents to obtain financing from third-party banks. The conduct resulted in the mischaracterization of a material amount of liabilities in China Ruitai's public filings as related-party obligations, while the liabilities were actually to unrelated third parties. Marcum reported the matter to China Ruitai's board on May 21, 2012, pursuant to Section 10A(b)(1) of the Exchange Act, which requires a public company's auditor to inform management that it has information indicating an illegal act has or may have occurred.

3. China Ruitai failed to take remedial actions, so Marcum issued a notice to China Ruitai pursuant to Section 10A(b)(2) of the Exchange Act. That notice indicated an illegal act had occurred and that failure of the company to take remedial action would warrant resignation of Marcum as China Ruitai's independent public accountants. The notice further informed China Ruitai that China Ruitai was required to notify the Commission no later than one business day after it received Marcum's report, pursuant to Section 10A(b)(3) of the Exchange Act.

4. China Ruitai failed to report the matter to the Commission. On July 27, 2012, Marcum issued notice pursuant to Section 10A(b)(3) of the Exchange Act to both China Ruitai and the Commission. The notice contained Marcum's immediate resignation from the audit engagement. The letter further requested that the company file a Form 8-K disclosing Marcum's resignation, as required by Section 13(a) of the Exchange Act and Item 4.01 to Form 8-K. China Ruitai did not file a Form 8-K regarding Marcum's resignation.

5. Since Marcum resigned as China Ruitai's auditor, China Ruitai has failed to file its required periodic reports. China Ruitai's last filing was a Form NT 10-K, filed on March 30, 2012. As a result, China Ruitai is delinquent with at least its December 31, 2011 Form 10-K, March 31, 2012 Form 10-Q, June 30, 2012 Form 10-Q, September 30, 2012 Form 10-Q, December 31, 2012 Form 10-K, March 31, 2013 Form 10-Q, and June 30, 2013 Form 10-Q.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in current and periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, Rule 13a-11 requires issuers to file current reports, and Rule 13a-13 requires issuers to file quarterly reports.

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities 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 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 FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)]. In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the

Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action

By the Commission.

Elizabeth M. Murphy
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. 70561 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3499 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15532

In the Matter of

MICHAEL McGRATH, CPA

Respondent.

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

I.

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

II.

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

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . 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.

78 of 90

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. McGrath, age 59, was a certified public accountant licensed to practice in the State of Illinois, but that license became inactive in 1986. He served as Chief Financial Officer of Mercantile Bancorp ("Mercantile") from 1986 until his termination in 2012.

2. Mercantile was, at all relevant times, a Delaware corporation and bank holding company with its principal place of business in Quincy, Illinois. Through its subsidiary banks, Mercantile conducted a consumer and commercial banking business and its securities were registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the NYSE Amex under the symbol MBR. In December 2011, Mercantile filed a Form 15 Certification and Notice of Termination of Registration. After the relevant time period, the FDIC closed two of Mercantile's three subsidiary banks. On June 27, 2013, Mercantile filed a bankruptcy petition.

3. On September 24, 2013, the Commission filed a complaint against McGrath in SEC v. Mercantile Bancorp, et al. (Civil Action No. 3:13-cv-3341). On September 26, 2013, the court entered an order permanently enjoining McGrath, by consent, from future violations of Section 17(a)(3) of the Securities Act and Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13a-14, 13b2-1 and 13b2-2 thereunder, and aiding and abetting future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder. McGrath was also ordered to pay a \$100,000 civil penalty and barred from serving as an officer or director of a public company.

4. The Commission's complaint alleged, among other things, that generally accepted accounting principles ("GAAP") required Mercantile to disclose a probable, material loss in an amended S-1 filing and to recognize that loss in Mercantile's Form 10-Q for the third quarter of 2010. Mercantile—through former CEO Ted Awerkamp and former CFO McGrath—did neither. Because it did not recognize that loss in its third quarter financial statements, Mercantile was able to (i) falsely state that its main subsidiary bank had met certain capital ratio thresholds required by the FDIC; (ii) understate its net loss for the quarter and the nine months ending September 30th as \$7.5 million and \$11 million (instead of at least \$12.78 million and at least \$16.28 million); and (iii) falsely state that its main subsidiary bank had net income of \$1.8 million for first nine months of 2010 when it actually had a net loss of at least \$3.48 million during that

period. The complaint also alleges that McGrath and Averkamp misled Mercantile's outside auditor and circumvented the company's internal accounting controls.

IV.

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

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

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

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. 70563 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15533

In the Matter of

Massimo L. Martinucci,

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 Massimo L. Martinucci ("Martinucci" 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.

III.

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

79 of 90

1. Martinucci, 44 years old, resides in Batavia, New York. From April 1996 through April 2008, Martinucci was a registered representative associated with Joseph Stevens & Company, Inc., a broker-dealer registered with the Commission at the time.

2. On September 27, 2011, Martinucci was convicted by guilty plea of one count of engaging in a Securities Fraud Scheme in violation of New York General Business Law 0352-c(5), two counts of Securities Fraud in violation of New York General Business Law 0352-c(6), and two counts of Criminal Possession of Stolen Property in the Third Degree in violation of New York Penal Law 165.50, before the Supreme Court of the State of New York, in People of New York v. Joseph Stevens & Company, Inc., et al., Case Number 02394-2009. On January 6, 2012, Martinucci was sentenced to four months' imprisonment and five years' probation and ordered to make restitution in the amount of \$45,228.

3. The counts of the indictment to which Martinucci pleaded guilty alleged, inter alia, that from in or about January 2003 to in or about November 2005, Martinucci participated in a scheme to defraud investors that resulted in excessive and undisclosed commissions in stocks.

IV.

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

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

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70581 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15546

In the Matter of

JAMES L. BRANDOLINO,

Respondent.

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Brandolino, 45 years old, was the Senior Managing Partner of Brandolino Investment Group, LLC, an Illinois limited liability company that purported to be a registered investment adviser specializing in managing portfolios with asset classes that include equities and managed futures. Neither Brandolino nor Brandolino Investment Group, LLC, was registered as an investment adviser with the Commission. From October 1999 through January 2001 and from April 2002 through October 2005, Brandolino was a registered representative associated with broker-dealers registered with the Commission. During the relevant period, Brandolino was a resident of Chicago, Illinois. He is currently residing at the Duluth Prison Camp in Duluth, Minnesota.

80 of 90

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTION

2. On August 9, 2011, Brandolino pled guilty to one count of mail fraud in violation of 18 U.S.C. 1341 before the United States District Court for the Northern District of Illinois, in United States v. James Brandolino, Crim. Complaint No. 11-CR-0033. On May 2, 2013, a judgment in the criminal case was entered against Brandolino. He was sentenced to a prison term of 107 months and ordered to pay approximately \$3.7 million in restitution.

3. The count of the criminal complaint to which Brandolino pled guilty alleged, inter alia, that from 2003 to January 2011, in connection with certain managed accounts and the offer and sale of investment interests in commodity pools, Brandolino knowingly devised a scheme to defraud investors, obtained money and property by means of materially false and fraudulent statements and by material omissions, and delivered false account statements by the United States Mail.

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70566 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3502 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15536

In the Matter of

JOHN KINROSS-KENNEDY,
CPA,

Respondent.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF
1934 AND RULE 102(e) OF THE
COMMISSION'S RULES OF
PRACTICE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against John Kinross-Kennedy, CPA ("Respondent" or "Kinross") pursuant to Sections 4C¹ and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) and (iii) of the Commission's Rule of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

81 of 90

II.

After an investigation, the Division of Enforcement and the Office of the Chief Accountant allege:

A. RESPONDENT

John Kinross-Kennedy, age 85, of Irvine, California, is a certified public accountant licensed in California. Kinross has operated as an unincorporated sole proprietor since 1993 and has been registered with the PCAOB since 2005. As of July 15, 2013, Kinross is the independent public accountant for six public companies. Since 2009, at any one time, he has been the independent accountant for as many as 23 public companies.

B. RELEVANT ISSUERS

1. At all relevant times, Issuer A's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and was traded on the OTC Bulletin Board, and its fiscal year ended on the last day of March.
2. At all relevant times, Issuer B filed reports with the Commission pursuant to Section 15(d) of the Exchange Act, its common stock was traded on the OTC Market, and its fiscal year ended on the last day of August.
3. At all relevant times, Issuer C's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and was traded on the OTC Market, and its fiscal year ended on the last day of September.
4. At all relevant times, Issuer D's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and was traded on the OTC Bulletin Board, and its fiscal year ended on the last day of December.
5. At all relevant times, Issuer E filed reports with the Commission pursuant to Section 15(d) of the Exchange Act, its common stock was traded on the OTC Bulletin Board, and its fiscal year ended on the last day of December.

C. KINROSS'S IMPROPER PROFESSIONAL CONDUCT

1. During 2011 and 2012, Kinross issued six unqualified audit reports listed in the table below in connection with his audits of the financial statements of five issuers (the

Rule 102(e)(1)(iii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

“Issuer Audits”), as well as audit reports for approximately 20 other issuers. In each of these six audit reports, Kinross represents that he conducted his audits in accordance with PCAOB standards. Kinross failed, however, to conduct each of the six audits of the five issuer’s financial statements in accordance with PCAOB standards, as described below.

Issuer	Report Date	Fiscal Periods
Issuer A	June 21, 2011	Periods from inception, March 31, 2009, to March 31, 2010 and 2011
Issuer A	June 25, 2012	Periods from inception, March 31, 2009, to March 31, 2011 and 2012
Issuer B	Oct. 31, 2011	Years ended and periods from inception, August 22, 2008, to August 31, 2011 and 2010
Issuer C	Dec. 22, 2011	Years ended and periods from inception, August 2, 2005, to September 30, 2011 and 2010
Issuer D	March 26, 2012	Years ended and periods from inception, December 22, 2006, to December 31, 2011 and 2010
Issuer E	Feb. 29, 2012	Years ended December 31, 2011 and 2010

AU §230, Due Professional Care in the Performance of Work

2. Kinross failed to exercise due professional care in each of the six Issuer Audits. See AU §230.02-.06. Kinross does not possess the degree of skill commonly possessed by other auditors and failed to exercise reasonable care and diligence. AU §230.02-.05. Kinross’s lack of knowledge and skill is demonstrated by his admitted familiarity with PCAOB requirements to perform certain auditing procedures, e.g. annual written confirmation of his independence (See PCAOB Rule 3526), and his failure to communicate with the predecessor auditor (See AU §315) and communicate with the audit committee (See AU §380). He also is unaware of certain changes in GAAP, such as the 2001 shift from amortization of goodwill to non-amortization of goodwill (changed by Financial Accounting Standard No. 142, *Goodwill and Other Intangible Assets* (June 2001)).

3. Kinross also failed to exercise due professional care on fundamental aspects of the audits by using outdated audit templates to document his audit planning and performance of certain audit procedures on each of the audits without any apparent effort to adapt those templates for subsequent changes in auditing standards. Kinross relied upon checklists published in 1993, the year he formed his audit practice and ten years before the creation of the PCAOB, for client acceptance, internal control evaluation, and transactional audit plans for small organizations. Kinross’s audit work papers for Issuer D’s December 31, 2011 financial statements included a copy of the cover page and an index of a 1993-checklist, but did not include the checklist itself. Not only was the checklist outdated, the cover page indicated that it pertained to GAAP disclosure requirements for financial statements of a *nonpublic* commercial business.

4. Kinross's inappropriate use of client personnel to perform audit steps also illustrates his lack of due professional care. For example, for Issuer E's December 31, 2011 audit, Kinross instructed client personnel to select one invoice per month for the sample to be subjected to audit testing. Even though he was present at the time the client made the selection, Kinross should have made sure that all items were available for selection, selected the items, and made sure that the sample was expected to be representative of the population.³

AU §326, Evidential Matter and Auditing Standard No. 15, Audit Evidence

5. Under AU §326, *Evidential Matter*, which was in effect for the pertinent periods beginning before December 15, 2010, an auditor was required to obtain sufficient competent evidential matter to afford a reasonable basis for his opinion. See AU §326.01 and 22-24; and AU §150.02, Generally Accepted Auditing Standards. Auditing Standard No. 15, *Audit Evidence* ("AS 15"), which is effective for fiscal periods beginning on or after December 15, 2010, requires that an auditor plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his opinion. See AS 15, ¶4. For each of the six Issuer Audits, Kinross failed to obtain the requisite level of evidential matter or audit evidence to support his opinion.

6. For the three audits of fiscal years beginning before December 15, 2010, Kinross failed to obtain sufficient competent evidential matter to afford a reasonable basis for his opinion. For issuer A, Kinross issued an unqualified audit report on Issuer A's financial statements as of March 31, 2010 and 2011 and the periods from inception (March 31, 2009), despite the fact that he had performed no audit procedures as of March 31, 2010 or for the period from inception (March 31, 2009) to March 31, 2010. Kinross issued an unqualified audit report on Issuer B's August 31, 2011 financial statements. Issuer B's sole operating subsidiary accounted for 100 percent of Issuer B's revenues and cost of revenues and 15 percent of its expenses. Yet, Kinross performed no audit procedures on the subsidiary's revenues or its expenses. Instead, Kinross conducted a "balance sheet audit," relying on the change in net equity to validate the subsidiary's net income and limiting the testing of Issuer B's expenses. With respect Issuer C, which recorded a \$42 million gain upon deconsolidation of Issuer B and a corresponding \$42 million investment in Issuer B (See FASB ASC 810-10-40-5, *Consolidation: Derecognition*), Kinross failed to consider potential impairment of Issuer C's \$42 million investment in Issuer B despite Issuer B's stock price having declined by 94 percent by Issuer C's fiscal year end.

7. For the three audits of fiscal years beginning on or after December 15, 2010, Kinross failed to plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his opinion. For issuer A, Kinross issued an

³ AU §350.03 *Audit Sampling*, "[R]equire[s] that the auditor use professional judgment in planning, performing, and evaluating a sample and in relating the evidential matter produced by the sample to other evidential matter when forming a conclusion about the related account balance or class of transactions." Additionally, AU §350.39 provides that the sample should be selected in such a way that the sample can be expected to be representative of the population and that each item in the population should have an opportunity to be selected.

unqualified audit report on Issuer A's financial statements as of March 31, 2011 and 2012 and the periods from inception (March 31, 2009), despite the fact that he had performed no audit procedures as of March 31, 2010 or for the period from inception (March 31, 2009) to March 31, 2010. With respect to his audit of Issuer D's December 31, 2011 financial statements, Kinross inadequately tested revenues and cost of goods sold. Despite Issuer D having only one customer and relatively few transactions, Kinross did not review sales contracts or purchase orders with customers or suppliers to identify terms that might affect the timing of revenue recognition or cost of goods sold. Additionally, Kinross inappropriately relied upon documents that he could not read, either because the documents were written in Chinese or because the copies were illegible. With respect to Issuer E, Kinross inadequately tested revenues and failed to investigate material, unidentified differences between schedules detailing sales transactions and the amount of recorded sales revenue.

Auditing Standard No. 8, Audit Risk

8. Kinross failed to obtain sufficient audit evidence by failing to conduct three audits in compliance with Auditing Standard No. 8, Audit Risk ("AS 8"), which is effective for audits of fiscal years beginning on or after December 15, 2010. AS 8 requires an auditor to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement due to error or fraud. An auditor obtains reasonable assurance by reducing audit risk to an appropriately low level through applying due professional care, including obtaining sufficient appropriate audit evidence. See AS 8, ¶3. Kinross did not exercise due professional care and did not obtain sufficient appropriate audit evidence for Issuer D's and Issuer E's December 31, 2011 audits or Issuer A's March 31, 2012 audit. Consequently, Kinross did not conduct these audits in a manner designed to reduce risk to an appropriately low level.

AU §333, Management Representations

9. Under AU §333, *Management Representations*, an independent auditor must obtain written representations from management for all financial statements and all periods covered by the audit report. Kinross failed to satisfy this auditing standard for each of the Issuer Audits because he issued audit reports on both the current and prior year's financial statements even though he obtained written representations from management only for the current year's financial statements. See AU §333.05.

Auditing Standard No. 3, Audit Documentation

10. For each of the Issuer Audits, Kinross's audit documentation was deficient. Auditing Standard No. 3, *Audit Documentation* ("AS 3") establishes the requirements for documentation that the auditor should prepare and retain in connection with engagements to support the auditor's conclusions and representations contained in the auditor's report. See AS 3, ¶2. Audit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement to (a) understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusion reached; and (b) determine who performed the work and the date such work

was completed as well as the person who reviewed the work and the date of such review. See AS 3 ¶6. Kinross failed to prepare documentation that sufficiently described the procedures he performed, the evidence he obtained, and the conclusions he reached. Kinross's documentation also did not identify the person who performed the work and the date such work was completed, or the person who reviewed the work and the date of the review. Kinross performed substantially all of the audit procedures, but he frequently did not sign or initial and date his audit work papers. Additionally, Kinross did not include written audit programs or document the conclusions he reached for most audit areas other than cash. See AS 3, ¶¶4-6. Finally, he did not prepare an engagement completion document identifying significant findings or issues. See AS 3, ¶13.

11. Kinross added information to his audit work papers after the documentation completion date without identifying who prepared the additional documentation and explaining why it was added. In some instances, he failed to specify the date he added the information. See AS 3, ¶16.

12. Kinross did not retain audit documentation for the required seven years. Kinross was unable to locate documentation to support his audit reports on Issuer B's fiscal year 2008 and Issuer C's fiscal year 2008 financial statements, the earliest years covered by his initial audit reports for these issuers. See AS 3, ¶14.

Auditing Standard No. 7, Engagement Quality Review

13. Kinross failed to obtain required Engagement Quality Reviews ("EQR") for the vast majority of his audit engagements, and he engaged an unqualified person to perform the few EQRs that he did obtain. Under Auditing Standard No. 7, *Engagement Quality Review* ("AS 7"), an auditor must obtain an EQR and concurring approval to issue the engagement report for each audit and interim review engagement.⁴ Kinross engaged Wilfred W. Hanson to conduct EQRs on the engagements for five of the 40 audit reports he issued on financial statements for fiscal years beginning on or after December 15, 2009.⁵ For the same period, however, Kinross also did not obtain the required EQRs for any of the other 35 audits he conducted or for any reviews of interim financial information. See AS 7, ¶1.

14. Kinross engaged Hanson to conduct an EQR on the audits of Issuer A's March 31, 2012 financial statements, Issuer B's August 31, 2011 financial statements, Issuer C's September 30, 2011 financial statements, Issuer D's December 30, 2011 financial statements, and Issuer E's December 31, 2011 financial statements. In connection with these audits, Kinross did not ascertain whether Hanson was qualified to perform the review. An engagement quality reviewer must be, among other things, competent, i.e., possessing the level of knowledge and competence related to accounting, auditing and

⁴ AS 7 is effective for audits and interim reviews for fiscal years beginning on or after December 15, 2009.

⁵ *In the Matter of Wilfred W. Hanson, CPA*. Admin Pro. File No. 3-_____

financial reporting required to serve as the engagement partner on the engagement under review. See AS 7, ¶¶4-5. Additionally, Kinross did not establish quality control policies and procedures to provide him with reasonable assurance that the engagement quality reviewer has sufficient competence, among other things, to perform the EQR. See AS 7, ¶4.⁶ Finally, Kinross did not determine whether Hanson prepared audit document in connection with the EQRs. See AS 7, ¶¶9-11 and ¶¶19-20.

15. With respect to Issuer D, Kinross requested that Hanson act as the engagement quality reviewer but did not request him to provide concurring approval of issuance of Kinross's audit report. Instead, Kinross improperly signed as the engagement quality review partner and provided concurring approval to issue the audit report, even though Kinross was the engagement partner responsible for supervising the audit.

AU §508, Reports on Audited Financial Statements

16. Under AU §508, *Reports on Audited Financial Statements*, an auditor may issue an unqualified opinion on historical financial statements only when the auditor has formed such an opinion on the basis of an audit performed in accordance with PCAOB standards. See AU §508.07. Kinross failed to conduct each of the Issuer Audits in accordance with PCAOB standards. Kinross should not have issued audit reports expressing an unqualified opinion and asserting he had conducted his audits in accordance with PCAOB standards.

Communications with Audit Committees

17. For each of the Issuer Audits, Kinross failed to make required communications to the audit committee or to others responsible for the oversight of the issuer's financial reporting process. See AU §380, *Communications With Audit Committees*, Section 10A(k) of the Exchange Act, Rule 2-07 of Regulation S-X, and PCAOB Rule 3526, *Communication with Audit Committees Concerning Independence*. Kinross did not make or document that he had made the required communications to the audit committee (or board of directors for an entities without an audit committee), including: i) the auditor's responsibility under PCAOB standards, ii) significant accounting policies, iii) management's judgments and accounting estimates, iv) audit adjustments, v) the auditor's judgment about the quality of the company's accounting principles, vi) other information in documents containing audited financial statements, vii) disagreements with management, viii) consultation with other accountants, ix) major issues discussed with management prior to retention, and x) difficulties encountered in performing the audit. See AU §380.03-.16.

⁶ PCAOB standard QC §40, *The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement* states, in part, that policies and procedures should be established to provide the firm with reasonable assurance that "those hired possess the appropriate characteristics to enable them to perform competently" and "[w]ork is assigned to personnel having the degree of technical training and proficiency required in the circumstances." QC §40, ¶.02.

18. For each of the Issuer Audits, Kinross neglected to report information regarding: i) all critical accounting policies and practices to be used, ii) all alternative treatments of financial information within GAAP for policies and practices related to material items that have been discussed with management, including ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm, and iii) other material written communications between the registered public accounting firm and management (management letter, summary of unadjusted differences). See Section 10A(k) of the Exchange Act and Rule 2-07 of Regulation S-X.

19. With respect to Issuer A, Kinross failed to affirm to the audit committee⁷, in writing, prior to accepting his initial engagement pursuant to standards of the PCAOB that he was in compliance with PCAOB Rule 3520, *Auditor Independence*. Similarly, with respect to continuation of engagements for Issuers A, B, C, D, and E, Kinross failed to affirm to the audit committee, in writing, at least annually that he was in compliance with PCAOB Rule 3520.

AU §315, Communication Between Predecessor and Successor Auditors

20. Kinross failed to make required communications with the predecessor auditor or obtain sufficient competent evidential matter to afford a reasonable basis for his opinion on Issuer A's fiscal year 2010 financial statements, which were included in his unqualified audit report on Issuer A's financial statements for the fiscal years ending March 31, 2011 and March 31, 2010. As the successor auditor, Kinross was required to obtain sufficient competent evidential matter to afford a reasonable basis for expressing an opinion on Issuer A's financial statements, including making an inquiry of the predecessor auditor and requesting to review its work papers. See AU §315, *Communications Between Predecessor and Successor Auditors*, ¶¶.03 and ¶¶.07-.13. For the fiscal year ending March 31, 2010, Kinross never contacted Issuer A's predecessor auditor. Instead, he relied exclusively on the predecessor's audit report on Issuer A's March 31, 2010 financial statements as the basis for his opinion on Issuer A's March 31, 2010 financial statements, even though he had not spoken with the predecessor auditor or reviewed the predecessor auditor's work papers. Because Kinross performed no audit procedures as of March 31, 2010 or for the period then ended, he failed to obtain sufficient competent evidential matter to afford a reasonable basis for his opinion on Issuer A's March 31, 2010 and 2011 financial statements. See AU §326 and AU §315.12.

AU § 330, The Confirmation Process

21. With respect to Issuer A, and consistent with his practice, Kinross did not control the confirmation process. The purpose of the confirmation process, which includes communicating the confirmation request to the appropriate third party, is to obtain evidence directly from a third party about management's financial statements. See AU §330.28. Kinross failed to maintain control over the confirmation requests and did not establish

⁷ Section 3(a)(58) of the Exchange Act states, in part, that the term "audit committee" means the entire board of directors if the issuer does not have an audit committee.

direct communication with the intended recipients. Kinross knew that the auditor should control the confirmation process, but he instructed his clients to prepare and mail confirmation requests on his behalf.

AU §334, Related Parties

22. With respect to Issuer D, Kinross failed to evaluate and assess the adequacy of the issuer's disclosure of related party transactions. Kinross knew that Issuer D derived 100 percent of its revenues and cost of revenues from a company that owned 93 percent of Issuer D's common stock, and with which Issuer D shared its officers and its principal place of business. Kinross also knew or should have known that the transactions with its parent company were material and required disclosure. See FASB ASC 850-10-50, *Related Party Disclosures*. Kinross failed to consider whether he had obtained sufficient appropriate evidential matter to understand the relationship of the parties and the effects of the transactions on the financial statements. Similarly, he failed to evaluate all the information available and satisfy himself that Issuer D adequately disclosed related party transactions in its financial statements. See AU §334.11. In fact, Issuer D did not make required disclosures regarding related parties transactions in its December 31, 2011 financial statements.

Auditing Standard No. 14, Evaluating Audit Results

23. For Issuers C and D, Kinross failed to aggregate uncorrected differences that were clearly not inconsequential, and evaluate whether material, either individually or in combination with other misstatements. AS 14, *Evaluating Audit Results*, ("AS 14").⁸ Kinross determined planning materiality based on an amount equal to five percent of total expenses. During the audit, Kinross identified, but did not address differences that exceeded five percent of total expenses, i.e., planning materiality. Kinross failed to evaluate whether the uncorrected differences were material, individually or in combination with other misstatements. See AS 14, ¶¶11-18.

Section 10A (j) of the Exchange Act, Audit Partner Rotation

24. Section 10A (j) of the Exchange Act, *Audit Partner Rotation*. Kinross was Issuer D's registered public accounting firm 2007 until he resigned in November 2012. During this period, Kinross issued audit reports for Issuer D's financial statements for each of the five years in the period ended December 31, 2011. Kinross continued to provide audit services in connection with reviews of Issuer D's interim financial information for the quarters ended March 31, June 30 and September 30, 2012. As a result, Kinross was not independent with respect to the audit services he provided in connection with his review of Issuer D's 2012 interim financial statements.⁹

⁸ AS 14 is effective for audits of fiscal years beginning on or after December 15, 2010.

⁹ Kinross does not qualify for the audit partner rotation exemption pursuant to Rule 2-01(c)(6)(ii) of Regulation S-X because Kinross was the auditor for five or more issuer clients at all relevant times.

D. VIOLATIONS

1. As a result of the conduct described above, Kinross willfully violated Sections 10A(j), *Audit Partner Rotation*, and 10A(k), *Reports to Audit Committees*, of the Exchange Act;
2. As a result of the conduct described above, Kinross willfully violated Rule 2-02(b)(1), *Representations as to the Audit included in Accountants' Reports*, and Rule 2-07, *Communication with Audit Committees*, of Regulation S-X.
3. As a result of the conduct described above, Kinross engaged in improper professional conduct as defined in Rule 102(e)(1)(iv)(B)(2) in that his conduct constituted negligent conduct, consisting of repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.
4. As a result of the conduct described above, Kinross willfully violated certain provisions of the Federal securities laws and the rules and regulations thereunder pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

III.

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

- A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;
- B. What, if any, remedial action is appropriate against Respondent pursuant to Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice, including, but not limited to, censure or denying, temporarily or permanently, the privilege of appearing or practicing before the Commission;
- C. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 10A(j) and (k) of the Exchange Act and Rules 2-02(b)(1) and 2-07 of Regulation S-X, whether Respondent should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70572 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15539

In the Matter of

GEOFFREY H. LUNN,

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 Geoffrey H. Lunn ("Respondent").

II.

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

82 of 90

III.

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

1. From at least February 2010 to February 2011, Lunn was a principal of WGC Group, Inc., a Nevada corporation, through which he received investment money related to securities offered by Dresdner Financial. Lunn never was registered as a broker or was associated with a registered broker-dealer. Lunn, 57 years old, is a resident of Boulder, Colorado.

2. On August 1, 2013, a judgment was entered by consent against Lunn, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder in the civil action entitled Securities and Exchange Commission v. Geoffrey Lunn, et al., Civil Action Number 12-cv-02767, in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that between February 2010 and February 2011 Lunn carried out a fraudulent investment scheme through a fictitious business called Dresdner Financial that raised more than \$5.77 million from at least 70 investors from throughout the United States and several foreign countries. The complaint further alleged that Lunn promised investors extremely high, guaranteed investment returns, and then misappropriated their investment money. The complaint also alleged that Lunn told the investors a series of lies about the reasons for which they were not paid their promised returns in order to keep the fraudulent scheme alive.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Lunn 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. 70567 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3503 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15537

In the Matter of

Wilfred W. Hanson, CPA,

Respondent.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted against Wilfred W. Hanson, CPA ("Respondent" or "Hanson") pursuant to Section 4C¹ of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

83 of 90

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 4C 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 finds³ that:

A. RESPONDENT

Wilfred W. Hanson, age 69, is a California-licensed certified public accountant. From 1971 to 1976, Hanson was an auditor for Arthur Young & Co. From 1976 until he retired in 1994, Hanson held various positions at The Times Mirror Company, including, from 1987 to 1991, as the director of auditing, and, from 1992 to 1994, as the assistant controller. Between 1994 and 2009, Hanson operated a family-owned manufacturing business. Since 2009, Hanson has provided forensic accounting, litigation support, and expert witness testimony in the areas of business valuation and the loss of company or individual earnings for an Irvine, California-based forensic accounting firm (the "Forensic Firm"). The Forensic Firm does not provide audit services and is not registered with the Public Company Accounting Oversight Board ("PCAOB").

B. OTHER RELEVANT PARTIES

1. John Kinross-Kennedy, CPA ("Kinross") is a certified public accountant licensed in the state of California and, since 1993, has operated as a sole proprietor. Kinross is registered with the PCAOB as John Kinross-Kennedy, CPA. During the relevant period covered by this Order, Kinross served as the independent public accountant conducting each of the Issuer Audits. Kinross rents an office from the Forensic Firm, but he is not an associate of the firm nor is the firm or its staff associated with Kinross's audit engagements.

2. At all relevant times, Issuer A's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act, was traded on the OTC Bulletin Board, and its fiscal year ended on the last day of March.

³ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

3. At all relevant times, Issuer B filed reports with the Commission pursuant to Section 15(d) of the Exchange Act, its common stock was traded on the OTC Market, and its fiscal year ended on the last day of August.

4. At all relevant times, Issuer C's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act, was traded on the OTC Market, and its fiscal year ended on the last day of September.

5. At all relevant times, Issuer D's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act, was traded on the OTC Bulletin Board, and its fiscal year ended on the last day of December.

6. At all relevant times, Issuer E filed reports with the Commission pursuant to Section 15(d) of the Exchange Act, its common stock was traded on the OTC Bulletin Board, and its fiscal year ended on the last day of December.

C. RESPONDENT'S IMPROPER PROFESSIONAL CONDUCT

Background

1. Hanson initially obtained a license as a CPA in the state of California in 1973, but allowed it to be cancelled in 1996 following his retirement in 1994. In 2009, he applied to the California Board of Accountancy and obtained a new license as a CPA. Since obtaining his new CPA license, Hanson has twice failed to obtain and report required continuing professional education timely, causing his CPA license to expire – from May to August 2010 and from May to August 2012.

2. Hanson obtained and reported a total of 13 hours of continuing professional education hours specifically related to PCAOB Standards in connection with his application for the issuance of a new CPA license and his subsequent annual renewals. In 2009, Hanson reported 13 hours of continuing professional education relating to PCAOB Auditing Standards Numbers 8 through 15. In 2010, 2011, and 2012, Hanson reported a total of 75 hours of continuing professional education, none of which relate to PCAOB standards. The majority of Hanson's continuing professional education relates to business valuation, bankruptcy, and litigation support services.

3. Between October 2011 and June 2012, Kinross retained Hanson to conduct engagement quality reviews of certain of Kinross's public company issuer audits. Hanson acted as the engagement quality reviewer on the audits of Issuer A's March 31, 2012 financial statements, Issuer B's August 31, 2011 financial statements, Issuer C's September 30, 2011 financial statements, Issuer D's December 30, 2011 financial statements, and Issuer E's December 31, 2011 financial statements, (the "Issuer Audits"). Hanson did not act as the engagement quality reviewer for any reviews of interim financial information. Previously, Hanson had no involvement with Kinross's audit engagements.

Applicable Professional Standards

4. PCAOB Standard No. 7, *Engagement Quality Review* ("AS 7"), which is effective for engagement quality reviews of audits and interim reviews for fiscal years beginning on or after December 15, 2009, defines the required qualifications of an engagement quality reviewer, what should be done when conducting an engagement quality review, and what information should be documented.

5. The engagement quality reviewer must possess the level of knowledge and competence related to accounting, auditing, and financial reporting required to serve as the engagement partner on the engagement under review.⁴ See AS 7, ¶5. On an audit of the financial statements of a public company, the engagement partner should be technically proficient, which includes having an understanding of applicable auditing standards and SEC reporting requirements. The necessary competence can ordinarily be gained through *recent* accounting, auditing, or industry experience and supplemented by continuing professional education and consultation (emphasis added). See PCAOB standard QC §40, ¶¶.05-.08.

6. In conducting an engagement quality review of an audit engagement, the engagement quality reviewer should, among other things, evaluate the significant judgments related to engagement planning and assessments and audit response to significant risks identified by the engagement team; review the engagement completion document; read other information in documents containing the financial statements to be filed with the Commission; and evaluate whether appropriate matters have been communicated, or identified for communication, to the audit committee, management, and other parties, such as regulatory bodies. See AS 7, ¶¶9-11. Additionally, the documentation of an engagement quality review should contain sufficient information that identifies: a) the engagement quality reviewer; b) the documents reviewed by the engagement quality reviewer, and c) the date the engagement quality reviewer provided concurring approval of issuance or, if no concurring approval of issuance was provided, the reasons for not providing the approval. See AS 7, ¶19.

7. In connection with an audit, the engagement quality reviewer may provide concurring approval of issuance only if, after performing with due professional care the review required by AS 7, he or she is not aware of a significant engagement deficiency (See AS 7, ¶12). Due professional care entails possessing the degree of skill commonly possessed by other auditors and exercising it with reasonable care and diligence. See AU §230.03-.05, *Due Professional Care in the Performance of Work*.

Hanson Failed to Comply with Applicable Professional Standards

8. Hanson is not competent to serve as the engagement partner on an audit of the financial statements of a public company. He does not have any *recent* accounting, auditing, or financial reporting experience. He has not participated in an audit of the financial statements of a

⁴ The term "engagement partner" has the same meaning as the "practitioner-in-charge of an engagement" in PCAOB interim quality control standard QC §40, *The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement*.

public company in over 35 years, has never before participated in an audit conducted in accordance with PCAOB standards, and has never served as the engagement partner for any audit of the financial statements of any company. He has had neither relevant accounting nor financial reporting industry experience in the last 19 years. Additionally, he has not otherwise gained the necessary competence through continuing professional education. Of the 206 hours of continuing professional education Hanson obtained and reported in connection with the issuance of his CPA license in 2009 and subsequent renewals through 2012, only 13 hours relate to PCAOB standards and none specifically relate to AS 7.

9. Hanson was also not competent to serve as the engagement quality review partner for Issuer A's audit because, at the time he conducted his review, he did not possess the requisite qualifications as his CPA license had expired. Rule 2-01(a) of Regulation S-X provides that the Commission will not recognize any person as either a public accountant or certified public accountant who is not in good standing as such under the laws of the place of his residence or principal office. Between May and August 2012, Hanson was not duly registered and in good standing under the laws of the state of California, where he resided and maintained his principal office. Accordingly, Hanson was not recognized as an accountant by the Commission in June 2012 when he acted as the engagement quality reviewer for the fiscal year 2012 audit of Issuer A.

10. Hanson failed to exercise due professional care in conducting engagement quality reviews of the Issuer Audits. Hanson provided concurring approval of issuance without performing, with due professional care, the engagement quality reviews of the Issuer Audits. First, he did not possess the degree of skill commonly possessed by other auditors and was not qualified to serve as the engagement partner. Second, he did not exercise reasonable care and diligence.

11. Hanson did not read AS 7 in preparation for his engagement to conduct engagement quality reviews of the Issuer Audits. Hanson also did not inquire about or otherwise investigate the requirements for conducting an engagement quality review or the qualifications or responsibilities of a person serving as an engagement quality reviewer. As such, he was unfamiliar with the level of knowledge and competence that a person serving as the engagement quality reviewer of an audit must have and unfamiliar with PCAOB standards for conducting an engagement quality review of an audit. Furthermore, Hanson did not conduct the engagement quality review pursuant to the procedures in AS 7. Accordingly, Hanson failed to exercise due professional care.

12. In connection with his engagement quality reviews of the Issuer Audits, Hanson merely reviewed the financial statements and Kinross's checklist to make sure all procedures were initialed and dated. Hanson documented his review by signing a 1993-vintage checklist, affirming only that he was satisfied that the detail review and partner review sections of the checklist were completed, that he had reviewed a draft of the financial statements and the auditor's report, and that he approved the issuance of the audit report. Among other things, Hanson did not review critical documents, such as the engagement completion document, which did not exist, nor did he evaluate whether matters had been communicated to the audit committee. Furthermore, Hanson did not properly reflect the date of his EQR and his concurring partner approval of issuance—at times, at Kinross's request, he dated his signature prior to the date he conducted his review.

13. By performing the above procedures, Hanson did not perform the procedures that AS 7 states should be performed in conducting an engagement quality review. Specifically, he did not: a) evaluate the significant judgments related to engagement planning and assessments and audit response to significant risks identified by the engagement team; b) review the engagement completion document, or recognize that the audit work papers did not comply with the PCAOB Auditing Standard No. 3, *Audit Documentation*, requirement that an engagement completion document be prepared; c) read the Forms 10-K containing the financial statements to be filed with the Commission; and d) evaluate whether appropriate matters have been communicated, or identified for communication, to the audit committee, management, and other parties, such as regulatory bodies. Additionally, his documentation is deficient in two respects. First, it does not contain sufficient information to identify the documents he reviewed. Second, the documentation does not always reflect the date Hanson provided concurring approval of issuance, because he, at times, dated his signature prior to the date he conducted his review.

D. VIOLATIONS

As a result of the conduct described above, Hanson engaged in improper professional conduct as defined in Rule 102(e)(1)(ii) and 102(e)(1)(iv)(B)(2) in that his conduct constituted negligent conduct, consisting of repeated instances of unreasonable conduct by Hanson, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

E. FINDINGS

Based on the foregoing, the Commission finds that Hanson engaged in improper professional conduct pursuant to Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) and 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice.

IV.

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

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

A. Hanson is denied the privilege of appearing or practicing before the Commission as an accountant.

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

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the

public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70579 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3504 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15544

In the Matter of

CHINA RUITAI
INTERNATIONAL
HOLDINGS CO., LTD.,
DIAN MIN MA, GANG
MA, AND JIN TIAN,

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS AND
NOTICE OF HEARING PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF
1934 AND RULE 102(E) OF THE
COMMISSION'S RULES OF
PRACTICE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 4C¹ and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

² Rule 102(e)(1)(iii) provides, in pertinent part, that:

84 of 90

against China Ruitai International Holdings Co., Ltd. ("China Ruitai"), Dian Min Ma, Gang Ma, Jin Tian (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Respondent China Ruitai, incorporated in Delaware in 1955 and located in the People's Republic of China ("PRC"), is a manufacturer of deeply processed chemicals used primarily in the production of PVC, cosmetics, foods, and paints. At all relevant times, China Ruitai's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and is quoted on OTC Link operated by OTC Markets Group, Inc. and formerly known as the Pink Sheets ("OTC Link") under the ticker symbol "CRUI."

2. Respondent Dian Min Ma, age 46, resides in the PRC and has been a Director and Chief Executive Officer ("CEO") of China Ruitai since 2007. Dian Min Ma, along with Xing Fu Lu, the President of China Ruitai, owns 100% of the capital stock of Shandong Ruitai Chemical Co., Ltd., a related party to China Ruitai. Dian Min Ma also serves as the Finance Manager for Taian Ruitai Cellulose Co., Ltd., a majority-owned (99%) subsidiary of China Ruitai.

3. Respondent Gang Ma, age 40, resides in the PRC and has been Chief Financial Officer ("CFO") of China Ruitai since 2007. Gang Ma is also the Director of the Financial Department for Taian Ruitai Cellulose Co., Ltd.

4. Respondent Jin Tian, age 38, resides in the PRC and has been a Director and Chief Accounting Officer ("CAO") of China Ruitai since 2007. Jin Tian is also an accountant for Taian Ruitai Cellulose Co., Ltd.

B. RELATED ENTITIES

1. Taian Ruitai Cellulose Co., Ltd. ("Taian Ruitai"), located in the PRC, is a majority-owned (99%) subsidiary of China Ruitai and is the operational subsidiary of China Ruitai.

2. Shandong Ruitai Chemical Co., Ltd. ("Shandong Ruitai"), located in the PRC, is a related party to China Ruitai and holds 1% of the capital stock of Taian Ruitai. Shandong Ruitai is 100% owned by Dian Min Ma and Xing Fu Lu, the President of China Ruitai. Shandong Ruitai is a dealer of hot steam, which it sells to Taian Ruitai.

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

C. FRAUDULENT AND ILLEGAL ACTIVITY

1. From approximately January to December 2011, Respondents orchestrated a scheme to fraudulently obtain up to \$40 million in bank financing using falsified documents. China Ruitai, through its subsidiary, Taian Ruitai, falsified purchase orders to purchase steam from Shandong Ruitai. Aided by the cooperation of Shandong Ruitai, Taian Ruitai obtained invoices from Shandong Ruitai for the fake purchase orders. Taian Ruitai then presented the fake invoices and purchase orders to various banks to obtain bank acceptance notes. Per the terms of the acceptance notes, China Ruitai deposited between 30% and 100% of the invoice amount with the bank, and the bank paid the stated invoice amount to Shandong Ruitai. The amounts that China Ruitai placed on deposit with the banks were held in reserve until China Ruitai repaid the bank acceptance notes.

2. After Shandong Ruitai received funds from the banks, Shandong Ruitai typically provided the funds to Taian Ruitai to be used as operating capital. At other times, Shandong Ruitai retained a portion of the funds for its own operational needs. In either scenario, the scheme was effectuated by the efforts of China Ruitai as the creditor with the banks and the originator of the purchase orders.

3. During the time period of the scheme, China Ruitai filed Forms 10-Q for the periods ended March 31, 2011, June 30, 2011, and September 30, 2011, and a Form 10-Q/A for the period ended June 30, 2011. In each of the Forms 10-Q and Form 10-Q/A, China Ruitai failed to make the disclosures of China Ruitai's obligations to the banks, the scheme China Ruitai was utilizing to provide working capital, and the risks associated with the ongoing scheme. As a result of the scheme, China Ruitai's related party obligations to Shandong Ruitai increased over 1600% from December 31, 2010 to December 31, 2011. As of September 30, 2011, these obligations represented over 36% of China Ruitai's liabilities. The failure to disclose the obligations to the bank and the nature of the activity to obtain bank financing materially misrepresented the actual operations, obligations, solvency, and liquidity of China Ruitai. The misstatements made it appear that China Ruitai was meeting its working capital requirements with cash flows generated from business activities, rather than financing from banks. In its footnotes to the financial statements, China Ruitai described the resulting obligations as only related party notes payable that were "non-interest bearing for the purpose of financing the Company's operations due to a lack of working capital and have no fixed terms of repayment." These statements were false and materially misleading because they failed to disclose the nature and terms of the obligations to the banks. Furthermore, the loans could result in undisclosed risk to the company, especially if the illegal nature of the loans was challenged or exposed by the banks, regulators, or others.

4. Dian Min Ma and Gang Ma each signed China Ruitai's periodic reports filed with the Commission for the first three quarters of 2011. In addition, Dian Min Ma and Gang Ma each signed certifications for the quarterly reports. Those filings incorrectly state that the reports did not "contain any untrue statement of a material fact or

omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report.” The statements and representations in China Ruitai’s filings were materially misleading.

5. Dian Min Ma, Gang Ma, and Jin Tian facilitated China Ruitai’s violations by perpetuating the illegal scheme and directly and indirectly filing or causing to be filed with the Commission quarterly reports on Form 10-Q and Form 10-Q/A that were inaccurate and materially misleading. CEO, Dian Min Ma, and CFO, Gang Ma signed certifications for those reports and attested to their accuracy. These were blatant misrepresentations because Dian Min Ma, Gang Ma, and Jin Tian knew or were reckless in not knowing that the bank financing transactions were illegal and that China Ruitai failed to disclose its obligations to the banks. China Ruitai could not have continued its scheme without the substantial assistance of the officers. The officers’ fraudulent conduct is imputable to China Ruitai.

6. During fiscal year 2011, China Ruitai retained the independent registered public accounting firm of Marcum Bernstein & Pinchuk LLP (“Marcum”), a New York CPA firm with offices in the PRC. Marcum performed the review procedures for each of the first three quarters of 2011. In each of these quarters, China Ruitai provided to Marcum management representation letters signed by Dian Min Ma, Gang Ma, and Jin Tian. The representation letters included materially misleading statements that: (1) management had no knowledge of any fraud; (2) all related party transactions had been properly disclosed; and (3) there had been no violations of laws. These statements were materially misleading because China Ruitai’s scheme was a violation of PRC laws, and the description of the related party obligations misrepresented the true nature of the activity. Because of their management positions as CEO, CFO, and CAO respectively, Dian Min Ma, Gang Ma, and Jin Tian knew or were reckless in not knowing the true nature of the transactions and that the financing was obtained fraudulently and illegally. They knew or were reckless in not knowing that the material misrepresentations would be incorporated into China Ruitai’s public filings and that the public filings materially misrepresented the true nature of the transactions.

7. Marcum also performed audit procedures for fiscal year end in preparation for filing of China Ruitai’s Form 10-K. As part of these audit procedures, Marcum performed substantive and analytical procedures on the related party balances between Taian Ruitai and Shandong Ruitai. Marcum made repeated inquiries regarding the related party balances from employees of China Ruitai, but the employees were uncooperative. Despite the lack of cooperation, Marcum identified at least \$66.7 million in potentially fake purchase orders. When confronted with this information, Gang Ma admitted that the purchase orders and corresponding invoices between Shandong Ruitai and Taian Ruitai were fictitious.

8. As a result of its discovery, Marcum demanded that China Ruitai obtain a legal opinion regarding the legality of the above-described conduct in relation to PRC law. China Ruitai obtained a legal opinion, dated April 12, 2012, which concluded

that the conduct violated Article 10 of the Negotiable Instruments Law. Marcum obtained a separate legal opinion, which came to the same conclusion.

9. As a result of its discovery and the legal opinions it obtained, Marcum reported the matter to China Ruitai's Board of Directors on May 21, 2012, pursuant to Section 10A(b)(1) of the Exchange Act, which requires the auditor to inform management that it has information indicating an illegal act has or may have occurred. Dian Min Ma, Gang Ma, and Jin Tian all received the letter. China Ruitai failed to take any remedial action in response to the letter.

10. On July 25, 2012, Marcum issued a notice to China Ruitai, pursuant to Section 10A(b)(2) of the Exchange Act, indicating an illegal act had occurred and that failure of the company to take remedial action would warrant resignation of Marcum as the independent registered public accountants of China Ruitai. Furthermore, the notice informed China Ruitai that China Ruitai was required to notify the Commission no later than one business day after it received Marcum's report, pursuant to Section 10A(b)(3) of the Exchange Act.

11. China Ruitai failed to report the matter to the Commission. Therefore, on July 27, 2012, Marcum issued a letter pursuant to Section 10A(b)(3) of the Exchange Act to both China Ruitai and the Commission. That letter provided notice to company management that Marcum was resigning from the audit engagement, effective immediately. The July 27, 2012 notice also informed China Ruitai that Marcum no longer wished to be associated with the Forms 10-Q for the periods ended March 31, 2011, June 30, 2011, and September 30, 2011. The letter further requested that the company file a Form 8-K disclosing to the SEC and users of the quarterly reports that Marcum should no longer be associated with the quarterly reports, and that such financial statements were "not reviewed."

12. To this date, China Ruitai has not complied with its obligation to report the matter to the Commission pursuant to Section 10A(b)(3) of the Exchange Act. China Ruitai failed to respond to Marcum's requests and cut off contact with Marcum. In addition, China Ruitai did not file a Form 8-K to announce the resignation of its auditor, as required by Section 13(a) of the Exchange Act and Item 4.01 to Form 8-K.

13. Since Marcum resigned as China Ruitai's auditor, China Ruitai has failed to file its required periodic reports. China Ruitai's last filing was a Form NT 10-K, filed on March 30, 2012. China Ruitai's last periodic report filed with the Commission was for the period ending September 30, 2011 and was filed on November 14, 2011. As a result, China Ruitai is delinquent with at least its 2011 and 2012 Forms 10-K, as well as Forms 10-Q for 2012 and 2013.

D. VIOLATIONS

1. As a result of the conduct described above, China Ruitai and Dian Min Ma violated, and Gang Ma willfully violated, Section 10(b) of the Exchange Act and

Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

2. As a result of the conduct described above, Jin Tian willfully violated Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) thereunder and aided and abetted and caused China Ruitai's violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder.

3. As a result of the conduct described above, China Ruitai violated Section 10(b) of the Exchange Act and Rules 10b-5 and 12b-20 thereunder by including materially false and misleading information in filings that misrepresented the true nature of obligations to banks and by misrepresenting that the obligations were related party transactions in its quarterly reports on Forms 10-Q and Form 10-Q/A for the first three quarters of 2011.

4. As a result of the conduct described above, China Ruitai violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder, which require that an issuer with securities registered under Section 12 of the Exchange Act file annual, quarterly, and current reports with the Commission.

5. As a result of the conduct described above, Dian Min Ma caused, and Gang Ma and Jin Tian willfully aided and abetted and caused China Ruitai's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder.

6. As a result of the conduct described above, Dian Min Ma violated, and Gang Ma willfully violated Exchange Act Rule 13a-14, which requires that the principal executive and principal financial officers of an issuer with securities registered under Section 12 of the Exchange Act sign a certification that, based on their knowledge, the annual and quarterly reports filed with the Commission do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading.

7. As a result of the conduct described above, China Ruitai violated Section 13(b)(2)(A) of the Exchange Act, which requires that an issuer with securities registered under Section 12 of the Exchange Act make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

8. As a result of the conduct described above, Dian Min Ma caused, and Gang Ma and Jin Tian willfully aided and abetted and caused China Ruitai's violations of Section 13(b)(2)(A) of the Exchange Act, and Dian Min Ma violated, and Gang Ma and Jin Tian willfully violated Exchange Act Rule 13b2-1, which prohibits a person from directly or indirectly, falsifying or causing to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Exchange Act; and Exchange Act Rule 13b2-2(a),

which prohibits an officer or director of an issuer with securities registered under Section 12 of the Exchange Act to make or cause to be made a materially false or misleading statement to an accountant in connection with the preparation or filing of any document or report required to be filed with the Commission.

9. As a result of the conduct described above, China Ruitai violated Section 10A(b)(3), which requires an issuer with securities registered under Section 12 of the Exchange Act, to notify the Commission that the issuer has received from its auditor a report pursuant to Section 10A(b)(2) of the Exchange Act indicating that illegal acts have been detected within one business day of the receipt of such report.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 21B of the Exchange Act including, but not limited to, disgorgement, prejudgment interest, and civil penalties pursuant to Section 21B of the Exchange Act;

C. Whether, pursuant to Section 21C of the Exchange Act, Respondent China Ruitai should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 10(b), 10A(b)(3), 13(a), and 13(b)(2)(A) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-11, and 13a-13, thereunder.

D. Whether, pursuant to Section 21C of the Exchange Act, Respondent Dian Min Ma should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 10(b), 13(a), and 13(b)(2)(A) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13a-14, 13b2-1, and 13b2-2(a) thereunder.

E. Whether, pursuant to Section 21C of the Exchange Act, Respondent Gang Ma should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 10(b), 13(a), and 13(b)(2)(A) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13a-14, 13b2-1, and 13b2-2(a) thereunder.

G. Whether, pursuant to Section 21C of the Exchange Act, Respondent Jin Tian should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 10(b), 13(a), and 13(b)(2)(A) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13b2-1, and 13b2-2(a) thereunder.

H. Whether, pursuant to Section 21C(f) of the Exchange Act, Respondents Dian Min Ma, Gang Ma, and Jin Tian should be prohibited, conditionally or unconditionally, and permanently or for such period of time as it shall determine, from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

I. Whether, pursuant to Section 4C of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice, Respondents Gang Ma and Jin Tian should be denied, temporarily or permanently, the privilege of appearing or practicing before the Commission as an accountant.

IV.

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

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

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

This Order shall be served forthwith upon Respondents personally or by certified mail or in accordance with the Hague Service Convention.

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter,

except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70562 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3500 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15534

In the Matter of

PATRIZIO & ZHAO LLC and
XINGGENG (JOHN) ZHAO,
CPA,

Respondents.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Patrizio & Zhao LLC ("P&Z") and Xinggeng (John) Zhao, CPA ("Respondents") pursuant to Sections 4C¹

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

85 of 90

and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.²

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds³ that:

A. SUMMARY

1. This matter involves improper professional conduct under Rule 102(e) of the Commission’s Rules of Practice and related violations by Patrizio & Zhao LLC (“P&Z”) partner Xinggeng (John) Zhao. P&Z served as auditor to Keyuan Petrochemicals, Inc. (“Keyuan”), a China-based issuer, and Zhao was the engagement partner.

2. On February 28, 2013, the Commission filed a complaint against Keyuan alleging that between May 2010 and January 2011, in what was its first year as a U.S. public company, Keyuan systematically failed to disclose in its SEC filings numerous material related party transactions, including transactions between Keyuan and its CEO and controlling shareholders as well as entities controlled by or affiliated with those persons.⁴ The Commission further alleged that the related party transactions took the form of loan guarantees, purchases of raw materials, sales of products, and short term cash transfers for financing purposes.

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

³ 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.

⁴ See *SEC v. Keyuan Petrochemicals, Inc.*, Civil Action No. 13-cv-00263 (D.D.C.).

3. P&Z conducted audits and interim reviews of the periods in which Keyuan failed to disclose the material related party transactions. P&Z audited Keyuan's December 31, 2008 ("2008") and December 31, 2009 ("2009") financial statements (the "Keyuan Audits"). P&Z also conducted interim reviews of Keyuan's financial statements for the first, second, and third quarters of 2010 (the "Keyuan Interim Reviews").

4. In conducting the Keyuan Audits and Keyuan Interim Reviews, Zhao failed to comply with Public Company Accounting Oversight Board ("PCAOB") standards.⁵ P&Z workpapers and other documents reflect many of the same types of related party transactions that Keyuan failed to disclose. Zhao, who determined that related party transactions were an audit risk area, reviewed documentation reflecting that Keyuan was engaged in such transactions. Nonetheless, he approved the issuance of unqualified audit opinions as well as interim review reports on Keyuan's financial statements that failed to disclose the material related party transactions, in violation of U.S. generally accepted accounting principles ("GAAP").⁶

5. By failing to conduct the Keyuan Audits and Keyuan Interim Reviews in accordance with PCAOB standards, P&Z and Zhao engaged in improper professional conduct. P&Z and Zhao also caused the primary disclosure and reporting violations that were the subject of the Commission's civil action against Keyuan.

B. RESPONDENTS

6. Xinggeng (John) Zhao, age 48, is a Chinese citizen and resident of Montville, New Jersey. Zhao is a founding partner of P&Z and head of the firm's China practice. Zhao is a Certified Public Accountant ("CPA") licensed in New Jersey. Zhao served as the engagement partner on the Keyuan Audits and Keyuan Interim Reviews.

7. Patrizio & Zhao LLC is an accounting and auditing firm registered with the PCAOB and based in Parsippany, New Jersey. The firm audits public companies, provides tax preparation services and performs a limited number of non-public company audits.

C. OTHER RELEVANT PARTY

8. Keyuan Petrochemicals, Inc., is a Nevada corporation whose common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. It is headquartered in Ningbo, Zhejiang Province, China. NASDAQ suspended trading in Keyuan's shares on October 7, 2011 and delisted the shares on April 23, 2012. Currently, its shares are

⁵ Citations to PCAOB standards refer to standards in effect at the time of the conduct discussed herein.

⁶ GAAP provides that an issuer has a duty to disclose material related party transactions. In particular, Financial Accounting Standards Board Accounting Standards Codification Topic 850 ("ASC 850"), formerly known as Statement of Financial Accounting Standards No. 57, provides that financial statements shall include disclosures of material related party transactions. ASC 850 specifically enumerates purchases, borrowings, lendings, and guarantees as "[e]xamples of common [related party] transactions."

quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. under the symbol "KEYP."

D. FACTS

Keyuan Failed to Disclose Material Related Party Transactions in Financial Statements Audited and Reviewed by P&Z

9. Keyuan, a China-based corporation, engages in the petrochemical business through its wholly-owned subsidiary, Ningbo Keyuan Plastics Co., Ltd. ("Ningbo Keyuan Plastics"). Chunfeng Tao, the CEO and Chairman of Keyuan, founded Ningbo Keyuan Plastics in 2007, along with Keyuan's controlling shareholders, Jicun Wang and Peijun Chen. In April 2010, Ningbo Keyuan Plastics consummated a reverse merger with a dormant Nevada shell corporation, which was renamed as Keyuan Petrochemicals.

10. P&Z was retained in September 2009 prior to the reverse merger and served as Keyuan's independent auditor in connection with the company's initial public filings with the Commission. Zhao served as the engagement partner for the Keyuan Audits and Keyuan Interim Reviews. Accordingly, he had the final responsibility for the Keyuan Audits and Keyuan Interim Reviews, including all accounting and auditing judgments made in connection with those engagements. In connection with the Keyuan Audits, P&Z issued audit reports with an unqualified opinion for 2008 and 2009. In connection with the Keyuan Interim Reviews, P&Z issued interim review reports for the first, second and third quarters of 2010.

11. Between May 2010 and January 2011, Keyuan filed two registration statements on Form S-1. During this period, Keyuan further filed quarterly reports for the second and third quarters of 2010 on Form 10-Q. P&Z's audit opinions for 2008 and 2009 were included in Keyuan's registration statements. P&Z's interim review reports for the second and third quarters of 2010 were included in the relevant 10-Qs filed by Keyuan.

12. In January 2011, Keyuan replaced P&Z with a new accounting firm to audit the company's December 31, 2010 ("2010") financial statements. As part of its 2010 audit, in early 2011, the new accounting firm, among other things, identified previously-undisclosed related party transactions involving Keyuan and its officers, directors, and controlling shareholders.

13. In October 2011, Keyuan filed its 10-K for 2010. The following month, in November 2011, Keyuan filed restated 10-Qs for the second and third quarters of 2010. In the 2010 10-K and the restated 10-Qs, Keyuan disclosed for the first time numerous material related party transactions that occurred in 2009 and the first three quarters of 2010, periods that were the subject of the audit and interim reviews by P&Z. The related party transactions—which included loan guarantees, purchases of raw materials, sales of products, and short term cash transfers for financing purposes—included transactions between the company and its CEO and controlling shareholders as well as entities controlled by or affiliated with those persons.

Related Party Transactions were a Significant Risk Area in the Keyuan Audits

14. From the outset, Zhao had reason to view the Keyuan engagement as high risk. Zhao was aware that Keyuan was a new company with a limited operating history that was seeking to obtain a U.S. exchange listing. He was further aware that Keyuan did not have any employees knowledgeable about U.S. accounting requirements and was reliant on an outside consultant to prepare its U.S. GAAP financial statements. More generally, Zhao considered the firm's Chinese audit clients to be high risk, and he further had a general understanding at the time that it was common for Chinese companies to engage in related party transactions. Notably, audit planning documents that Zhao reviewed and prepared specifically identified the company's lack of U.S. GAAP experience and related party transactions as audit risk areas.

15. During the course of the Keyuan Audits, Zhao encountered red flags that Keyuan had not properly identified and disclosed related parties and related party transactions. For instance, during the audit planning, Zhao requested Keyuan's Vice President of Accounting to provide a list of Keyuan's related parties and related party transactions. The Vice President of Accounting informed Zhao that there were none. Moreover, the initial draft financial statements prepared by the outside consultant and provided to P&Z did not identify any related parties or disclose any related party transactions.

16. Thereafter, however, P&Z audit staff obtained a list of related parties from Keyuan and further identified related party transactions involving Keyuan, thus contradicting Keyuan's initial representations that there were no related parties or related party transactions. For instance, audit workpapers and planning documents reflect the existence of related party transactions in the form of loan guarantees, sales, other payables, and notes payables. Several documents specifically noted the existence of related party transactions, while others indicated that "further procedures and disclosures [of related party transactions] were necessary."

17. Zhao encountered yet additional red flags. The list of related parties provided by Keyuan's management did not include several entities identified as related parties in either audit planning documents or audit workpapers prepared by P&Z audit staff. In addition, P&Z audit workpapers indicate that audit staff identified transactions with entities identified as related parties or members of Keyuan's management that did not have proper approval. Finally, P&Z was provided a management representation letter at the conclusion of the audit, signed by the CEO, that stated that material related party transactions, including sales, payables, and guarantees, had been properly recorded or disclosed in the financial statements; however, there were no such disclosures anywhere in the financial statements.

Zhao Failed to Conduct the Keyuan Audits in Accordance with PCAOB Standards

Failure to exercise due professional care

18. PCAOB standards require auditors to exercise due professional care when conducting an audit and preparing a report. (AU § 230.01) Under this standard, auditors must

maintain an attitude of professional skepticism, which includes “a questioning mind and a critical assessment of audit evidence.” (AU § 230.07) An auditor should view related party transactions within the framework of existing accounting pronouncements, placing primary emphasis on the adequacy of disclosure. (AU § 334.02)

19. Zhao failed to exercise the requisite level of care and professional skepticism. He prepared and reviewed 12/31/08 and 12/31/09 audit planning documents that reflected related parties and material related party transactions and further reviewed numerous 12/31/08 and 12/31/09 audit schedules that reflected the existence of material related party transactions. These transactions took the form of loan guarantees, sales, other payables/financings, and notes payables. However, Zhao failed to perform a critical assessment of the audit evidence and ensure that P&Z issued the appropriate audit opinion since no related party disclosures were included in Keyuan’s financial statements, as required by U.S. GAAP, and otherwise failed to design or perform procedures to determine the extent of the related party transactions and why Keyuan had not disclosed such transactions.

Improper reliance on representations by management

20. PCAOB standards provide that representations from management are part of the audit evidence the auditor obtains to complement other audit procedures. (AU § 333.03) If a management representation is contradicted by other audit evidence, the auditor should investigate the circumstances of the contradiction and consider the reliability of those representations. (AU § 333.04)

21. The primary related party audit procedure relied on by P&Z involved the use of a list of related parties provided by Keyuan’s management. That list was purportedly used to identify related party transactions during the Keyuan Audits.

22. However, Zhao and members of the audit team came across audit evidence that cast substantial doubts on the reliability of the management-provided list. For instance, P&Z audit staff identified several additional related parties that were not included on the list provided by management. Moreover, P&Z identified numerous transactions with related parties, including transactions with persons and entities on the list provided by management. These subsequent findings by P&Z, which were reviewed by Zhao, contradicted the initial management representations to P&Z that Keyuan was not engaged in related party transactions.

23. In these circumstances, PCAOB standards required Zhao to investigate the circumstances behind the conflict between management’s representations regarding related parties and related party transactions and the other audit evidence gathered by P&Z audit staff. Zhao, however, did not direct the performance of any such procedures. Because Zhao failed to further investigate these contradictions, he failed to comply with PCAOB standards and lacked a basis to rely on the representations made by management.

Failure to obtain sufficient competent evidential matter and properly audit related party transactions

24. PCAOB standards require an auditor to obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding the financial statements under audit. (AU § 326.01) In selecting particular substantive tests to achieve the audit objectives, an auditor considers, among other things, the risk of material misstatement of the financial statements. (AU § 326.11) With respect to related party transactions, PCAOB standards require that after an auditor identifies related party transactions, he or she should apply the procedures considered necessary to obtain satisfaction concerning their purpose, nature, and extent and their effect on the financial statements. (AU § 334.09) For each related party transaction for which disclosure is required, PCAOB standards require that the auditor satisfy himself that the transaction is adequately disclosed in the financial statements. (AU § 334.11) The higher the auditor's assessment of risk regarding related party transactions, the more extensive or effective the audit tests should be. (AU § 9334.19)

25. Zhao failed to obtain sufficient audit evidence to support an unqualified audit opinion on Keyuan's 2008 and 2009 financial statements. In particular, Zhao failed to obtain audit evidence justifying why the material related party transactions reflected in the audit documentation he reviewed (*i.e.*, loan guarantees, sales, other payables/financings, and notes payables) were not disclosed by Keyuan. Zhao also failed to perform adequate procedures to determine the extent of Keyuan's related party transactions and obtain sufficient evidence to support the lack of related party disclosures by Keyuan in its 2008 and 2009 financial statements.

Failure to ensure adequate audit documentation

26. PCAOB Auditing Standard No. 3 requires, in part, that audit documentation contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand the procedures performed, the evidence obtained, and the conclusions reached; who performed and reviewed the work; and the dates such work was completed and reviewed. (AS 3.06) Zhao failed to comply with, and failed to ensure audit staff under his supervision complied with, the applicable audit documentation standards.

27. As an initial matter, P&Z's audit documentation does not reflect several key procedures purportedly employed by the engagement team to audit related party transactions: for instance, there is no documentation reflecting that P&Z made an inquiry of Keyuan for an identification of related parties and related party transactions (or management's response that there were no such transactions); that management provided a list of related parties; or that P&Z audit staff used such a list to identify and test related party transactions.

28. Audit documentation also does not reflect P&Z's conclusions and findings on the issue of related party transactions. For instance, audit documentation does not reflect why the material related party transactions reflected in P&Z's workpapers were not disclosed by Keyuan. In addition, there is no explanation for how or why certain entities—although not on the

management-provided list—were identified by P&Z audit staff as related parties, or why transactions with these entities were ultimately not disclosed as related party transactions in Keyuan’s financial statements. Moreover, audit documentation does not reflect sufficient information to explain and reconcile otherwise conflicting information regarding certain entities identified as related parties. In addition, although related party transactions were identified as a risk area for the Keyuan Audits, P&Z did not document what procedures were performed with respect to the presentation and disclosure of related party transactions.

29. Zhao also failed to fully document his review of audit workpapers and ensure audit staff under his supervision properly documented their review of workpapers. None of the 2008 and 2009 audit testing workpapers bear any evidence of review by Zhao, the audit manager or the audit senior. However, in the relevant audit documentation checklists, Zhao checked “yes” to indicate that he had signed off and dated workpapers he had reviewed. Moreover, Zhao reviewed audit documentation checklists which reflected that the audit senior had checked “yes” to indicate that workpapers contained reviewer signatures when, in fact, none of the testing workpapers contained any such evidence of review.

30. Moreover, P&Z did not prepare an engagement completion document for the Keyuan Audits that documented significant findings or issues, including, as it relates to related party transactions. Zhao, however, checked “yes” in audit documentation checklists indicating that he had prepared and/or reviewed the engagement completion document.⁷

Other violations of PCAOB standards

31. Zhao violated additional PCAOB standards based on the conduct described above. First, Zhao did not adequately plan the audit—he failed to design procedures to identify related parties beyond those identified by management as well as to identify all material transactions with those parties.⁸ Zhao also failed to design procedures to investigate, as noted above, the conflict between management representations and certain other audit evidence gathered by P&Z audit staff.

32. Zhao also failed to develop audit procedures that were tailored to the risk presented by the company’s related party transactions. In particular, audit planning documents indicate that a risk assessment was conducted, and that related party transactions were specifically identified as a risk area. However, there is no indication that Zhao designed any heightened procedures for auditing this risk area.

⁷ PCAOB Auditing Standard No. 3.13 states: “The auditor must identify all significant findings or issues in an engagement completion document.”

⁸ When planning the audit, the auditor should consider conditions that may require extension or modification of audit tests, such as the existence of related party transactions. (AU § 311.03g) Additionally, an audit of financial statements is a cumulative process and the audit evidence obtained may cause the auditor to modify the planned procedures. (AU § 312.33)

33. Zhao further improperly issued an unqualified audit opinion on Keyuan's 2008 and 2009 financial statements, which failed to include required disclosures under GAAP of material related party transactions.⁹

Zhao Failed to Conduct the Keyuan Interim Reviews in Accordance with PCAOB Standards

34. In connection with an interim review, PCAOB standards provide that an auditor should exercise due professional care and professional skepticism (AU § 722.01); should obtain a basis for communicating whether he is aware of any material modifications that should be made to the interim financial information for it to conform with GAAP (AU § 722.07); and should follow general documentation standards (AS 3, AU § 722.51-.52).

35. Zhao served as engagement partner for P&Z's interim reviews of Keyuan's financial statements for the first, second, and third quarters of 2010. Several violations of PCAOB standards similar to some of those described above also occurred during the Keyuan Interim Reviews. As an initial matter, workpapers for each of the interim review periods, which Zhao reviewed, reflect numerous related party loan guarantees; none of these loan guarantees, however, were disclosed by Keyuan in its financial statements as related party transactions.¹⁰

36. P&Z also failed to perform required analytical procedures in connection with the quarterly reviews. In particular, PCAOB standards provide that an auditor, as part of an interim review, should apply analytical procedures to the interim financial information, which should include comparing current period and prior period information as well as comparing current period amounts against the auditor's expectations that were based on plausible relationships. (AU § 722.16) P&Z did not perform the required analytical procedures for the first and second quarter 2010 interim reviews. With respect to the analytical procedures for the third quarter 2010 review, although procedures were performed, P&Z failed to perform procedures that were consistent with the requirements of PCAOB standards, as they failed to include a comparison of the current interim information to an auditor's expectations that were based on plausible relationships.

37. Zhao also failed to ensure that appropriate documentation was prepared in connection with the 2010 interim reviews. Numerous workpapers contain no preparer and/or reviewer sign-offs by Zhao (or by other audit staff), even though Zhao indicated in interim review checklists that he had signed off and dated all workpapers he had reviewed. Zhao also

⁹ An auditor should express a qualified or an adverse opinion on financial statements that fail to include required disclosures under GAAP. (AU § 431.03)

¹⁰ The accountant performing a review of interim financial information should make additional inquiries or perform other procedures when he or she becomes aware of information that leads him or her to believe that the interim financial information may not be in conformity with GAAP in all material respects. (AU § 722.22) Additionally, the accountant should modify their report if information the accountant believes is necessary for adequate disclosure in conformity with GAAP is not included in the interim financial information. (AU § 722.43)

failed to ensure preparation of engagement completion documents for the interim reviews, even though review programs that Zhao reviewed and signed-off on indicated that such a document had been prepared.

Zhao Failed to Investigate Subsequent Discovery of Facts

38. PCAOB standards provide that when an auditor becomes aware of information which relates to the financial statements previously reported on by him, but which was not known to him at the date of his report, and which is of such a nature from such a source that he would have investigated it had it come to his attention during the course of the audit, he should, as soon as practicable, undertake to determine whether the information is reliable, and whether the facts existed at the date of his report. (AU § 561.04; *see also* AU § 722.46) This undertaking must be performed even when the auditor has resigned or been discharged. (AU § 9561.02)

39. Zhao failed to investigate subsequently discovered facts existing as of the date of the P&Z audit reports that may have affected the firm's opinions on Keyuan's 2008 and 2009 financial statements and review reports on the financial statements for the 2010 quarterly periods. In particular, in early 2011, several months after P&Z had been replaced as Keyuan's auditor, Zhao was informed by Keyuan's senior management that the successor audit firm had refused to sign off on the 2010 audit report because, in part, it had identified an off-balance sheet cash account as well as undisclosed related party transactions (some of which involved entities that had not been previously identified by P&Z as related parties).

40. Zhao's response to the serious revelations being made by Keyuan's management was inadequate. Zhao did not take steps to determine whether the information learned regarding potentially new undisclosed related party transactions and the off-balance sheet account was reliable and whether the facts existed as of the dates of P&Z's 2008 and 2009 audit opinions and the interim review reports for 2010. For instance, Zhao made no inquiry to determine the identities of the undisclosed related parties; what undisclosed related party transactions had been noted by the successor audit firm; or the periods in which the undisclosed related party transactions occurred. Zhao also made no inquiry regarding the off-balance sheet cash account, including the dates when the account was in use and the amount of the transactions conducted through the account. Zhao failed to inquire further as required by AU § 561 notwithstanding the fact that, based on the information provided to him by Keyuan's management, he had developed substantial concerns around this time as to the audit opinions his firm had previously issued.

E. VIOLATIONS

Rule 102(e) and Section 4C of the Exchange Act

41. As a result of the conduct described above, Respondents engaged in improper professional conduct within the meaning of Section 4C of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. Section 4C of the Exchange Act and Rule 102(e)(1)(ii) provide, in pertinent part, that the Commission may censure or deny, temporarily or

permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have engaged in improper professional conduct. Section 4C(b) and Rule 102(e)(1)(iv) define improper professional conduct with respect to persons licensed to practice as accountants.

42. Under Section 4C(b) and Rule 102(e)(1)(iv)(B), the term “improper professional conduct” means one of two types of negligent conduct: (1) a single instance of highly unreasonable conduct in circumstances for which heightened scrutiny is warranted; or (2) repeated instances of unreasonable conduct that indicate a lack of competence.

43. Respondents’ failures to abide by PCAOB standards in the Keyuan Audits and the Keyuan Interim Reviews constitute repeated instances of unreasonable conduct, and also satisfy the highly unreasonable conduct standard since the audit area of related party transactions warranted heightened scrutiny.¹¹ Any one of Respondents’ auditing failures would have been highly problematic, but taken together the failures are deemed by the Commission to be egregious. In short, Respondents conducted the Keyuan Audits and Keyuan Interim Reviews in a manner that no other reasonable auditor would have done so under the circumstances with respect to related party transactions.

P&Z and Zhao were a Cause of Keyuan’s
Violations of Sections 17(a)(2) and (a)(3) of the Securities Act and
Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder

44. Under Section 21C of the Exchange Act, the Commission may enter a cease-and-desist order against any person who is or was a “cause” of another’s primary violation if the person knew or should have known that his act or omission would contribute to the primary violation. Negligence is sufficient to establish “causing” liability under Section 21C of the Exchange Act when a person is alleged to have caused a primary violation that does not require scienter. *See KPMG LLP v. SEC*, 289 F.3d 109, 112 (D.C. Cir. 2002).

45. Keyuan violated Sections 17(a)(2) and (a)(3) of the Securities Act of 1933 (“Securities Act”) by failing to disclose material related party transactions in registration statements filed with the Commission between May 2010 and January 2011. Keyuan further violated Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder by failing to disclose material related party transactions in its 10-Qs for the second and third quarters of 2010, as required by GAAP. With respect to both the registration statements and the quarterly reports, the material related party loan guarantees, sales, other payables/financings, and notes payables

¹¹ As noted above, Zhao received conflicting information from management regarding the existence of related parties and related party transactions. Zhao also knew that Keyuan was a relatively new China-based company and that its accounting staff lacked U.S. GAAP experience. More generally, courts have found that related party transactions warrant heightened scrutiny and must be appropriately vetted and scrutinized by auditors to a greater degree because of the risk that they may not be conducted on an arms-length basis. *See McCurdy v. SEC*, 396 F.3d 1258, 1261 (D.C. Cir. 2005) (noting that related party transactions “are viewed with extreme skepticism in all areas of finance”); *see also* AU § 334 (recognizing the need for care in the examination of material related party transactions).

reflected in P&Z's workpapers should have been disclosed by Keyuan pursuant to GAAP and/or Commission regulations.

46. For each of the periods in which Keyuan failed to disclose material related party transactions, P&Z issued an audit report or an interim review report. In particular, for 2008 and 2009, P&Z issued audit reports containing an unqualified opinion stating that P&Z conducted an audit of Keyuan's financial statements in accordance with PCAOB standards and that Keyuan's financial statements were presented in conformity with GAAP. P&Z consented to the inclusion of these audit reports in Keyuan's Form S-1 registration statements filed with the Commission between May 2010 and January 2011. For the second and third quarters of 2010, P&Z issued interim review reports stating that P&Z conducted reviews of Keyuan's quarterly financial statements in accordance with PCAOB standards and that P&Z was not aware of any material modifications that should be made to Keyuan's financial statements for them to conform with GAAP. P&Z consented to the inclusion of these interim review reports in Keyuan's 10-Qs for the second and third quarters of 2010.

47. Neither P&Z's audit reports or its interim review reports were accurate, however, because P&Z failed to conduct the Keyuan Audits and Keyuan Interim Reviews in accordance with PCAOB standards and because Keyuan's financial statements were not prepared in conformity with GAAP. Zhao knew or should have known that as a consequence Keyuan filed financial statements with the Commission that failed to disclose material related party transactions as required by GAAP and Commission regulations. P&Z and Zhao were thus a cause of Keyuan's failure to accurately disclose material related party transactions and Keyuan's resulting violations of Sections 17(a)(2) and (a)(3) of the Securities Act and Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder.

P&Z and Zhao Violated Exchange Act § 10A(a)(2)

48. Section 10A(a)(2) of the Exchange Act requires each audit conducted of an issuer by a registered public accounting firm to include "procedures designed to identify related party transactions that are material to the financial statements or otherwise require disclosure therein." No showing of scienter is necessary to establish a violation of Section 10A. *See SEC v. Solucorp Indus., Ltd.*, 197 F. Supp. 2d. 4, 10-11 (S.D.N.Y. 2002).

49. P&Z and Zhao, in connection with the Keyuan Audits, violated Section 10A(a)(2) of the Exchange Act because they failed to include auditing procedures designed to identify material related party transactions. As noted above, P&Z audit workpapers reflected the existence of material related party transactions; the audit, however, lacked adequate procedures to ensure that those transactions were disclosed as such by Keyuan in financial statements that were the subject of the Keyuan Audits and Keyuan Interim Reviews. Moreover, P&Z and Zhao failed to appropriately design procedures to identify Keyuan's related party transactions, including investigating the conflicting information provided by management regarding the identification of related parties and related party transactions.

F. FINDINGS

50. Based on the foregoing, the Commission finds that P&Z and Zhao engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice and Section 4C of the Exchange Act.

51. Additionally, the Commission finds that P&Z and Zhao were a cause of Keyuan's violations of Sections 17(a)(2) and (a)(3) of the Securities Act and Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder.

52. Additionally, the Commission finds that P&Z and Zhao violated Section 10A(a)(2) of the Exchange Act.

IV.

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

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

A. P&Z shall cease and desist from committing or causing any violations and any future violations of Section 10A(a)(2) of the Exchange Act and from causing any violations and any future violations of Sections 17(a)(2) and (a)(3) of the Securities Act and Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 promulgated thereunder.

B. P&Z is denied the privilege of appearing or practicing before the Commission as an accountant pursuant to Rule 102(e)(i)(ii) of the Commission's Rules of Practice and Section 4C of the Exchange Act.

C. After three years from the date of this order, P&Z may request that the Commission consider its reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as an independent accountant. Such an application must satisfy the Commission that:

1. P&Z is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective. However, if registration with the PCAOB is dependent upon reinstatement by the Commission, the Commission will consider the application on its other merits;

2. P&Z has hired an independent CPA consultant ("consultant"), who is not unacceptable to the staff of the Commission and is affiliated with a public accounting firm registered with the Board, that has conducted a review of P&Z's quality control system and submitted to the staff of the Commission a report that describes the review conducted and procedures performed, and represents that the review did not identify any criticisms of or

potential defects in the firm's quality control system that would indicate that any of P&Z's employees will not receive appropriate supervision. P&Z agrees to require the consultant, if and when retained, to enter into an agreement that provides that for the period of review and for a period of two years from completion of the review, the consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with P&Z, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the consultant in performance of his/her duties under this Order shall not, without prior written consent of the staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with P&Z, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the review and for a period of two years after the review.

3. P&Z has resolved all disciplinary issues with the PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and

4. P&Z acknowledges its responsibility, as long as it appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

D. P&Z shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$30,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;¹²
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

¹² The minimum threshold for transmission of payment electronically is \$50,000.00 as of April 1, 2012. This threshold will be increased to \$1,000,000 by December 31, 2012. For amounts below the threshold, respondents must make payments pursuant to option (2) or (3) above.

Payments by check or money order must be accompanied by a cover letter identifying P&Z as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

E. Zhao shall cease and desist from committing or causing any violations and any future violations of Section 10A(a)(2) of the Exchange Act and from causing any violations and any future violations of Sections 17(a)(2) and (a)(3) of the Securities Act and Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13 promulgated thereunder.

F. Zhao is denied the privilege of appearing or practicing before the Commission as an accountant pursuant to Rule 102(e)(i)(ii) of the Commission's Rules of Practice and Section 4C of the Exchange Act.

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

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

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

(a) Zhao, or the public accounting firm with which he is associated, is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

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

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

(d) Zhao acknowledges his responsibility, as long as Zhao appears or practices before the Commission as an independent accountant, to comply with all requirements

of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

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

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. 70564 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3501 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15535

In the Matter of

Malcolm L. Pollard, CPA and
Malcolm L. Pollard, Inc.

Respondents.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Malcolm L. Pollard, CPA ("Pollard") and Malcolm L. Pollard, Inc. (the "firm" or "Pollard, Inc.") (collectively "Respondents") pursuant to Sections 4C¹ and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

² Rule 102(e)(1)(ii) provides, in pertinent part, that:

86 of 90

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds³ that:

SUMMARY

This matter concerns multiple failures of Respondents to comply with Public Company Accounting Oversight Board ("PCAOB") Standards in connection with annual audits and quarterly reviews of the financial statements of three microcap issuers, herein referred to as Issuers A, B and C.

Respondents repeatedly engaged in unreasonable conduct that resulted in violations of applicable professional standards and which demonstrate a lack of competence to practice before the Commission. Among other things, Respondents repeatedly failed to prepare and maintain adequate audit work papers, consider and document fraud risks, obtain engagement quality reviews, and obtain written management representations. In addition, after Respondents became aware that Issuer B included their audit report in its Form 10-K filing with the Commission without permission, Respondents failed to inform Issuer B's management or the audit committee of its board of directors of the illegal act. In addition, Respondents failed to design procedures as part of their audit to detect illegal acts. Respondents also claimed in each of their audit reports that they complied with PCAOB Standards when they had not.

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

³ The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

RESPONDENTS

1. **Malcolm L. Pollard ("Pollard")**, age 72, resides in Erie, Pennsylvania. Pollard has been licensed as a certified public accountant in the Commonwealth of Pennsylvania since 1981.⁴ Pollard operates as the sole shareholder and employee of Pollard, Inc., a Pennsylvania corporation he formed in May 1993 and which he registered with the PCAOB in January 2010. Pollard withdrew the firm's PCAOB registration in November 2011.

2. **Malcolm L. Pollard, Inc. (the "firm" or "Pollard, Inc.")** is a Pennsylvania corporation with its principal place of business in Erie, Pennsylvania. Pollard, conducted the audits at issue in this matter, through his firm Pollard, Inc. which was registered with the PCAOB in January 2010. The firm withdrew its PCAOB registration in November 2011. Pollard owns and controls Pollard, Inc., and is its sole shareholder and employee.

RELATED ENTITIES

3. **Issuer A** is a Nevada corporation with its principal place of business in Carson City, Nevada. Issuer A's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is traded on the OTC Market. Issuer A files periodic reports, including Forms 10-K and 10-Q, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder.

4. **Issuer B** is a Wyoming corporation with its principal place of business in Wayne, Pennsylvania. Issuer B's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is traded on the OTC Market. Issuer B files periodic reports, including Forms 10-K and 10-Q, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder.

5. **Issuer C** is a Nevada corporation with its principal place of business in Hollywood, Florida. Issuer C's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is traded on the OTC Market. Issuer C files periodic reports, including Forms 10-K and 10-Q, with the Commission pursuant to Section 13(a) of the Exchange Act and related rules thereunder.

FACTS

ISSUER A

6. Issuer A's public filings state that it offers air-combat training, aerial refueling, aircraft maintenance training, disaster relief services, and other aerospace/defense services to the United States and foreign militaries and agencies. Issuer A had no revenues for the fiscal years ended December 31, 2009 and 2010, and sustained net losses of \$1,418,332 for fiscal year 2010. As of December 31, 2010, Issuer A had two full-time employees. Respondents issued an audit

⁴ Pollard is also an attorney and is licensed to practice in Pennsylvania. The conduct at issue in this Order is based on Pollard's conduct as a CPA and not as an attorney.

report on May 12, 2011 on Issuer A fiscal year 2010 financial statements and claimed to have conducted their audit in accordance with PCAOB Standards. Respondents, however, repeatedly failed to adhere to those standards in the performance of their audit.

Failure to Prepare and Retain Adequate Audit Documentation

7. PCAOB Standards require an auditor to document the procedures performed, evidence obtained, and conclusions reached with respect to relevant financial statement assertions. Audit documentation must clearly demonstrate that the work was in fact performed and must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement: (1) to understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached, and (2) to determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review. AS No. 3, *Audit Documentation*, at .06. In addition, an auditor must identify all significant findings or issues in an engagement completion document. AS No. 3, *Audit Documentation*, at .13.

8. Respondents' audit documentation for the fiscal year 2010 audit of Issuer A was seriously deficient.⁵ The work papers did not include audit programs or memoranda describing procedures performed. The work papers did not include any notations or evidence of the procedures performed or conclusions reached based on the work performed. Further, none of the work papers contained evidence indicating who had performed the work and the date such work was completed.

9. Respondents also failed to prepare an engagement completion document. The engagement completion document identifies the significant findings or issues of the audit which are substantive matters that are important to understanding the procedures performed, evidence obtained, or conclusions reached during the audit.

Failure to Consider Fraud Risks

10. PCAOB Standards require an auditor to consider fraud in a financial statement audit and document: (1) the procedures performed to obtain information necessary to identify and assess the risks of material misstatement due to fraud; (2) specific risks of material misstatement due to fraud that were identified, and a description of the auditor's response to those risks; and (3) the results of the procedures performed to further address the risk of management override of controls. AU § 316, *Consideration of Fraud in a Financial Statement Audit*, at .83.

11. Respondents' work papers were devoid of any documentation that they considered fraud risks in their fiscal year 2010 financial statement audit of Issuer A. The work papers contained no documentation of the procedures performed to identify and assess fraud risks, the fraud risks identified, or the results of procedures performed to address fraud risks.

⁵ See AS No. 3 at ¶4 for examples of audit documentation.

Failure to Perform an Engagement Quality Review

12. PCAOB Standards require an engagement quality review and concurring approval of issuance for each audit engagement and for each engagement to review interim financial information. The objective of the engagement quality reviewer is to perform an evaluation of the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report, to determine whether to provide concurring approval of issuance. The PCAOB Standards provide further that the engagement quality reviewer must be an associated person of a registered public accounting firm and that, to maintain objectivity, the reviewer (and any others who assist) should not make decisions on behalf of the engagement team or assume any of the responsibilities of the engagement team. The engagement partner remains responsible for the engagement and its performance, notwithstanding the involvement of the engagement quality reviewer and others who assist the reviewer. AS No. 7, *Engagement Quality Review*, at .01-.03, .07.

13. As noted above, PCAOB Standards require an engagement quality review and concurring approval of issuance for each audit engagement. AS No. 7, *Engagement Quality Review*, at .01. Respondents failed to obtain an engagement quality review for their audit of Issuer A.

ISSUER B

14. Issuer B's public filings state that it develops and markets a unique line of vitamin-enriched gourmet spices. According to its Form 10-K for fiscal year ended December 31, 2010, Issuer B's initial product line featured ground pepper, cinnamon, granulated garlic and crushed red pepper packaged in plastic screw-top shakers, and its products under development included ketchup, mustard and salad dressing which will include its vitamin-enriched spices. Issuer B had no sales until the first quarter of fiscal year 2010. Its gross revenues for fiscal year 2010 were \$18,901. Its total expenses were \$2,056,059, for a net operating loss of \$2,037,568. As of December 31, 2010, Issuer B had one employee, its President and CEO.

15. Respondents audited Issuer B's fiscal year 2009 and 2010 financial statements. Respondents' audits, however, failed to comply with PCAOB Standards. Respondents also failed to have procedures in place to detect illegal acts and failed to investigate a potential illegal act on the part of Issuer B despite knowledge that an illegal act had occurred.

Failure to Prepare and Retain Adequate Audit Documentation

16. As described above, PCAOB Standards require that audit documentation clearly demonstrate that the work was in fact performed. AS No. 3, *Audit Documentation*, at .06. Because audit documentation is the written record that provides the support for the representations in the auditor's report, it should: (a) demonstrate that the engagement complied with the standards of the PCAOB; (b) support the basis for the auditor's conclusions concerning every relevant financial statement assertion; and (c) demonstrate that the underlying accounting records agreed or reconciled with the financial statements. AS No. 3, *Audit Documentation*, at .05. The PCAOB Standards also provide that the auditor must retain audit documentation for

seven years from the date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements or, if a report is not issued, seven years from the date that fieldwork was substantially complete. AS No. 3, *Audit Documentation*, at .14.

17. The audit documentation for Respondents' fiscal year 2009 and 2010 Issuer B audits was grossly inadequate. Respondents' work papers consisted only of a Management Representation letter signed by the CEO of Issuer B stating that the letter was provided to Respondents in connection with their audits for the years ended December 31, 2010 and 2009, and a draft of Issuer B's Form 10-Q for the period ended September 30, 2010. These documents failed to demonstrate that Respondents' engagement complied with PCAOB Standards, failed to support the basis for Respondents' conclusions concerning relevant financial statement assertions, and failed to demonstrate that the underlying accounting records agreed or reconciled with the financial statements. Indeed, the dearth of documents suggests that no audit work was in fact performed by Respondents.

Failure to Perform an Engagement Quality Review

18. As noted above, PCAOB Standards require an engagement quality review and concurring approval of issuance for each audit engagement and for each engagement to review interim financial information. AS No. 7, *Engagement Quality Review*, at .01. Respondents failed to obtain an engagement quality review for their audit of Issuer B for the year ended December 31, 2010.

Failure to Have Procedures to Detect Illegal Acts and to Investigate a Potential Illegal Act

19. Section 10A(a)(1) provides that each audit by a registered public accounting firm shall include . . . procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts. In addition, Section 10A(b)(1) provides that if, in the course of conducting an audit . . . the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall . . . determine whether it is likely that an illegal act has occurred, and, if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer . . . and as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential.

20. Respondents gave a draft audit report to Issuer B but did not give the Company permission to include their report in the Company's Form 10-K filing, which Issuer B filed with the Commission on April 15, 2011. The report that was in the 10-K filing was not the draft that Respondents provided the Company. Respondents did not do any evaluation to ascertain whether an illegal act actually occurred and did not evaluate the possible effect of the act on the financial statements. Respondents were aware that an audit report bearing the firm's name had been included in the Form 10-K filed with the Commission. Despite this knowledge,

Respondents did not inform Issuer B's management that the Company had included their audit report without permission and did not assure that the audit committee (or the board of directors) was adequately informed of that fact. In addition, Respondents audit had no procedures in place to detect illegal acts.

ISSUER C

21. Issuer C currently operates an e-commerce website that enables businesses to establish an on-line retail presence. Issuer C had \$28,351 in gross revenues for fiscal year 2010 and an accumulated deficit of approximately \$9 million as of December 31, 2010.

22. Respondents issued an audit report on March 18, 2011 on Issuer C's fiscal year 2008 and 2009 financial statements,⁶ and an audit report on April 12, 2011 on Issuer C's fiscal year 2009 and 2010 financial statements. For each, Respondents claimed to have conducted the audit in accordance with PCAOB Standards. Respondents also conducted quarterly reviews for June 30, 2010, September 30, 2010, March 31, 2011, and June 30, 2011 for Issuer C. Respondents failed repeatedly to adhere to PCAOB Standards in the performance of their Issuer C audits and reviews.

Failure to Prepare and Retain Adequate Audit Documentation

23. As noted above, PCAOB Standards include requirements for documentation the auditor should prepare and retain. AS No. 3, *Audit Documentation*, at .01. Respondents' audit documentation for the audits for the fiscal years ended December 31, 2008, 2009 and 2010 of Issuer C was woefully inadequate. The audits failed to include evidence of the procedures performed, evidence obtained, and conclusions reached with respect to relevant financial statement assertions. For example, the work papers did not include audit programs or memoranda describing procedures performed. The work papers did not include any notations or evidence of the procedures performed or conclusions reached based on the work performed. Further, none of the work papers contained evidence indicating who had performed the work and the date such work was completed.

Failure to Consider Fraud Risks

24. PCAOB Standards require an auditor to consider fraud in a financial statement audit and document: (1) the procedures performed to obtain information necessary to identify and assess the risks of material misstatement due to fraud; (2) specific risks of material misstatement due to fraud that were identified, and a description of the auditor's response to those risks; and (3) the results of the procedures performed to further address the risk of management override of controls. AU § 316, *Consideration of Fraud in a Financial Statement Audit*, at .83.

⁶ The fiscal years ended December 31, 2009 and 2008 were audited by a predecessor firm and included in Issuer C's Form 10-K filed with the Commission on April 15, 2010. On October 19, 2010, the PCAOB permanently revoked the registration of the predecessor firm. Respondents' March 18, 2011 opinion and audit report for fiscal years 2009 and 2008 were included in Issuer C's amended Form 10-K filed with the Commission on April 7, 2011.

25. Respondents' work papers contained no documentation showing that they considered fraud in connection with the audits of Issuer C for fiscal years 2008, 2009 and 2010. The work papers contained no documentation of the procedures performed to identify and assess fraud risks, the fraud risks identified, or the results of procedures performed to address fraud risks.

Failure to Perform an Engagement Quality Review

26. As discussed above, PCAOB Standards require an engagement quality review and concurring approval of issuance for each audit engagement and for each engagement to review interim financial information. AS No. 7, *Engagement Quality Review*, at .01. Respondents failed to obtain engagement quality reviews for their audit of Issuer C for the fiscal year ended December 31, 2010 and for the four quarterly reviews performed for the quarters ended June 30, 2010, September 30, 2010, March 31, 2011 and June 30, 2011.

Failure to Obtain Written Management Representations

27. PCAOB Standards require an independent auditor to obtain written representations from management as a part of an audit of financial statements and they should be obtained for all financial statements and periods covered by the auditor's report. The written representations ordinarily confirm representations explicitly or implicitly given to the auditor, indicate and document the continuing appropriateness of such representations, and reduce the possibility of misunderstanding concerning the matters that are the subject of the representations. AU § 333, *Management Representations*, at .01-.02, .05.

28. Respondents failed to obtain written representations from Issuer C's management as part of their audits for fiscal years ended December 31, 2008 and 2009.

VIOLATIONS

Improper Professional Conduct

29. Rule 102(e)(1)(ii) of the Commission's Rules of Practice provides, in part, that the Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have engaged in improper professional conduct. Rule 102(e)(1)(iv) defines improper professional conduct with respect to persons licensed to practice as accountants. As applicable here, improper professional conduct means a violation of applicable professional standards that resulted from "repeated instances of unreasonable conduct . . . that indicate a lack of competence to practice before the Commission." "Unreasonable conduct," as used in this provision, means ordinary negligence. *See In the Matter of Dohan & Co. CPA*, Release No. 420 (June 27, 2011).

30. Respondents engaged in repeated instances of unreasonable conduct that indicate a lack of competence to practice before the Commission. Due to their number and seriousness, any one of Respondents' auditing failures described above amount to negligent misconduct. Respondents conducted the audits in question in a manner in which no other reasonable auditor

would act. Specifically, Respondents failed: (i) to obtain written management representations in their fiscal year 2008 and 2009 audits of Issuer C. (AU § 333) (ii) to prepare and maintain adequate audit work papers for their fiscal year 2010 audit of Issuer A, fiscal year 2009 and 2010 audits of Issuer B, and fiscal year 2008, 2009 and 2010 audits of Issuer C, and to include an engagement completion document in their fiscal year 2010 audit of Issuer A (AS No. 3); (iii) to consider and document fraud in their fiscal year 2010 audit of Issuer A and their fiscal year 2008, 2009 and 2010 audits of Issuer C (AU § 316. 83); and (iv) to obtain engagement quality reviews in their fiscal year 2010 audit of Issuer A, fiscal year 2010 audit of Issuer B, fiscal year 2010 audit of Issuer C, and for the quarterly reviews for quarters ended June 30, 2010, September 30, 2010, March 31, 2011 and June 30, 2011 of Issuer C (AS No. 7).

Violations of Sections 10A(a)(1) and (b)(1) of the Exchange Act

31. Section 10A(a)(1) of the Exchange Act provides that “[e]ach audit...by a registered public accounting firm *shall* include” procedures designed to detect illegal acts that would have a material effect on the determination of the financial statement amounts.

32. Section 10A(b)(1) of the Exchange Act provides that if “the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall . . . determine whether it is likely that an illegal act has occurred; and . . . if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer” Section 10A(b)(1) further requires the public accounting firm to “inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential.”

33. Respondents gave Issuer B a draft audit report but did not give the Company permission to include their report in the Company’s Form 10-K filing which Issuer B filed with the Commission on April 15, 2011. Respondents did not do any evaluation to ascertain whether an illegal act actually occurred and did not evaluate the possible effect of the act on the financial statements. Respondents knew that Issuer B filed an audit report bearing the firm’s name. Despite knowing that this illegal act had occurred, Respondents did not inform Issuer B’s management that the Company had included Respondents’ audit report without Respondents’ permission and did not assure that the audit committee (or the board of directors) was adequately informed of that fact. Moreover, Respondents had no procedures in place during the audit to detect illegal acts. Accordingly, Respondents willfully violated Sections 10A(a)(1) and (b)(1) of the Exchange Act.

Violation of Exchange Act Rule 2-02 of Regulation S-X

34. Rule 2-02(b)(1) of Regulation S-X mandates that an accountant’s report “state whether the audit was made in accordance with generally accepted auditing standards” “[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS

or to specific standards under GAAS, as they relate to issuers, should be understood to mean the standards of the PCAOB plus any applicable rules of the Commission." *See In the Matter of KMJ Corbin & Co.*, Release No. 3185 (Sept. 13, 2010). Thus, an auditor violates Regulation S-X 2-02(b)(1) if it issues a report stating that it had conducted its audit in accordance with PCAOB Standards when it had not. *See In the Matter of Andrew Sims, CPA*, Release No. 2950 (March 17, 2009).

35. Each of Respondents' audit reports stated that they had conducted their audits in accordance with PCAOB Standards. Respondents, however, did not conduct their audits in accordance with PCAOB Standards. As described above, Respondents committed repeated audit failures in violation of those standards. Respondents failed to: (1) obtain written management representations; (2) prepare and maintain adequate audit documentation; (3) consider and document fraud; and (4) obtain engagement quality reviews. Accordingly, Respondents willfully violated Rule 2-02(b)(1).

FINDINGS

36. Based on the foregoing, the Commission finds that Respondents engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

37. Based on the foregoing, the Commission finds that Respondents willfully violated Exchange Act Sections 10A(a)(1) and (b)(1).

38. Based on the foregoing, the Commission finds that Respondents willfully violated Exchange Act Rule 2-02 of Regulation S-X.

IV.

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

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

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Exchange Act Sections 10A(a)(1) and (b)(1).

B. Respondents shall cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 2-02 of Regulation S-X.

C. Respondents are denied the privilege of appearing or practicing before the Commission as an accountant.

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. 70571 / September 30, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3683 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15538

In the Matter of

**LAWRENCE MAXWELL
MCCOY,**

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,
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Lawrence Maxwell McCoy ("Respondent" or "McCoy").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From January 2004 to April 2008, McCoy was a registered representative associated with ING Financial Partners, Inc., which at the time of his association was a broker-

dealer registered with the Commission and an investment adviser registered with the Commission. McCoy, age 68, is a resident of Michigan.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On September 20, 2012, McCoy pleaded guilty to one count of wire fraud in violation of 18 U.S.C. § 1343 before the United States District Court for the Western District of Michigan, in United States v. Lawrence Maxwell McCoy, Crim. Information No. 1:12-CR-00222 (JTN). On January 3, 2013, McCoy was sentenced in that proceeding to a prison term of 54 months followed by two years of supervised release and ordered to make restitution in the amount of \$690,267.37.

3. The count of the criminal information to which McCoy pleaded guilty alleged, among other things, that in 2007, while associated with ING Financial Partners, Inc., for the purpose of executing a scheme to defraud investors by fabricating an investment that he called "Marsico Private Ledger," McCoy used the wires in interstate commerce to communicate with his clients about their purported investments. Specifically, McCoy created fake price updates for the investment on a website which stored its information on data centers located in California, Texas, or Florida. Such information was then accessed by investors in Michigan.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act; and

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70576 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15541

In the Matter of

STEVEN SCARCELLA

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 Steven Scarcella ("Scarcella" 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.

III.

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

88 of 90

1. Scarcella, 46 years old, resides in Old Bridge, New Jersey. From February 1997 through April 2008, Scarcella was a registered broker associated with Joseph Stevens & Company, Inc., a broker-dealer registered with the Commission.

2. On August 8, 2011, Scarcella was convicted in the Supreme Court of the State of New York in People of the State of New York v. Joseph Stevens & Co., Inc., et al., Case Number 02394-2009 of: (1) one count of securities fraud, a violation of New York General Business Law 352-c(5); (2) one count of securities fraud, a violation of New York General Business Law 0352-c(6); (3) one count of grand larceny in the second degree, a violation of New York Penal Law 155.40(1); and (4) one count of grand larceny in the third degree, a violation of New York Public Law 155.35. On December 2, 2011 Scarcella was sentenced to five years' probation and ordered to make restitution in the amount of \$193,074.00.

3. In connection with that conviction, Respondent admitted that:

- (a) He participated in firm-wide schemes at Joseph Stevens & Co., Inc. in order to generate excessive and undisclosed commissions;
- (b) At times, he encouraged customers to purchase shares so that he would receive extra commissions that were not disclosed to customers;
- (c) He participated in tactics to delay the execution of customer orders until an artificially inflated price was achieved to enrich himself and others at the expense of customers;
- (d) He engaged in fraud by making material false representations while engaged in promoting the sale and purchase of securities; and
- (e) During the scheme, Scarcella, along with others, stole over \$420,000 from more than 20 customers.

IV.

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

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

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

organization 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. 70577 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15542

In the Matter of

CRAIG SHAPIRO,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Craig Shapiro ("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 Exchange Act, 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. Shapiro, 37 years old, resides in Brooklyn, New York. From April 1999 through April 2008, Shapiro was a registered representative associated with Joseph Stevens & Company, Inc., a broker-dealer registered with the Commission at the time.

89 of 90

2. On September 23, 2011, Shapiro pled guilty in the Supreme Court of the State of New York in People v. Joseph Stevens & Co., Inc., et al., Case Number 02394-2009 to: (1) one count of engaging in securities fraud in violation of New York General Business Law 0352-c(5); (2) one count of engaging in securities fraud in violation of New York General Business Law 0352-c(6); (3) one count of criminal possession of stolen property in the second degree in violation of New York Penal Law 165.52; and (4) one count of criminal possession of stolen property in the third degree in violation of New York Penal Law 165.50. People v. Joseph Stevens & Co., No. 02394-2009 (N.Y. App. Div. 2011). On January 27, 2012, Shapiro was sentenced to ten months' incarceration, three years' probation and 75 hours of community service. He was also ordered to make restitution in the amount of \$87,500.

3. The indictment alleged that Shapiro, a registered representative, participated in a firm-wide scheme while he was associated with Joseph Stevens & Co., to generate excessive and undisclosed commissions. As part of that scheme, Shapiro encouraged customers to purchase shares so that he would receive extra commissions that were not disclosed to customers. Shapiro obtained money and property by means of material false representations while engaged in promoting the sales and purchases of securities. In addition, Shapiro knowingly possessed stolen property, the money generated as a result of the manipulation of securities, with the intent to benefit himself or a person other than the money's true owner.

IV.

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

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

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; 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 ACT OF 1933
Release No. 9461 / September 30, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70578 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15543

In the Matter of

Robert Patrick Stephens

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933 AND SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934 MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER**

I.

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

II.

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

90 of 90

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

These proceedings arise out of a \$40 million Ponzi scheme orchestrated by Robert P. Copeland ("Copeland"). Respondent referred investors to Copeland who then fraudulently induced them to invest in the unregistered securities offering. Respondent received more than \$1 million in sales commissions paid by Copeland for referring investors.

Respondent

1. Stephens, 58 years old, is a resident of Atlanta, Georgia. Between 1987 and 2009, Stephens was a registered representative with various broker-dealers and investment advisers registered with the Commission.

Other Relevant Individuals

2. **Robert P. Copeland**, age 47, is a Georgia resident currently incarcerated in federal prison for his role in orchestrating a \$40 million Ponzi scheme. Copeland pleaded guilty to one count of wire fraud and consented to injunctions in a prior Commission action against him for violations of the registration and antifraud provisions of the federal securities laws.²

3. **James S. Quay** ("Quay"), age 50, is a resident of Atlanta, Georgia. Between 1999 and 2004, Quay was a registered representative with various broker-dealers and investment advisers registered with the Commission. Quay was the primary salesperson for the Copeland scheme. On October 2, 2012, the Commission filed an action against Quay in United States District Court for the Northern District of Georgia for violations of the registration and anti-fraud provisions of the federal securities laws.³ Quay settled without admitting or denying the allegations against him in the Commission's complaint and consented to a final judgment permanently enjoining him from future violation of the securities laws and ordering him to pay disgorgement of \$1,403,638.62 and a civil money penalty of \$450,000. The Commission also instituted settled administrative proceedings pursuant to Commission Rule of Practice 102(e) and Section 15(b) of the Exchange Act, in which Quay consented to a bar from appearing or practicing before the Commission as an attorney or an accountant and from association with any

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

² SEC v. Robert P. Copeland, Civil Action File No. 1:09-CV-00943 (N.D. Ga. 2009); U.S. v. Robert P. Copeland, Criminal Action File No. 1:09-CR-00178 (N.D. Ga. 2009).

³ SEC v. James S. Quay, et al., Civil Action File No. 1:12-cv-03429-RWS (N.D. Ga. 2012).

broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, as well as a penny stock bar.

Background

4. From at least 2004 through January 2009, Copeland fraudulently raised approximately \$40 million from at least 140 investors in several states, including Georgia. He promoted investments earning 15% to 18% interest per year, claiming that investor funds would be loaned in connection with real estate transactions. Through his controlled entities, Copeland directed unregistered offers and sales of interest-bearing notes to evidence at least some of the investments.

5. In reality, Copeland lied to investors, omitted material facts to investors, operated a fraudulent Ponzi scheme, and misappropriated investor funds. Copeland located most of the investors through referrals from Quay and Stephens, who each received more than \$1 million in commissions paid by Copeland.

6. To recruit investors for the scheme, Quay would send mailers to retirees inviting them to attend steak-house dinners, at times attended by Stephens, where he and Stephens would, at times, recommend potential investors to schedule private consultations to discuss their financial situation in greater detail. Follow-up consultations with potential investors would typically take place at Quay's personal office. For those investors procured by Stephens, he generally attended these follow-up meetings, described Copeland's investment program, and introduced the investors directly to Copeland. Stephens' role in procuring investors for the offering, as evidenced by his locating potential investors, assisting in seminars to attract the investors, discussing the Copeland investment program with investors, and introducing the investors directly to Copeland – all of which led to more than \$1 million in commissions for Stephens – made him a necessary participant and substantial factor in the offering of securities.

7. At no time were the offerings of securities for Copeland's program that were introduced by Stephens registered with the Commission.

8. As a result of the conduct described above, Stephens willfully violated Sections 5(a) and 5(c) of the Securities Act.⁴ Section 5(a) of the Securities Act provides that, unless a registration statement is in effect as to a security, it is unlawful for any person to, directly or indirectly, engage in the offer or sale of securities. Section 5(c) of the Securities Act provides a similar prohibition against offers to sell, or offers to buy, unless a registration statement has been filed.

⁴ 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)).

Disgorgement

9. Respondent has submitted a sworn Statement of Financial Condition dated May 15, 2013 and as amended on June 17, 2013 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest.

IV.

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

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

A. Respondent Stephens cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.

B. Respondent Stephens 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.

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

D. Respondent shall pay disgorgement of \$999,881.43 and prejudgment interest of \$166,654.92, but that payment of all prejudgment interest and all but \$15,000.00 of disgorgement is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated May 15, 2013 and as amended on June 17, 2013 and other documents submitted to the Commission. The payment required by this Order shall be made to the Securities

and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Robert Patrick Stephens as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Aaron W. Lipson, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, Georgia, 30326-1382.

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

F. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for September 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY JO WHITE, CHAIR

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

MICHAEL S. PIWOWAR, COMMISSIONER

(3 Documents)

*Commissioner Pinowar
not participating*

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

March 1, 2012

In the Matter of

**China North East Petroleum
Holdings Limited,**

File No. 500-1

**ORDER OF SUSPENSION
OF TRADING**

It appears to the Securities and Exchange Commission ("Commission") that there is a lack of current and accurate information concerning the securities of China North East Petroleum Holdings Limited ("NEP"), a Nevada corporation with principal executive offices in New York and oil drilling operations in the People's Republic of China. NEP's common stock is registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") and is traded on NYSE Amex.

Questions have arisen regarding the accuracy and completeness of information contained in NEP's public filings with the Commission concerning, among other things, certain transfers of cash from the company's bank accounts to the personal bank accounts of related parties.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of NEP.

Therefore, IT IS ORDERED, pursuant to Section 12(k) of the Exchange Act, that trading in the above-listed company is suspended for the period from 9:30 a.m. EST, March 1, 2012, through 11:59 p.m. EDT, on March 14, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

1 of 3

*Commissioner Piwowar
not participating*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 70318 / September 4, 2013

Admin. Proc. File No. 3-9599

In the Matter of

JOHN GARDNER BLACK and
DEVON CAPITAL MANAGEMENT
1446 Centre Line Road
Warriors Mark, Pennsylvania 16877

ORDER DENYING PETITION TO SET ASIDE ADMINISTRATIVE BAR ORDER

John Gardner Black and Devon Capital Management ("Devon"), a former registered investment adviser of which Black was at all relevant times president, portfolio manager, and sole shareholder (together, "Petitioners"), ask us to set aside our 1998 Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions, the entry of which Petitioners consented to in order to settle the matter ("Settled Order"). The Settled Order revoked Devon Capital's registration as an investment adviser and imposed an associational bar against Black.¹ The Settled Order was issued in a "follow-on" administrative proceeding that was brought after Petitioners consented to the entry of an injunction against future violations of the antifraud provisions of the federal securities laws. Petitioners assert that the Settled Order is "invalid" for the following three reasons:

¹ *John Gardner Black*, Investment Advisers Act Rel. No. 1720, 1998 SEC LEXIS 845 (May 4, 1998).

Petitioners mailed a "Petition to Reinstate Black and Devon Capital Management as Investment Advisors" to various Commission officials in September 2012. They also sent a single copy of an appendix (the "Appendix") containing documents cited in the petition. Neither the petition nor the Appendix was filed in accordance with Rule of Practice 151(b), which provides that "[f]iling of papers with the Commission shall be made by filing them with the Office of the Secretary." 17 C.F.R. § 201.151(b).

On February 26, 2013, Petitioners filed the petition currently under review with the Office of the Secretary, stating that it "replace[d] the petition filed in September" and "supersede[d] the prior petition." Petitioners did not include a copy of the Appendix, which was mentioned in their transmittal letter, but upon request, they provided one.

(1) The Settled Order does not comply with Sections 203(e) and (f) of the Investment Advisers Act of 1940² because the record does not show that Petitioners caused public harm.

(2) The permanent injunction underlying the Settled Order is invalid because it lacks the specificity required by Rule 65(d) of the Federal Rules of Civil Procedure.

(3) The Commission's impartiality might reasonably be questioned because it failed to disclose certain information to the district court before that court issued the permanent injunction.

The Division of Enforcement opposes Petitioners' request, and for the reasons discussed below, we deny it.³

I.

On December 12, 1997, Petitioners settled civil injunctive proceedings by agreeing to be enjoined from certain violations of the antifraud provisions of the securities laws.⁴ The injunctive complaint alleged that Black, acting through two entities he owned and controlled, Devon and Financial Management Sciences, Inc. ("FMS"), an affiliate of Devon that held the money and securities of Devon's investment advisory clients, perpetrated an ongoing fraudulent scheme that resulted in the loss of millions of dollars of municipal bond proceeds invested by school districts throughout western and central Pennsylvania.⁵ As relevant here, the complaint alleged that Devon represented to those school districts that the investment contract in which their money would be invested, a so-called "Collateralized Investment Agreement" ("CIA"), was fully protected or collateralized by a pool of securities equaling the amount of the client's principal investment. In fact, the complaint alleged, Black misrepresented the value of the assets held as collateral, overstating the actual value of those assets by approximately \$71 million. In addition,

² 15 U.S.C. § 80b-3(e) and (f).

³ We also deny Petitioners' motion that the Division's response to their petition "be stricken as non-responsive." Petitioners' assertion that the Division's response "does not dispute a single point raised in [their] petition" is incorrect. The response addresses all three of Petitioners' principal arguments and additionally addresses the question whether the relief they seek should be granted under the public interest standard we use in making such determinations.

⁴ *SEC v. Black*, 97-CV-2257 (W.D. Pa. Dec. 12, 1997) (order of permanent injunction). We take official notice of this order. See, e.g., *John W. Lawton*, Advisers Act Rel. No. 3513, 2012 SEC LEXIS 3855, at *7 n.3 (Dec. 13, 2012) (taking official notice of three district court orders pursuant to Rule of Practice 323, 17 C.F.R. § 201.323); *John Francis D'Acquisto*, Advisers Act Rel. No. 1696, 1998 SEC LEXIS 91, at *3 n.1 (Jan. 21, 1998) (taking official notice, pursuant to Rule 323, that district court entered an order of disgorgement, assessed prejudgment interest, and entered a final judgment for the Commission).

⁵ Although FMS was a defendant in the injunctive action, it was not a party to the follow-on proceeding.

the complaint alleged that Petitioners and FMS misappropriated a total of approximately \$2 million of client funds to pay personal and business expenses.

Without admitting or denying the allegations in the complaint,⁶ Petitioners consented to the entry of the district court's order enjoining them from future violations of the provisions charged in the complaint. In entering the injunctive order, the district court ruled that there was sufficient basis for the entry of final judgment, and it prohibited Petitioners from contesting the allegations in the complaint in connection with the subsequent determination of the appropriate disgorgement and penalty amounts. Black subsequently consented to a court order requiring him to pay disgorgement of \$3,632,031 (plus \$326,883 in prejudgment interest), and a civil money penalty of \$500,000.⁷

On May 4, 1998, Petitioners consented to the entry of the Settled Order, in anticipation of administrative proceedings, and without admitting or denying the findings contained therein. In issuing the Settled Order, we found that Petitioners had been enjoined and that the complaint in the injunctive proceeding alleged that they had made material misrepresentations and omissions, resulting in millions of dollars in losses to their clients, and that they had benefitted financially from their actions.⁸

In 2000, Black pled guilty to twenty-one counts of investment adviser fraud, three counts of mail fraud, and two counts of making false statements.⁹ These criminal proceedings apparently arose from the same conduct that provided a basis for the civil action that resulted in the consent injunction discussed above. In connection with the criminal proceedings, Black stipulated that he, through FMS, represented to clients and prospective clients that he would "secure or collateralize the investments of the client with securities having a fair market value equal to or greater than 100% of the clients' investments." Black also stipulated that "[a]t no material time as of January 1, 1995, did the collateral accounts hold collateral at a ratio of 100% of the fair market value of client funds invested." The stipulation provided further that, even though Black used collateralized mortgage obligations ("CMOs") to provide collateral for the clients' accounts, he "failed to disclose that client funds had . . . been invested in [CMOs]" when clients asked him if there were CMOs in their accounts. Black was sentenced to forty-one months of imprisonment and three years of supervised release, and was ordered to pay \$61,300,000 in restitution.¹⁰

⁶ Petitioners admitted that the court had jurisdiction over the matter.

⁷ *SEC v. Black*, 97-CV-2257 (W.D. Pa. Apr. 29, 1998) (order of disgorgement and civil penalties). The disgorgement order applied only to Black, not to Devon. We take official notice of this order. *See supra* note 4 (citing authority).

⁸ *Black*, 1998 SEC LEXIS 845, at *3.

⁹ Only Black was charged in the indictment. Devon was not a defendant.

¹⁰ It appears that Black was released from prison on June 13, 2003. *See John Gardner Black, Advisers Act Rel. No. 3015*, 2010 SEC LEXIS 1051, at *6 n.8 (Apr. 13, 2010).

In 2006, Black filed a motion in federal district court under Federal Rule of Civil Procedure 60(b), seeking relief from the injunction and the order requiring him to pay disgorgement and civil penalties.¹¹ The district court denied the motion, and the U.S. Court of Appeals for the Third Circuit affirmed that denial.¹² Black has also sought relief in the U.S. Court of Federal Claims, where he asked the court to find that the Commission "obtained an indictment on allegations that [Black] and his companies committed securities violations based upon an incorrect market value of investment contracts and thereby effectuated a taking of property without just compensation" in violation of the Fifth Amendment.¹³ The court dismissed Black's complaint, ruling that Black could not "recast the valuation issue as a takings claim in the Court of Federal Claims in order to seek an alternative forum in which to raise the same issues that he already presented and to try to obtain a different outcome."¹⁴

In 2009, Petitioners asked us to set aside the Settled Order, asserting that "[t]he factual basis for the proceeding no longer constitute[d] violations" of the provisions charged. We found that, because Petitioners consented to the imposition of the injunction and then consented to the entry of the Settled Order in the follow-on proceeding against him, they were estopped from challenging before the Commission the underlying allegations made in the injunctive complaint.¹⁵ We also found that Petitioners did not identify any compelling circumstances that would justify setting aside the revocation of Devon's registration or the bar prohibiting Black's association with any investment adviser or investment company.¹⁶

¹¹ See *SEC v. Black*, 262 F. App'x 360, 362-63 (3d Cir. 2008) (describing district court filing as made by Black). Rule 60(b) allows a party to ask the district court to grant relief from an injunction on the grounds of "mistake" or "any other reason." Fed. R. Civ. P. 60(b).

¹² *SEC v. Black*, 262 F. App'x at 362-63.

¹³ *Black v. United States*, 84 Fed. Cl. 439, 440 (2003). This action was brought by Black. Devon was not a plaintiff.

¹⁴ *Id.* at 452.

¹⁵ *Black*, 2010 SEC LEXIS 1051, at *9-10.

¹⁶ We initially barred Black from associating with any broker, dealer, municipal securities dealer, investment adviser, or investment company. *Black*, 1998 SEC LEXIS 845, at *4. In April 2010, however, in light of precedent issued after the Settled Order, we set aside the portion of the Settled Order that "collaterally" barred Black from association with a broker, dealer, or municipal securities dealer. *Black*, 2010 SEC LEXIS 1051, at *15 (citing *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (vacating collateral bar prohibiting association with investment adviser as beyond the scope of the Commission's statutory authority when bar was ordered)). Black filed a motion for reconsideration, which we denied. *John Gardner Black, Advisers Act Rel. No. 3040* (June 18, 2010). Black filed a petition for review (not joined in by Devon) of our April 2010 order; the petition was denied by the Court of Appeals. *Black v. SEC*, 462 F. App'x 6 (D.C. Cir. 2012).

II.

Petitioners contend that Sections 203(e) and (f) permit the Commission to impose sanctions on investment advisers and their associated persons only after it has made a determination of public harm on the record. They contend that FMS's tax returns, which were "released" by PriceWaterhouseCoopers after the Commission issued the Settled Order, show, among other things, that the value of the CIA was greater than its cost to the clients, that between January 1995 and June 1997 the clients received more profits than they had contracted for, and that "[t]he \$3.6 million the [Commission] claimed was misappropriated by Black was legitimate business expenses."¹⁷ Thus, they contend, "no public harm was caused by Black or Devon," and "[t]herefore, the [Settled] Order is invalid." Moreover, Petitioners maintain, the Commission was aware of these and other alleged facts before the district court entered the permanent injunction, but it wrongfully failed to disclose them to the district court.¹⁸ Petitioners further contend that this alleged failure to disclose calls into question the Commission's impartiality.

The Division responds that Petitioners' argument is both legally and factually incorrect. Legally, it argues, there is no requirement of "evidence on the record that [Petitioners] caused public harm"; instead, Sections 203(e) and (f) require a finding that the imposition of sanctions is "in the public interest." The Division argues that this "public interest" requirement was satisfied. It points out that the Settled Order quoted allegations from the complaint in the injunctive action

¹⁷ The Appendix includes copies of the returns on which Petitioners rely.

¹⁸ Other alleged facts the Petitioners claim that the Commission knew but failed to disclose to the district court include that: (1) "[t]he liquidation value of the FMS investments was less than the fair value of the CIAs outstanding," (2) the revenues of FMS between January 1, 1995 and July 1, 1997 exceeded \$51 million, (3) Devon was an adviser to municipal bond issuers on the investment of bond proceeds and compliance with the arbitrage regulations, and (4) the CIAs sold "were in compliance with the Arbitrage Regulations including the reporting of fair value of the CIAs." Because we understand Petitioners' argument as a challenge to the injunction that is not appropriately presented in an administrative proceeding such as this one, *see infra* notes 22-23 and accompanying text, we do not address the potential merits of any of these factual assertions. We note, however, that Petitioners fail to explain why some of these alleged facts should have been disclosed to the district court, that Petitioners cite to no evidence supporting their assertion that the Commission was aware of these alleged facts when the district court entered the Settled Order, and that these factual assertions are either entirely unsupported by citations to record evidence or are supported only with vague references to certain tax returns included in the Appendix, with no references to specific parts of the tax returns and no analysis as to how the returns purportedly support the allegations presented. We further note that, since the tax returns were signed in 1999, they could not have been considered by the district court when it granted the injunction in 1998, and that if Petitioners choose to argue that the tax returns support vacating or modifying the injunction, they should address this argument to the district court. *See infra* note 23. Finally, we note that the tax returns Petitioners rely on are not signed by an FMS officer (but merely purport to be signed by a paid preparer); they thus lack the required attestation as to the returns being "true, correct, and complete."

pertaining to Petitioners' "misrepresentations and omissions of material fact in connection with the solicitation and management of Devon's investment advisory clients' funds, resulting in the loss of millions of dollars of municipal bond proceeds invested by school districts and other local government units" and to Petitioners' having "benefi[ted] financially from their actions." And the Division further observes that the Settled Order stated that the Commission deemed it "appropriate and in the public interest" to accept Petitioners' offers of settlement and to impose sanctions. The Division further argues that even if a showing of public harm were required, the record shows that Petitioners' misconduct caused extensive public harm, including the loss of millions of dollars raised for the benefit of local school districts. With respect to Petitioners' attacks on the Commission's impartiality, the Division argues that Petitioners are merely rephrasing arguments that go to the valuation of the securities at issue, that the Commission and courts have previously rejected these arguments, and that Petitioners' statements are merely bald assertions lacking in evidentiary support.

Petitioners further contend, citing *SEC v. Goble*,¹⁹ that the permanent injunction underlying the Settled Order is invalid because it does not comply with Rule 65(d) of the Federal Rules of Civil Procedure which, they allege, requires that an injunction be specific in terms and describe in reasonable detail the acts to be enjoined. Petitioners contend that the injunction "does not state an act or violation to be enjoined. The injunction only refers to the complaint. Therefore, the injunction is invalid" The Division responds that *Goble* does not suggest, much less compel, the conclusion that the Settled Order should be set aside. It points out that in *Goble*, "the Court did not dismiss the action or vacate the findings as to liability because the injunction lacked specificity, but rather directed the district court to craft more precise injunctive language." The Division also notes that as a decision of the Eleventh Circuit, *Goble* is not binding precedent for courts in the Third Circuit, where Petitioners' injunction was entered. Additionally, the Division distinguishes this case from those in which the Commission has granted relief because a sanction underlying a bar order has been set aside, since in this case, the injunction has not been set aside.

III.

Petitioners cite no authority for their argument that the Settled Order does not comply with Sections 203(e) and (f) because it does not contain a finding that the public was harmed by their conduct. Those sections condition the imposition of sanctions on a finding that the sanctions are in the public interest, and the Settled Order contains this required finding.²⁰ We therefore reject Petitioners' first argument.

¹⁹ 682 F.3d 934 (11th Cir. 2012).

²⁰ Because follow-on proceedings presume that the allegations of the injunctive complaint are true, we did not, and were not required to, make any findings of misconduct in entering the Settled Order. But as set forth above, the injunctive complaint alleged, among other things, that Black overstated the value of the assets held as collateral by approximately \$71 million and that Black was involved in misappropriating approximately \$2 million of client funds.

Petitioners' other arguments are—as were the arguments they presented in the petition we decided in 2010—efforts to undermine the Settled Order by attacking the injunction on which it is based. But it has been our policy, since well before the Settled Order was entered, "not to permit a defendant . . . to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint."²¹ As we stated when considering Petitioners' earlier petition, parties to a follow-on proceeding are "estopped from challenging before us the district court's findings or, as here, the allegations made in the complaint in that proceeding."²² Petitioners consented to the imposition of the injunction, and because "[Petitioners] settled the underlying injunctive action[, they remain] bound by the allegations in the injunctive complaint unless and until the district court modifies the injunction."²³

As we stated in determining Petitioners' earlier petition, we have a strong interest in the finality of our settlement orders,²⁴ and we have repeatedly held that administrative bar orders will remain in place in the usual case and are removed only in compelling circumstances.²⁵ In deciding whether to grant relief from such a bar, we consider certain factors related to the public interest involved, including:

the nature of the misconduct at issue in the underlying matter[;] . . . the time that has passed since issuance of the administrative bar; the compliance record of, and any regulatory interest in, the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement, as expressed in response to the petition for relief; and whether there exists any other

²¹ 17 C.F.R. § 202.5(e); *see also* *Marshall E. Melton*, Securities Exchange Act Rel. No. 48228, 2003 SEC LEXIS 1767, at *28-29 (July 25, 2003) (reaffirming policy); *Samuel O. Forson*, Exchange Act Rel. No. 38853, 1997 SEC LEXIS 1507, at *3 (July 21, 1997) ("[H]aving consented to the entry of an injunction based on [certain] allegations, Forson may not question them now in an action based on that injunction." (citation omitted)).

²² *Black*, 2010 SEC LEXIS 1051, at *9-10 (citing additional authority).

²³ *Id.* at *10. As noted, *see supra* note 11, Rule 60(b) allows Petitioners to ask the district court to grant relief from the injunction against them on the grounds of "mistake" or "any other reason." Fed. R. Civ. P. 60(b). They are free to do so. We observe, as set forth above, that Black has thus far failed in his attempts to persuade the courts to grant the relief he seeks. *See supra* notes 11-14, 16 and accompanying text.

²⁴ *Black*, 2010 SEC LEXIS 1051, at *8.

²⁵ *E.g.*, *Linus N. Nwaigwe*, Exchange Act Rel. No. 69967, 2013 SEC LEXIS 1997, at *2 (July 11, 2013); *Kenneth E. Mahaffy, Jr.*, Exchange Act Rel. No. 68462, 2012 SEC LEXIS 4020, at *2 (Dec. 18, 2012).

circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.²⁶

Petitioners have presented no compelling circumstances that would make relief appropriate. As we found in 2010, Black was enjoined

in connection with a fraudulent scheme that lasted two years and defrauded clients, mostly rural school districts investing the proceeds from bond issues, of millions of dollars. After [he] agreed to the sanctions imposed by the Settled Order, Black pled guilty to criminal charges arising, it appears, out of the same conduct which led to the injunction and was imprisoned and order to pay more than \$61 million in restitution.²⁷

The bar and revocation were imposed fifteen years ago, but we have previously held, in considering requests to modify sanctions, that substantially longer periods are not unduly long.²⁸ Although Petitioners have no apparent disciplinary record since the imposition of the bar, "a clean disciplinary record is not determinative in our consideration of sanctions."²⁹ Petitioners have not identified any unanticipated consequences of the bar and revocation or provided any additional factors that would support the requested relief. In opposing Petitioners' request, the Division notes that we observed in 2010 that Black showed no remorse for his actions and did not demonstrate that he had learned from his misconduct or show that he was unlikely to engage in future misconduct if permitted to reenter the industry. It also argues that Petitioners' current petition "shows no change in Black's view of his fraudulent conduct, and provides no comfort that granting the requested relief would be consistent with either the public interest or the investor protection purposes of the securities laws."

Considering all these factors, we find that Petitioners have not identified any compelling circumstances to justify the requested relief. We therefore decline to set aside the revocation of Devon's registration or the bar prohibiting Black's association with any investment adviser or investment company.

Accordingly, IT IS HEREBY ORDERED that the petition of Devon Capital Management, Inc. to set aside the revocation order entered against it on May 4, 1998 is DENIED; and it is further

²⁶ *Black*, 2010 SEC LEXIS 1051, at *12 (citing *Kenneth W. Haver, CPA*, Exchange Act Rel. No. 54824, 2006 SEC LEXIS 2735, at *7 (Nov. 28, 2006)).

²⁷ *Black*, 2010 SEC LEXIS 1051, at *14.

²⁸ *See id.* at *13 (discussing cases, including cases where passage of more than twenty years since bar was imposed was held not to weigh significantly in favor of relief).

²⁹ *Id.* at *13 n.17 (citing cases).

ORDERED that the petition of John Gardner Black to set aside the bar order entered against him on May 4, 1998, as it applies to the bar from association with any investment adviser or investment company, is DENIED.

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. 70557 / September 30, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3498 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-13739

In the Matter of :
John W. Jacobsen, CPA : ORDER GRANTING APPLICATION FOR
: REINSTATEMENT TO APPEAR AND PRACTICE
: BEFORE THE COMMISSION AS AN ACCOUNTANT

On January 7, 2010, John W. Jacobsen, CPA ("Jacobsen") was denied the privilege of appearing or practicing as an accountant before the Commission as a result of settled public administrative proceedings instituted by the Commission against Jacobsen pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.¹ This order is issued in response to Jacobsen's application for reinstatement to practice before the Commission as an accountant.

Jacobsen served as the engagement partner for Eide Bailly LLP's ("Eide") review of Quest Resource Corporation ("Quest Resource") and Quest Energy Partners, L.P.'s ("Quest Energy" and, together with Quest Resource", "Quest") financial statements for the quarter ended June 30, 2008. The Commission alleged that while performing these professional services, Jacobsen learned that Quest had engaged in a circular series of funds transfers to and from a company controlled by the CEO of Quest Resource and general partner of Quest Energy. As a result of these transfers, \$10 million was outstanding at the time of Eide's review of Quest's second quarter financial statements. Jacobsen failed to undertake adequate procedures to determine whether the transfers were properly recorded in Quest's financial statements and properly disclosed in its Forms 10-Q for the second quarter of 2008. Specifically, Jacobsen failed to undertake adequate procedures to ascertain the terms and other details of the transactions; to determine whether the transactions were authorized by Quest's board of directors; or whether Quest had properly accounted for the transactions, including whether it had

¹ See Accounting and Auditing Enforcement Release No. 3098 dated January 7, 2010. Jacobsen was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

established appropriate reserves. Moreover, Jacobsen failed to adequately consider whether the transfers might constitute fraud or an illegal act and whether the transfers violated Section 13(k) of the Exchange Act which prohibits any issuer to make "personal loans" to any executive officer.

Jacobsen has met all of the conditions set forth in the original order and, in his capacity as an independent accountant, has stated that he will comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to all requirements relating to registration, inspections, concurring partner reviews and quality control standards. 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, Jacobsen 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.

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 the information supplied, representations made, and undertakings agreed to by Jacobsen, it appears that he has complied with the terms of the January 7, 2010 order denying him the privilege of 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 Jacobsen, 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, and that Jacobsen, by undertaking to comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards, in his practice before the Commission as an independent accountant 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 John W. Jacobsen, CPA is hereby reinstated to appear and practice before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for September 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY JO WHITE, CHAIR

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(29 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70304 / September 3, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15449

In the Matter of

**Crescent Moon, Inc.,
Financial Ventures, Inc.,
Fire From Ice, Inc. (f/k/a Roman
Acquisition Corp.),
Freeman Technologies Corp., and
Great American Recreation, 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 Crescent Moon, Inc., Financial Ventures, Inc., Fire From Ice, Inc. (f/k/a Roman Acquisition Corp.), Freeman Technologies Corp., and Great American Recreation, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Crescent Moon, Inc. (CIK No. 1101101) is a dissolved Wyoming corporation located in Bloomfield, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Crescent Moon 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, 2004, which reported a net loss of over \$39,000 for the prior three months.

1 of 29

2. Financial Ventures, Inc. (CIK No. 1031524) is a dissolved Florida corporation located in Toronto, Ontario with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Financial Ventures 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 March 31, 2007, which reported a net loss of \$300 for the prior year.

3. Fire From Ice, Inc. (f/k/a Roman Acquisition Corp.) (CIK No. 1418968) is a revoked Nevada corporation located in Sovereign Island, Australia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fire From Ice 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 January 31, 2011, which reported a net loss of over \$3,800 for the prior three months.

4. Freeman Technologies Corp. (CIK No. 1114814) 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). Freeman 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 July 31, 2001, which reported a net loss of over \$3,958 for the prior three months.

5. Great American Recreation, Inc. (CIK No. 103317) is a New Jersey corporation located in McAfee, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Great American Recreation 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 July 31, 1995. On February 14, 1996, Great American Recreation filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey, and the case was terminated on March 29, 1999.

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/or 13a-13 thereunder.

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Walter
Commissioner Parades
not participating*

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 30685 / September 4, 2013

In the Matter of

WELLS FARGO BANK, N.A.
101 North Phillips Avenue
Sioux Falls, SD 57104

ALTERNATIVE STRATEGIES BROKERAGE SERVICES, INC.
401 South Tryon Street, TH3
5th Floor
Charlotte, NC 28202

ALTERNATIVE STRATEGIES GROUP, INC.
401 South Tryon Street, TH 3
5th Floor
Charlotte, NC 28202

FIRST INTERNATIONAL ADVISORS, LLC
30 Fenchurch Street
London, England
UK EC3M 3BD

GALLIARD CAPITAL MANAGEMENT, INC.
800 LaSalle Avenue, Suite 1100
Minneapolis, MN 55402

GOLDEN CAPITAL MANAGEMENT, LLC
5 Resource Square
Suite 400
10715 David Taylor Drive
Charlotte, NC 28262

METROPOLITAN WEST CAPITAL MANAGEMENT, LLC
610 Newport Center Drive
Suite 1000
Newport Beach, CA 92660

PEREGRINE CAPITAL MANAGEMENT, INC.)
 800 LaSalle Avenue, Suite 1850)
 Minneapolis, MN 55402)
)
 WELLS CAPITAL MANAGEMENT INCORPORATED)
 525 Market Street, 10th Floor)
 San Francisco, California 94105)
)
 WELLS FARGO FUNDS DISTRIBUTOR, LLC)
 525 Market Street, 12th Floor)
 San Francisco, California 94105)
)
 WELLS FARGO FUNDS MANAGEMENT, LLC)
 525 Market Street, 12th Floor)
 San Francisco, California 94105)
)
 (812-14176))
)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

Wells Fargo Bank, N.A. (“Wells Fargo Bank”), Alternative Strategies Brokerage Services, Inc., Alternative Strategies Group, Inc., First International Advisors, LLC, Galliard Capital Management, Inc., Golden Capital Management, LLC, Metropolitan West Capital Management, LLC, Peregrine Capital Management, Inc., Wells Capital Management Incorporated, Wells Fargo Funds Distributor, LLC, and Wells Fargo Funds Management, LLC (collectively, “Applicants”) filed an application on July 12, 2013 requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 (“Act”) exempting Applicants and any other company of which Wells Fargo Bank is or may become an affiliated person (together with Applicants, “Covered Persons”) from section 9(a) of the Act with respect to an injunction effective July 15, 2013, entered against Wells Fargo Bank by the United States District Court for the Northern District of California.

On July 15, 2013, the Commission issued a temporary conditional order (pursuant to delegated authority) exempting Applicants from section 9(a) of the Act with respect to the above-referenced injunction from July 15, 2013 until the Commission took final action on an application for a permanent order or, if earlier, September 13, 2013 (Investment Company Act Release No. 30600). On August 6, 2013, the Commission issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act (Investment Company Act Release No. 30644) until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the conduct of Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by Wells Fargo Bank, et al. (File No. 812-14176) that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction effective July 15, 2013, described in the application, entered against Wells Fargo Bank by the United States District Court for the Northern District of California.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

*Chair White
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70337 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15458

In the Matter of

LAWRENCE D. POLIZZOTTO

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT
TO SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND
IMPOSING CIVIL PENALTIES AND A
CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Lawrence D. Polizzotto ("Polizzotto" or "Respondent").

II.

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

3 of 29

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

On September 21, 2011, Polizzotto, the former head of investor relations for First Solar, Inc. ("First Solar"), selectively disclosed to approximately 20 sell-side analysts and institutional investors that First Solar would not receive a significant loan guarantee from the U.S. Department of Energy ("DOE") it and industry analysts had previously anticipated the company would receive. Polizzotto also directed a subordinate to make similar calls, and provided the subordinate with a list of talking points. The next morning, First Solar publicly disclosed the loss of the DOE loan guarantee and its stock price dropped by 6%. As a result of his conduct, Polizzotto caused First Solar's violation of Section 13(a) of the Exchange Act and Regulation FD promulgated thereunder.

Facts

1. First Solar is a Delaware corporation headquartered in Tempe, Arizona. The company manufactures and sells solar modules. It also designs, constructs, and sells complete solar power systems. The company's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on The NASDAQ Stock Market LLC under the trading symbol FSLR.
2. Respondent Polizzotto, is a resident of Arizona, and was First Solar's vice president of investor relations between April 2008 and November 2011. He was also a member of First Solar's Disclosure Committee, which among other things, focused on compliance with Regulation FD.
3. At all relevant times, Polizzotto was authorized by First Solar to speak on its behalf to investors, analysts, and other securities professionals, and was aware that Exchange Act Regulation FD [17 C.F.R. §§ 243.100, *et seq.*] prohibited him from selectively disclosing material nonpublic information to one party that was not publicly disclosed to all.
4. In June 2011, First Solar received conditional commitments from the DOE for loan guarantees of approximately \$4.5 billion relating to three separate First Solar projects: Antelope Valley Solar Ranch 1 ("AVSR"), Desert Sunlight, and Topaz Solar ("Topaz"). The loan guarantees were important to First Solar because they would allow the company to receive guaranteed low-cost financing from the federal government. However, each of the guarantees was

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.

conditioned upon First Solar meeting several requirements prior to September 30, 2011, the last day on which the DOE could make the loan guarantees.

5. Between June and September 2011, analysts wrote numerous reports speculating as to whether First Solar would be able to meet the September 30 deadline with respect to all three loan guarantees. Most analysts believed the company would meet the deadline for AVSR and Desert Sunlight, but the Topaz loan guarantee was the subject of more discussion because it had more regulatory hurdles to overcome prior to September 30. Topaz was also the largest of the three projects, having received a conditional \$1.93 billion loan guarantee commitment.

6. On September 13, 2011, Polizzotto attended an investor conference with First Solar's CEO at the time. During the conference, First Solar's CEO publicly expressed confidence that the company would receive all three loan guarantees.

7. On September 15, 2011, Polizzotto and several other executives learned that the DOE had decided not to provide a loan guarantee with respect to the Topaz project. The group of employees responsible for public disclosure regarding the DOE loans, including Polizzotto and one of First Solar's in-house lawyers, began discussing how and when the company should disclose the loss of the Topaz loan guarantee.

8. Late on the evening of September 15, in response to questions regarding the timing and content of a press release, the in-house lawyer sent an e-mail to the team, including Polizzotto, which stated the following:

"[I]f we receive a DOE notice tomorrow, we would not have to issue a press release or post something to our website the same day. We would, though, be restricted by Regulation FD in any [sic] answering questions asked by analysts, investors, etc. until such time that we do issue a press release or post to our website (assuming DOE itself doesn't make this notice public). ..."

9. After reading this e-mail and in anticipation of a meeting between a First Solar representative and a DOE representative to discuss the Topaz situation, Polizzotto sent an internal email that included the following statements:

"They [the DOE] need to recognize we are a public company and this is a material event for us. If they notify us of this without the other 2 approvals it will create huge concern to the investment community. We need them to communicate the whole picture with other 2 at the same time. ..."

10. Between Friday, September 16, and Wednesday, September 21, First Solar continued to work on the timing and content of the Topaz press release. The company also coordinated with the DOE to allow it to review the release.

11. On September 20, the U.S. House of Representatives' Committee on Energy and Commerce sent a letter to the DOE (the "Congressional Inquiry") inquiring about its loan guarantee program and the status of the guarantees that had not yet been closed, including all three

of First Solar's conditional guarantees. This event caused concern within the solar industry regarding whether the DOE would be able to move forward with its conditional loan guarantee commitments. On the morning of September 21, First Solar's stock dropped at the open by more than \$6 (or approximately 8%), from \$79.21 to below \$73. In addition, analysts began issuing research reports about the Congressional Inquiry, and Polizzotto began receiving numerous calls from analysts and investors.

12. When Polizzotto arrived at work on the morning of September 21, he knew the Topaz press release had not yet been issued, and found out shortly thereafter that it would not be issued until the following morning. Nevertheless, he drafted several Topaz-related talking points, which he and a subordinate investor relations employee delivered to more than 30 analysts and investors with whom they spoke that day. The talking points indicated that there was a higher probability the company would receive the loan guarantees for AVSR and Desert Sunlight, and a lower probability the company would receive the Topaz guarantee. As part of the "high probability/low probability" message, Polizzotto reminded analysts and institutional investors of previously-disclosed facts about Topaz that shed a negative light on the project, such as permitting obstacles, pending litigation, and a need to secure financing. The message effectively signaled that, contrary to the message that had been delivered by First Solar's CEO at a conference the prior week, the company no longer believed it would receive the Topaz guarantee. In addition, Polizzotto referred to a rumor that had been circulating regarding a potential Topaz buyer. According to the rumor, which First Solar had not publicly confirmed, a large energy company was in discussions with First Solar regarding the purchase of the Topaz project and could provide financing at a very low cost of capital, thereby significantly reducing the negative effect of not receiving the DOE loan guarantee.

13. In addition, in certain discussions, Polizzotto went further than his "high probability/low probability" message, and told at least one analyst and one institutional investor that if they wanted to be conservative, they should assume First Solar would not receive the Topaz loan guarantee.

14. In some instances, immediately after speaking with Polizzotto, analysts e-mailed the equity sales teams within their organizations with the message that they expected First Solar to receive two out of the three loan guarantees.

15. On the evening of September 21, First Solar's management learned from a news article that Polizzotto may have selectively disclosed the Topaz information to certain analysts and investors. As a result, they finalized their plans regarding the Topaz press release and issued it prior to the opening of the market on September 22. The company's stock opened that morning at \$68.95, down 6%.

16. As a result of the conduct described above, Polizzotto caused a violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)], and Regulation FD [17 C.F.R. §§ 243.100 *et seq.*] promulgated thereunder, by First Solar in connection with the selective disclosure of material nonpublic information described above.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Lawrence D. Polizzotto cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Regulation FD promulgated thereunder.

B. Respondent shall pay a civil money penalty of \$50,000 to the United States Treasury. Payment shall be made in the following installments: \$25,000.00 within 10 days of the entry of this Order; and \$25,000.00 within 365 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:


- (1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Lawrence D. Polizzotto as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Lorraine B. Echavarria, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., Suite 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary

5
By: 
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 70344 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15463

In the Matter of

JOHN A. PICINI,

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 John Picini ("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 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

4 of 29

III.

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

1. Picini, 53 years old, resides in North Attleboro, Massachusetts. From 2006 through August 2012, Picini was associated with The Center for Senior Financial Planning, an unregistered investment adviser that targeted senior citizens as clients.

2. On April 3, 2013, Picini pled guilty to five counts of mail fraud and three counts of tax evasion in violation of Title 18 United States Code, Sections 1341 and 1342 and Title 26 United States Code, Section 7201 before the United States District Court for the District of Massachusetts, in United States v. John A. Picini, No. 13-CR-10061.

3. The counts of the criminal information to which Picini pled guilty alleged, inter alia, that Picini defrauded investors and obtained money and property by means of materially false and misleading statements and that, in furtherance of the scheme, he used the United States mails. Picini advised clients to liquidate retirement funds that were invested in annuities or other tax deferred investment vehicles and to reinvest the funds in purported investment accounts supposedly managed by Picini. Contrary to his representations, he used his clients' funds to pay his personal expenses.

IV.

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

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

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

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

customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70343 / September 6, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3666 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15462

In the Matter of

VICTOR MANUEL RIVERA, JR.

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND 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 Victor Manuel Rivera, Jr. ("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 Exchange Act and Section

5 of 29

203(f) of the Advisers Act, 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. Rivera, 49 years old, resides in Clifton, New Jersey. From August 2007 through March 2011, Rivera was an investment adviser representative and registered representative associated with Morgan Stanley Smith Barney (and its predecessor firm), a broker-dealer and investment adviser registered with the Commission.

2. On February 28, 2012, Rivera pled guilty to one count of wire fraud in violation of 18 United States Code, Section 1343 before the United States District Court for the District of New Jersey, in United States v. Victor Manuel Rivera, Jr., 2:12-cr-00150-WJM (D.N.J.). On August 1, 2012, a judgment in the criminal case was entered against Rivera. He was sentenced to two years' probation and ordered to make restitution in the amount of \$94,000.

3. The count of the criminal information to which Rivera pled guilty alleged that from October 2008 through October 2010, Rivera defrauded investors and obtained money and property by means of materially false and misleading statements, and that he transmitted by wire funds in interstate commerce from the defrauded investors, without their knowledge or authorization, to a bank account Rivera controlled.

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

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially

waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70338 / September 6, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3664 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15459

In the Matter of

Ralph A. Saviano,

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 A. Saviano ("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 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

6 of 29

III.

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

1. Ralph A. Saviano ("Saviano"), age 71, resides in Somerset, New Jersey and conducted business as an investment adviser primarily in New Jersey under the name Saviano Financial Group, an unincorporated d/b/a. From July 2007 through June 2012, Saviano was associated with a dually registered investment adviser and broker-dealer (the "Firm") as an independent contractor.

2. On June 5, 2013, Saviano pled guilty in U.S. District Court for the District of New Jersey to one count of wire fraud in violation of 18 U.S.C. Section 1343. In addition to pleading guilty to wire fraud involving two former clients, Saviano agreed to a sentencing guideline offense level that results in a guideline range between 27 and 33 months, the entry of a forfeiture money judgment in the amount of \$699,926.51 and an order of restitution for the same amount.

3. The count of the criminal information to which Saviano pled guilty alleged, inter alia, that Saviano, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmitted or caused to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice. In connection with that plea, Respondent admitted that:

(a) From as early as July 2007 through in or about June 2012, Respondent worked in Somerset, New Jersey as an independent contractor, financial adviser, investment adviser, and was associated with the Firm.

(b) In or about May 2012, Respondent accompanied a client to her bank to redeem a CD and instructed the client to make the proceeds from the CD payable to Respondent. The client did so, providing approximately \$63,000 to Respondent to invest in two investment funds. Instead of investing the client's money, however, Respondent misappropriated it for his personal use; and

(c) In or about June 2012, a client provided Respondent with approximately \$75,000 via a check made out to cash with the words "Financial Investment" in the memo field. In or about September 2012, the client twice contacted Respondent to inquire about the whereabouts and return on her investment. Respondent informed her that "he was working on it," that he forgot the client wanted monthly disbursements of \$400-\$500, and that he needed to file additional paperwork in order to process these disbursements. The client contacted Respondent several more times with no success. Instead of investing the approximately \$75,000 for his client, Respondent misappropriated the funds for his personal use.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Saviano'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 Saviano 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; barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 70365 / September 10, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15467

In the Matter of

**Colorado 2001B Limited Partnership,
Fusion Golf Shafts, Inc., and
Graphics Technologies, 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 Colorado 2001B Limited Partnership, Fusion Golf Shafts, Inc., and Graphics Technologies, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Colorado 2001B Limited Partnership (CIK No. 1156218) is a West Virginia corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Colorado 2001B Limited Partnership 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, 2005.

2. Fusion Golf Shafts, Inc. (CIK No. 1492622) is a revoked Nevada corporation located in Willmar, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fusion Golf Shafts is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10

7 of 29

registration statement on May 26, 2010, which reported a net loss of over \$18,000 between its April 7, 2009 inception and March 31, 2010.

3. Graphics Technologies, Inc. (CIK No. 1077597) is a dissolved Minnesota corporation located in Eden Prairie, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Graphics Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 31, 2000, which reported a net loss of over \$25.7 million for the prior nine months. As of September 5, 2013, the company's stock (symbol "GTIX") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

4. 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.

5. 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.

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70366; File No. SR-OCC-2013-805)

September 10, 2013

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of an Advance Notice to Amend an Existing Interpretation and Policy to Give OCC Discretion Not to Grant a Particular Clearing Member Margin Credit for an Otherwise Eligible Security

Pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”)¹ and Rule 19b-4(n)(1)(i)² of the Securities Exchange Act of 1934 (“Act”), notice is hereby given that on August 15, 2013, The Options Clearing Corporation (“OCC”) filed with the Securities and Exchange Commission (“Commission”) the advance notice as described in Items I, II and III below, which Items have been prepared by OCC.³ The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Advance Notice

OCC proposes to amend an existing Interpretation and Policy so that OCC has discretion to disapprove as margin collateral for a particular clearing member, shares of an otherwise eligible security held as margin.

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

³ OCC is a designated financial market utility and is required to file advance notices with the Commission. See 12 U.S.C. 5465(e). OCC also filed the proposal contained in this advance notice as a proposed rule change under Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder. 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4, respectively. See SR-OCC-2013-14.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed advance notice and discussed any comments it received on the proposed advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A) and (B) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Advance Notice

The purpose of the proposed advance notice is to provide OCC with discretion with regard to granting or not granting margin credit to a clearing member. OCC currently may withhold margin credit from all clearing members with respect to a specific security. OCC proposes to address the risk presented by concentrated positions of securities posted as margin by particular clearing members by withholding margin credit from such clearing member's accounts. OCC proposes to enhance its ability to limit its risk exposure to a concentrated position of equity securities posted as margin by a specific clearing member by providing OCC with the discretion to disregard, for the purposes of granting margin credit, some or all of the otherwise eligible equity securities posted as margin. In addition, the proposed advance notice is designed to provide OCC with discretion to make exceptions to proposed Interpretation and Policy .14 with respect to a specific clearing member. Accordingly, OCC may allow margin credit for an otherwise ineligible security for a specific clearing member in situations in which OCC determines that such security serves as a hedge to positions in cleared contracts in the same account of such clearing member.

Rule 604 lists the acceptable types of assets that clearing members may post with OCC to satisfy their margin requirements under Rule 601, including equity securities, and establishes the eligibility criteria for such assets. Equity securities are the most common form of margin assets posted by clearing members and, under Rule 601, are included in OCC's STANS margining system for the purposes of valuing such equity securities and determining on a portfolio basis a clearing member's margin obligation to OCC.

Interpretation and Policy .14 to Rule 604 allows OCC to disapprove a security as margin collateral for all clearing members based on a consideration of the factors set forth in the interpretation, including number of outstanding shares, number of outstanding shareholders and overall trading volume. The STANS system currently takes into account the risk to a portfolio presented by fluctuations in the market price of concentrated security positions by identifying the two individual securities whose adverse price movements would result in the largest losses in each account and applying additional margin requirements to an account based on those losses if appropriate.

However, this test does not evaluate a large equity securities position in relation to the securities position's average daily trade volume, which would be relevant if OCC were required to liquidate the position. OCC has determined that in the event of a clearing member liquidation, OCC may be exposed to concentration risk arising from a large equity security position deposited or pledged as margin by a particular clearing member. Depending on the relationship between the average daily trading volume of a particular security and the number of outstanding shares of such security deposited by a clearing member as margin, it is possible that the listed equities markets may not be able to quickly absorb the equity securities OCC seeks to sell, or without an appreciable negative

price impact, in the event OCC needs to liquidate the clearing member's accounts. This risk is greatest when the number of shares being sold is large and the average daily trading volume is low. Neither the STANS system nor Rule 604 explicitly addresses this type of concentration risk.

To address concentration risk arising from the potential need to liquidate a particular clearing member's margin collateral, OCC proposes to expand its discretion under Interpretation and Policy .14 to limit, in OCC's discretion, the margin credit granted to an individual clearing member account which maintains a concentrated equity securities position by disregarding some or all of the otherwise eligible equity securities posted as margin based on an assessment of specific factors listed in Interpretation and Policy .14. OCC considers an equity security's average daily trading volume and the number of shares a clearing member deposited as margin to be the two most significant factors when making a decision to limit margin credit due to concentration risk.⁴ In addition, OCC proposes to amend Interpretation and Policy .14 so that it may grant margin credit when otherwise ineligible securities are deposited as margin collateral if such ineligible securities act as a hedge against cleared contracts held in the same account. For example, if a clearing member deposits otherwise ineligible equity securities as margin, OCC may nevertheless deem such ineligible securities to be acceptable margin collateral to the extent that the position is a hedge against a short position in its cleared contracts, because a decline in the value of the securities that serve as a hedge would be wholly or partially offset by an increase in value in the hedged

⁴ The limit is currently two times the equity security's average daily trading volume.

position thereby reducing or eliminating the concentration risk. In such a situation, OCC will limit the margin credit granted to the lesser of a multiple of the daily trading volume or the "delta equivalent position"⁵ for the particular equity security, taking into account the hedging position.⁶

OCC staff has been monitoring concentrated securities positions and assessing the impact of the proposed change described in this advance notice filing. OCC believes that, with OCC's assistance by supplying additional information to clearing members, clearing members will be able to accommodate the proposed changes without undue hardship. Accordingly, after receiving regulatory approval for the proposed advance notice, OCC will implement the change and work on an "as needed" manual basis with

⁵ The "delta equivalent position" is the value of a securities position that takes into account the position's use as a hedge against cleared option or futures positions. This value is calculated using the "delta" of the option or futures contract, which is the ratio between the theoretical change in the price of an underlying asset to the corresponding change in the price of the options or futures contract. Thus, delta measures the sensitivity of an options or futures contract price to changes in the price of the underlying asset. For example, a delta of +0.7 means that for every \$1 increase in the price of the underlying stock, the price of a call option will increase by \$0.70. Delta for an option or future can be expressed in shares of the underlying asset. For example, a standard put option with a delta of -.45 would have a delta of -45 shares, because the unit of trading is 100 shares.

⁶ Assume, for example, an average daily trade volume of 250 shares, a threshold of 2 times the average daily trade volume, and a delta of -300 shares for the options on a particular security in a particular account. A position of 700 shares that did not hedge any short options or futures would receive credit for only 500 shares (i.e., 2 times the average daily trade volume). If the net long position in the account, as adjusted for the delta of short option and futures positions, were only 400, credit would be given for the entire 700 shares since the delta equivalent position is below the 500 share threshold. However, if the option delta were +300, the net long position would be 1000, and credit would only be given for 500 shares because the delta equivalent position would exceed the 500 share threshold.

clearing members that are impacted until the limits are imposed systematically and the distribution of the applicable files and reports to clearing members is automated.

The proposed advance notice is consistent with Section 806(e)(1)(A)⁷ of the Payment, Clearing, and Settlement Supervision Act of 2010 because the proposed change could be deemed to materially affect the nature or level of risks presented by OCC. The proposed advance notice enhances OCC's ability to limit its risk exposure to potential losses from defaults by clearing members under normal market conditions through the use of risk-based parameters and encourages clearing members to have sufficient financial resources to meet their obligations to OCC. The proposed advance notice is not inconsistent with any existing OCC By-Laws or Rules, including those proposed to be amended.

(B) Clearing Agency's Statement on Comments on the Proposed Advance Notice Received from Members, Participants, or Others

Written comments on the proposed advance notice were not and are not intended to be solicited with respect to the proposed advance notice and none have been received.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The clearing agency may implement the proposed change pursuant to Section 806(e)(1)(G) of the Clearing Supervision Act⁸ if it has not received an objection to the proposed change within 60 days of the later of (i) the date that the Commission received the advance notice or (ii) the date the Commission receives any further information it requested for consideration of the notice. The clearing agency shall not

⁷ 12 U.S.C. 5465(e)(1)(A).

⁸ 12 U.S.C. 5465(e)(1)(G).

implement the proposed change if the Commission objects to the proposed change within the required time period.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date of receipt of the advance notice, or the date the Commission receives any further information it requested, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

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. 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 SR-OCC-2013-805 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-OCC-2013-805. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at

http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_13_805.pdf.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2013-805 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70359 / September 10, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15246

In the Matter of

LAURA A. ROSER,

Respondent.

ORDER MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE ACT OF
1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Laura A. Roser ("Respondent" or "Roser").

II.

Following the institution of these proceedings on March 15, 2013, Respondent submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act as to Laura A. Roser ("Order"), as set forth below.

9 of 29

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

These proceedings arise out of civil enforcement action against Roser, her then husband, and her entity, Art Intellect, Inc. d/b/a Mason Hill and VirtualMG, which operated as a classic Ponzi scheme.

Respondent

1. Laura A. Roser, age 32, is a resident of Salt Lake City, Utah. Roser has never been registered with the Commission or held any securities licenses. Roser is a defendant in United States v. Roser, Case No. 2:12-cr-680-RJS-PMW (D. Utah). Roser was the founder and president of Art Intellect, Inc., d/b/a Mason Hill, an entity which raised funds from investors in order to purchase, rehabilitate and manage distressed real estate.

Background

2. On March 6, 2013, Roser was permanently enjoined from future violations of Sections 17(a), 5(a) and (c) of the Securities Act of 1933 and Section 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Art Intellect, Inc., Civil Action Number 2:11-cv-00357, in the United States District Court for the District of Utah. The Court found, among other violations, that Roser was acting as an unregistered broker-dealer. Roser was ordered to pay \$1,509,313 in disgorgement and a civil penalty in an amount to be determined.

3. The Commission's Complaint alleged that from at least April 2009 through April 2011, Roser fraudulently raised at least \$2.5 million through an offering fraud and Ponzi scheme from approximately 75 investors. The Complaint further alleged that Roser made numerous misrepresentations to investors at the time they made their investments, including that investor funds would be used to purchase distressed real estate at discounted prices, to rehabilitate the properties and secure tenants, and to pay for the managing of the properties by Mason Hill, Roser's company. In reality, investor funds were used to pay Mason Hill's operating expenses, to pay sales commissions, for personal use by two other parties involved in the scheme, and to make putative profit payments to earlier investors. The Complaint also alleged that Roser sold unregistered securities in the form of investment contracts and acted as an unregistered broker.

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.

IV.

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Parowan
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70355 / September 10, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15465

In the Matter of

Big Bear Mining Corp.,
Four Rivers BioEnergy, Inc.,
Mainland Resources, Inc.,
QI Systems, Inc.,
South Texas Oil Co., and
Synova Healthcare Group, 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 Big Bear Mining Corp., Four Rivers BioEnergy, Inc., Mainland Resources, Inc., QI Systems, Inc., South Texas Oil Co., and Synova Healthcare Group, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Big Bear Mining Corp. (CIK No. 1354213) is a defaulted Nevada corporation located in Hilton Head Island, South Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Big Bear Mining is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2011, which reported a net loss of over \$1.34 million for the prior twelve months. As of September 5, 2013, the company's stock (symbol "BGBR") was quoted on OTC Link (previously "Pink Sheets") operated

10 of 29

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. Four Rivers BioEnergy, Inc. (CIK No. 1312069) is a defaulted Nevada corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Four Rivers is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2011, which reported a net loss of over \$1.7 million for the prior nine months. As of September 5, 2013, the company's stock (symbol "FRBE") 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. Mainland Resources, Inc. (CIK No. 1395205) is a defaulted Nevada corporation located in The Woodlands, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Mainland is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K/A for the period ended February 29, 2012, which reported a net loss of over \$1.56 million for the prior twelve months. As of September 5, 2013, the company's stock (symbol "MNLU") 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. QI Systems, Inc. (CIK No. 1125672) is a void Delaware corporation located in Colleyville, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). QI 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, 2007, which reported a net loss of over \$1.2 million for the prior nine months. As of September 5, 2013, the company's stock (symbol "QIII") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. South Texas Oil Co. (CIK No. 1288946) is a revoked Nevada corporation located in San Antonio, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). South Texas Oil 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 over \$10 million for the prior six months. On October 29, 2009, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Texas, which was converted to Chapter 7 and was still pending as of May 17, 2013. As of September 5, 2013, the company's stock (symbol "STXXQ") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Synova Healthcare Group, Inc. (CIK No. 1316826) is a Nevada corporation located in Media, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Synova 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, 2007, which reported a net loss of over \$8.1 million for the prior nine months. On December 18, 2007, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware which was converted to Chapter 7

and was still pending as of May 17, 2013. As of September 5, 2013, the company's stock (symbol "SNVHQ") was quoted on OTC Link, had four 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/or 13a-13 thereunder.

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By Jill M. Peterson
Assistant Secretary

*Commissioner Pinowar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 10, 2013

In the Matter of

**Big Bear Mining Corp.,
Four Rivers BioEnergy, Inc.,
Mainland Resources, Inc.,
QI Systems Inc.,
South Texas Oil Co., and
Synova Healthcare Group, Inc.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Big Bear Mining Corp. because it has not filed any periodic reports since the period ended December 31, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Four Rivers BioEnergy, Inc. because it has not filed any periodic reports since the period ended July 31, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mainland Resources, Inc. because it has not filed any periodic reports since the period ended February 29, 2012.

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

11 of 29

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of South Texas Oil Co. 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 Synova Healthcare Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of 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 September 10, 2013, through 11:59 p.m. EDT on September 23, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Prower
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70353 / September 10, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15464

In the Matter of

HydroGen Corp.,
QueryObject Systems Corp.,
Security Intelligence Technologies, Inc.,
Skins, Inc.,
SLM Holdings, Inc.,
Spring Creek Healthcare Systems, Inc., and
Startech Environmental 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 HydroGen Corp., QueryObject Systems Corp., Security Intelligence Technologies, Inc., Skins, Inc., SLM Holdings, Inc., Spring Creek Healthcare Systems, Inc., and Startech Environmental Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. HydroGen Corp. (CIK No. 1124394) is an expired Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). HydroGen is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended June 30, 2008, which reported a net loss of over \$40 million since the company's November 11, 2001 inception. As of September 5, 2013, the company's

stock (symbol "HYDGQ") was quoted on OTC Link (previously "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. QueryObject Systems Corp. (CIK No. 855743) 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). QueryObject 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 \$79,039 for the three prior six months. As of September 5, 2013, the company's stock (symbol "QOBJ") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Security Intelligence Technologies, Inc. (CIK No. 1117258) is a dissolved Florida corporation located in New Rochelle, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Security Intelligence is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2008, which reported a net loss of \$945,399 for the prior nine months. On May 30, 2008, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of New York, which was converted to Chapter 11, and terminated on January 15, 2009. As of September 5, 2013, the company's stock (symbol "SITGQ") 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. Skins, Inc. (CIK No. 1300744) is a revoked Nevada corporation located in Hoboken, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Skins 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, 2009, which reported a net loss of over \$2 million for the prior three months. On August 14, 2009, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Delaware, which was still pending as of May 17, 2013. As of September 5, 2013, the company's stock (symbol "SKNNQ") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. SLM Holdings, Inc. (CIK No. 1304559) is a void Delaware corporation located in Woodbury, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SLM 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 \$801,615 for the prior nine months. As of September 5, 2013, the company's stock (symbol "SMHI") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Spring Creek Healthcare Systems, Inc. (CIK No. 1366823) is a revoked Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Spring Creek 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, 2011, which reported a net loss of over \$1.2 million for the prior nine months. As of September 5, 2013, the company's stock (symbol "SCRK") was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Startech Environmental Corp. (CIK No. 875762) is a delinquent Colorado corporation located in Wilton, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Startech is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2009, which reported a net loss of over \$3.2 million for the prior nine months. On April 28, 2010, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Connecticut, which was still pending as of May 17, 2013. As of September 5, 2013, the company's stock (symbol "STHKQ") 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

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/or 13a-13 thereunder.

III.

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

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Pinover
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 10, 2013

In the Matter of

**HydroGen Corp.,
QueryObject Systems Corp.,
Security Intelligence Technologies, Inc.,
Skins, Inc.,
SLM Holdings, Inc.,
Spring Creek Healthcare Systems, Inc., and
Startech Environmental Corp.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of HydroGen Corp. 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 QueryObject Systems Corp. 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 Security Intelligence Technologies, Inc. because it has not filed any periodic reports since the period ended March 31, 2008.

13 of 29

7

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Spring Creek Healthcare Systems, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

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

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on September 10, 2013, through 11:59 p.m. EDT on September 23, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Frowner
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 70351 / September 10, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15455

In the Matter of

Exmocare, Inc. (n/k/a Second Solar, Inc.),
First Transaction Management, Inc.,
jetPADS, Inc.,
PepperBall Technologies, Inc.,
Pure Play Music, Ltd.,
Rim Semiconductor Co.,
Small Business Co., Inc.,
StarVox Communications, Inc.,
Steakhouse Partners, Inc., and
Sutura, 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 Exmocare, Inc. (n/k/a Second Solar, Inc.), First Transaction Management, Inc., jetPADS, Inc., PepperBall Technologies, Inc., Pure Play Music, Ltd., Rim Semiconductor Co., Small Business Co., Inc., StarVox Communications, Inc., Steakhouse Partners, Inc., and Sutura, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Exmocare, Inc. (n/k/a Second Solar, Inc.) (CIK No. 1098686) is a revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered

14 of 29

with the Commission pursuant to Exchange Act Section 12(g). Exmocare is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended February 29, 2008, which reported a net loss of \$561,399 for the prior six months. As of September 5, 2013, the company's stock (symbol "SDSL") was quoted on OTC Link (previously, "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. First Transaction Management, Inc. (CIK No. 1096613) is a delinquent Delaware corporation located in Westlake Village, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). First Transaction 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, 2011, which reported a net loss of over \$2.7 million since the company's March 25, 1999 inception. As of September 5, 2013, the company's stock (symbol "FMNG") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. jetPADS, Inc. (CIK No. 1438392) is a revoked Nevada corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). jetPADS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2011, which reported a net loss of \$148,614 for the prior nine months. As of September 5, 2013, the company's stock (symbol "JPAD") was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. PepperBall Technologies, Inc. (CIK No. 1216199) is a delinquent Colorado corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PepperBall 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 \$869,000 million for the prior nine months. As of September 5, 2013, the company's stock (symbol "PBAL") 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. Pure Play Music, Ltd. (CIK No. 1122686) is a revoked Nevada corporation located in Poway, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pure Play 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 \$775,913 for the prior nine months. As of September 5, 2013, the company's stock (symbol "PPML") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Rim Semiconductor Co. (CIK No. 1026595) is a Utah corporation located in La Jolla, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Rim 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 April 30, 2008, which reported a net loss of over \$5.4 million for the prior six months. As of September 5, 2013, the company's stock (symbol "RSMI") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Small Business Co., Inc. (CIK No. 1285936) is a Delaware corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Small Business 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, 2009, which reported a net loss of \$262,184 for the prior nine months. As of September 5, 2013, the company's stock (symbol "SBCO") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. StarVox Communications, Inc. (CIK No. 895716) is a void Delaware corporation located in San Jose, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). StarVox is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended May 31, 2007, which reported a net loss of over \$16.5 million for the prior nine months. On March 26, 2004, StarVox filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of California which was still pending as of May 17, 2013. As of September 5, 2013, the company's stock (symbol "SVOXQ") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

9. Steakhouse Partners, Inc. (CIK No. 1017156) is a void Delaware corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Steakhouse is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2007, which reported a net loss of over \$13.6 million for the prior twelve months. On May 15, 2008, Steakhouse filed a Chapter 11 petition in the U.S. Bankruptcy Court for Southern District of California which was converted to Chapter 7 and was still pending as of May 17, 2013. As of September 5, 2013, the company's stock (symbol "STKPQ") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

10. Sutura, Inc. (CIK No. 937814) is a Delaware corporation located in Fountain Valley, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sutura is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2008, which reported a net loss of over \$11 million for the prior twelve months. As of September 5, 2013, the company's stock (symbol "SUTU") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

11. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

*Commissioner Pivovarov
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 10, 2013

In the Matter of

**Exmocare, Inc. (n/k/a Second Solar, Inc.),
First Transation Management, Inc.,
jetPADS, Inc.,
PepperBall Technologies, Inc.,
Pure Play Music, Ltd.,
Rim Semiconductor Co.,
Small Business Co., Inc.,
StarVox Communications, Inc.,
Steakhouse Partners, Inc., and
Sutura, 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 Exmocare, Inc. (n/k/a Second Solar, Inc.) because it has not filed any periodic reports since the period ended February 29, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of First Transaction Management, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of jetPADS, Inc. because it has not filed any periodic reports since the period ended December 31, 2011.

15 of 29

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

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

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

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

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Sutura, 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 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 September 10, 2013, through 11:59 p.m. EDT on September 23, 2013.

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. 70368 / September 11, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3667 / September 11, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15468

In the Matter of

ERIC T. BURNS,

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
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Eric T. Burns ("Respondent" or "Burns").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

From November 1997 to March 7, 2011, Respondent was the president of Dimensions Financial Group, Inc., an investment adviser registered with the Commission. From approximately April 2011 through July 2011, Respondent was also seeking to become a registered representative associated with Morgan Stanley Smith Barney, a broker-dealer registered with the Commission. Respondent, 44 years old, is a resident of Wichita, Kansas.

16 of 29

B. RESPONDENT'S CRIMINAL CONVICTION

1. On January 17, 2013, Burns pled guilty to five counts of mail fraud in violation of Title 18 United States Code, Section 1343 before the United States District Court for the District of Kansas, in United States v. Eric T. Burns, 12-cr-10184-EFM. On May 31, 2013, a judgment in the criminal case was entered against Burns. He was sentenced to a prison term of 63 months followed by three years of supervised release and ordered to make restitution in the amount of \$2,246,870.00.

2. The counts of the criminal information to which Burns pled guilty alleged, among other things, that Burns defrauded investment advisory clients and/or former investment advisory clients and obtained money by means of false and fraudulent pretenses and representations. The misconduct underlying the charges to which he pled guilty occurred from July 2010 through June 2011. During that time period, Burns was associated with an investment adviser from June 2010 through March 7, 2011, and he was seeking to become associated with a broker-dealer from April 2011 through July 2011.

III.

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

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

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

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

IV.

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

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

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as

provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3668 / September 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15406

In the Matter of

BENJAMIN DANIEL
DEHAAN,

Respondent.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940

I.

On August 5, 2013, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Benjamin Daniel DeHaan ("DeHaan" or "Respondent").

II.

In response to 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 Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

III.

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

17 of 29

1. DeHaan was the owner and president of Lighthouse Financial Partners, LLC ("Lighthouse"), an investment adviser registered with the State of Georgia, from 2007 until mid-2012. DeHaan, 38 years old, is a resident of Tucker, Georgia.

2. On October 10, 2012, an Order of Permanent Injunction was entered by consent against DeHaan, permanently enjoining him from future violations of Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Benjamin Daniel DeHaan and Lighthouse Financial Partners, LLC, Civil Action Number 1:12-CV-1996-TWT, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint in the civil action alleged that from approximately January 2011 through early May 2012, DeHaan moved approximately \$1.2 million in funds belonging to his clients from their accounts at a custodial broker-dealer into a bank account in Lighthouse's name that he controlled, thus gaining custody and control of these client assets. DeHaan and Lighthouse told the clients that these funds would be used to open new accounts at another broker-dealer. The complaint further alleged that once in this account, at least some of these funds were moved to a personal account belonging to DeHaan and to accounts used by Lighthouse for business expenses. At least \$600,000 in client funds remained unaccounted for at the time the complaint was filed. DeHaan was also alleged to have provided false documents to the Commission's staff and to an examiner for the State of Georgia.

4. On February 1, 2013, DeHaan pled guilty to one count of wire fraud in violation of Title 18, United States Code, Section 1343 before the United States District Court for the Northern District of Georgia, in United States of America v. Benjamin Daniel DeHaan, Criminal Information No. 1:13-CR-27-SCJ (N.D. Ga. Feb. 1, 2013).

5. The count of the criminal information to which DeHaan pled guilty alleged, among other things, that DeHaan defrauded investors and misappropriated funds from them to pay his own expenses and those of Lighthouse while providing false information to them in quarterly account statements.

6. On July 24, 2012, the Commissioner of Securities for the State of Georgia ("Commissioner") issued an administrative order revoking the registration of Lighthouse as an investment adviser and DeHaan as an investment adviser representative. In the Matter of Lighthouse Financial Partners, LLC (CRD# 142816), and Benjamin Daniel DeHaan (CRD# 4213868), Case No. ENSC-120156 (July 24, 2012).

7. The Commissioner's order found, among other things, that Lighthouse and DeHaan had provided false information and documents to the Commissioner's staff during an examination of Lighthouse's books and records.

IV.

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


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


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70376 / September 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15470

In the Matter of

Axcess International, Inc.,
Gamma Pharmaceuticals, Inc.,
Innovex, Inc,
Knight Energy Corp.,
Komodo, Inc.,
Uphonia, Inc., and
Wilson Brothers USA, 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. Axcess International, Inc. ("AXSI")¹ (CIK No. 710597) is a Delaware corporation located in Addison, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AXSI 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, 2010, which reported a net loss of \$2,367,342 for the prior nine months. As of September 6, 2013, the common stock of AXSI was quoted on OTC Link (formerly "Pink

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

Sheets”) operated by OTC Markets Group Inc. (“OTC Link”), had seven market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

2. Gamma Pharmaceuticals, Inc. (“GMPM”) (CIK No. 904146) is a forfeited Delaware corporation located in St. Paul, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GMPM 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 \$1,510,775 for the prior six months. On August 11, 1995, GMPM filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Central District of California, which was dismissed on August 16, 1996. As of September 6, 2013, the common stock of GMPM 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. Innovex, Inc. (“INVX”) (CIK No. 50601) is an inactive Minnesota corporation located in Plymouth, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). INVX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 4, 2009, which reported a net loss of \$19,845,365 for the prior nine months. As of September 6, 2013, the common stock of INVX was quoted on OTC Link, had six market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

4. Knight Energy Corp. (“KNECQ”) (CIK No. 1068660) is a forfeited Maryland corporation located in Irving, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). KNECQ 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 \$3,585,158 for the prior nine months. On April 6, 2009, KNECQ filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of Texas, which was still pending as of September 6, 2013. As of September 6, 2013, the common stock of KNECQ 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. Komodo, Inc. (“KMDO”) (CIK No. 786129) is a revoked Nevada corporation located in Kirksville, Missouri with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). KMDO 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 \$358 for the prior three months. As of September 6, 2013, the common shares of KMDO were quoted on OTC Link, had four market makers, and were eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

6. Uphonia, Inc. (“UPHN”) (CIK No. 1005698) is a void Delaware corporation located in Milwaukee, Wisconsin with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). UPHN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of \$4,337,952 for the prior nine months. As of September 6, 2013, the common stock of UPHN was quoted on OTC Link, had six market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

7. Wilson Brothers USA, Inc. ("WLBR") (CIK No. 107469) is a dissolved Illinois corporation located in Kaufman, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WLBR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004. As of September 6, 2013, the common stock of WLBR was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 12, 2013

In the Matter of

**Axcess International, Inc.,
Gamma Pharmaceuticals, Inc.,
Innovex, Inc,
Knight Energy Corp.,
Komodo, Inc.,
Uphonia, Inc., and
Wilson Brothers USA, 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 Axcess International, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gamma Pharmaceuticals, 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 Innovex, Inc because it has not filed any periodic reports since the period ended July 4, 2009.

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

19 of 29

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Komodo, 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 Uphonia, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Wilson Brothers USA, Inc. because it has not filed any periodic reports since the period ended September 30, 2004.

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 September 12, 2013, through 11:59 p.m. EDT on September 25, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

4/11/13
10:00 AM

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 September 12, 2013, through 11:59 p.m. EDT on September 25, 2013.

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. 70374 / September 12, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15469

In the Matter of

**Carbiz, Inc.,
InZon Corporation,
IQ Micro, Inc.,
Irwin Financial Corporation, and
Princeton Media Group, 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. Carbiz, Inc. ("CBZFF")¹ (CIK No. 1307425) is an Ontario corporation located in Sarasota, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CBZFF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 31, 2009. As of September 6, 2013, the common shares of CBZFF were quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had five market makers, and were 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. InZon Corporation ("IZON") (CIK No. 814183) is a defaulted Nevada corporation located in Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IZON 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 \$3,398,285 for the prior six months. As of September 6, 2013, the common stock of IZON was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. IQ Micro, Inc. ("IQMC") (CIK No. 1350041) is a delinquent Colorado corporation located in West Palm Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IQMC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of \$1,228,018 for the prior nine months. As of September 6, 2013, the common stock of IQMC was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Irwin Financial Corporation ("IRWNQ") (CIK No. 52617) is an Indiana corporation located in Indianapolis, Indiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IRWNQ 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 \$150,991,000 for the prior six months. On September 18, 2009, IRWNQ filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of Indiana, which was still pending as of September 6, 2013. As of September 6, 2013, the common stock of IRWNQ was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Princeton Media Group, Inc. ("PCMEF") (CIK No. 814456) is an Ontario corporation located in Palm Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PCMEF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2006, which reported a net loss of \$104,488 for the prior year. As of September 6, 2013, the common stock of PCMEF was quoted on OTC Link, had five 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

September 18, 2013

In the Matter of

**American Energy Production, Inc.,
Best Energy Services, Inc.,
Community Central Bank Corporation,
Explortex Energy, Inc.,
HemoBioTech, Inc.,
Larrea Biosciences Corporation,
MBI Financial, Inc., and
Million Dollar Saloon, Inc.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Energy Production, 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 Best Energy Services, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Community Central Bank Corporation because it has not filed any periodic reports since the period ended September 30, 2010.

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

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

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Million Dollar Saloon, 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 September 18, 2013, through 11:59 p.m. EDT on October 1, 2013.

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. 70433 / September 18, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15496

In the Matter of

**American Energy Production, Inc.,
Best Energy Services, Inc.,
Community Central Bank Corporation,
Explortex Energy, Inc.,
HemoBioTech, Inc.,
Larrea Biosciences Corporation,
MBI Financial, Inc., and
Million Dollar Saloon, Inc.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND
NOTICE OF HEARING
PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American Energy Production, Inc. ("AENP")¹ (CIK No. 1111391) is a void Delaware corporation located in Mineral Wells, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AENP 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. As of September 13, 2013, the common stock of AENP was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC

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

Link”), had eight market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

2. Best Energy Services, Inc. (“BEYSQ”) (CIK No. 1397346) is a revoked Nevada corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BEYSQ 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, 2010, which reported a net loss from continuing operations of \$2,762,924 for the prior nine months. On February 15, 2011, BEYSQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Kansas, which was converted to a Chapter 7 petition on March 16, 2012, and was still pending as of September 16, 2013. As of September 13, 2013, the common stock of BEYSQ 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. Community Central Bank Corporation (“CCBD”) (CIK No. 1014133) is a Michigan corporation located in Mt. Clemens, Michigan with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CCBD 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, 2010, which reported a net loss of \$12,236,000 for the prior nine months. As of September 13, 2013, the common stock of CCBD was quoted on OTC Link, had four market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

4. Explortex Energy, Inc. (“EXPX”) (CIK No. 1364255) is a Nevada corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EXPX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2009, which reported a net loss of \$40,329 for the prior three months. As of September 13, 2013, the common stock of EXPX was quoted on OTC Link, had eight market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

5. HemoBioTech, Inc. (“HMBT”) (CIK No. 1301348) is a void Delaware corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). HMBT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2009, which reported a net loss of \$2,339,000 for the prior year. As of September 13, 2013, the common stock of HMBT was quoted on OTC Link, had five market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

6. Larrea Biosciences Corporation (“LRRRA”) (CIK No. 1175594) is a permanently revoked Nevada corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LRRRA 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 \$118,886 for the prior nine months. As of September 13, 2013, the common stock of LRRRA was quoted on OTC Link, had five market makers, and was eligible for the “piggyback” exception of Exchange Act Rule 15c2-11(f)(3).

7. MBI Financial, Inc. ("MBIF") (CIK No. 51511) is a revoked Nevada corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MBIF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of \$8,613,445 for the prior nine months. As of September 13, 2013, the common stock of MBIF was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Million Dollar Saloon, Inc. ("MLDS") (CIK No. 1002396) is a Nevada corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MLDS 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. As of September 13, 2013, the common stock of MLDS was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

9. 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.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or 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. 70455 / September 19, 2013

ADMINISTRATIVE PROCEEDING

File No. 3-15505

In the Matter of

American Asset Development, Inc.,
aVinci Media Corp.,
Ceragenix Pharmaceuticals, Inc.,
Marshall Holdings International, Inc.,
MedCom USA, Incorporated, and
Millenium Holding Group, Inc.,

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND
NOTICE OF HEARING
PURSUANT TO SECTION
12(j) OF THE SECURITIES
EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American Asset Development, Inc. ("AADI")¹ (CIK No. 1076886) is a revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AADI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2009, which reported a net loss of \$423,785 for the prior year. As of September 13, 2013, the common stock of AADI 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. aVinci Media Corp. ("AVMC") (CIK No. 842695) is a void Delaware corporation located in Draper, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AVMC 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, 2010, which reported a net loss of \$166,604 for the prior nine months. As of September 13, 2013, the common stock of AVMC was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Ceragenix Pharmaceuticals, Inc. ("CGXP") (CIK No. 1180743) is a void Delaware corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CGXP is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2009, which reported a net loss of \$8,409,339 for the prior year. On June 2, 2010, CGXP filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Colorado, which was still pending as of September 16, 2013. As of September 13, 2013, the common stock of CGXP 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. Marshall Holdings International, Inc. ("MHLI") (CIK No. 1062760) is a revoked Nevada corporation located in Salt Lake City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MHLI 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 \$1,473,136 for the prior nine months. As of September 13, 2013, the common stock of MHLI was quoted on OTC Link, had two market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. MedCom USA, Incorporated ("EMED") (CIK No. 907127) 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). EMED is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2008, which reported a net loss of \$148,223 for the prior six months. As of September 13, 2013, the common stock of EMED 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. Millenium Holding Group, Inc. ("MNHG") (CIK No. 1100674) is a revoked Nevada corporation located in Henderson, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MNHG is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2006, which reported a net loss of \$2,480,476 for the prior year. On December 28, 2010 filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Nevada, which was closed on March 18, 2011. As of September 13, 2013, the common stock of MNHG was quoted on OTC Link, had seven 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].

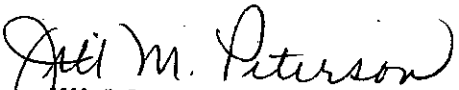
This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

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


By Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 19, 2013

In the Matter of

**American Asset Development, Inc.,
aVinci Media Corp.,
Ceragenix Pharmaceuticals, Inc.,
Marshall Holdings International, Inc.,
MedCom USA, Incorporated, and
Millenium Holding Group, Inc.,**

File No. 500-1

**ORDER OF SUSPENSION OF
TRADING**

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of aVinci Media Corp. because it has not filed any periodic reports since the period ended September 30, 2010.

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

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

25 of 29

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Millenium Holding Group, Inc. because it has not filed any periodic reports since the period ended December 31, 2006.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on September 19, 2013, through 11:59 p.m. EDT on October 2, 2013.

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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3672 / September 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15509

In the Matter of

Stephen C. Bond,

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 Stephen C. Bond ("Bond" or "Respondent").

II.

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

III.

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

1. From 2001 to 2008, Bond was employed by purported investment management companies based in the San Francisco Bay Area known as Asenqua Capital Management, LLC and Fireside Capital Management, LLC (together, the "Asenqua funds"). Bond held various positions during his employment with the Asenqua funds. At times, Bond held himself

26 of 29

out to be the "fund manager" of the Asenqua funds. Bond was later a consultant and provided research analysis to the Asenqua funds. Bond, age 45, is a resident of Concord, California.

2. On August 12, 2013, a final judgment was entered by consent against Bond, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") 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. Stephen C. Bond*, Civil Action No. 10-cv-1358, in the United States District Court for the Northern District of California.

3. In his various capacities, Bond worked with Albert K. Hu ("Hu"), the founder of the Asenqua funds, to assist him in attracting investors in the funds. Hu introduced Bond to investors at meetings to solicit investment in the funds. During these meetings, Bond spoke to potential investors about industry market trends and the Asenqua funds' investment strategy. Bond's introduction by Hu was designed to provide an air of legitimacy to the Asenqua funds and security for fund investors. Bond and Hu showed potential investors presentations and documents prepared by Hu that purported to describe the funds' purported high investment returns. As a result of these meetings, Hu raised more than \$5 million from investors, who believed that Bond was the "fund manager" of the Asenqua funds. Bond managed no portfolio of investments for the Asenqua funds and relied on the documents prepared by Hu without further diligence. Investors' funds were not invested in the manner described in fund documents and during investor presentations. Instead, Hu used investor funds to pay himself, Bond and others as Hu saw fit. Despite having no investment portfolio to manage or further analyzing the funds' returns, Bond received more than \$850,000 as compensation for work and repayment of expenses, nearly 20 percent of the funds raised from investors. In June 2012, a jury in the United States District Court for the Northern District of California found Hu guilty of seven counts of wire fraud related to the Asenqua 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's Offer.

Accordingly, it is hereby ORDERED pursuant to 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 five years to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by 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 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 Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3672 / September 19, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15509

In the Matter of

Stephen C. Bond,

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 Stephen C. Bond ("Bond" or "Respondent").

II.

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

III.

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

1. From 2001 to 2008, Bond was employed by purported investment management companies based in the San Francisco Bay Area known as Asenqua Capital Management, LLC and Fireside Capital Management, LLC (together, the "Asenqua funds"). Bond held various positions during his employment with the Asenqua funds. At times, Bond held himself

out to be the "fund manager" of the Asenqua funds. Bond was later a consultant and provided research analysis to the Asenqua funds. Bond, age 45, is a resident of Concord, California.

2. On August 12, 2013, a final judgment was entered by consent against Bond, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") 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. Stephen C. Bond*, Civil Action No. 10-cv-1358, in the United States District Court for the Northern District of California.

3. In his various capacities, Bond worked with Albert K. Hu ("Hu"), the founder of the Asenqua funds, to assist him in attracting investors in the funds. Hu introduced Bond to investors at meetings to solicit investment in the funds. During these meetings, Bond spoke to potential investors about industry market trends and the Asenqua funds' investment strategy. Bond's introduction by Hu was designed to provide an air of legitimacy to the Asenqua funds and security for fund investors. Bond and Hu showed potential investors presentations and documents prepared by Hu that purported to describe the funds' purported high investment returns. As a result of these meetings, Hu raised more than \$5 million from investors, who believed that Bond was the "fund manager" of the Asenqua funds. Bond managed no portfolio of investments for the Asenqua funds and relied on the documents prepared by Hu without further diligence. Investors' funds were not invested in the manner described in fund documents and during investor presentations. Instead, Hu used investor funds to pay himself, Bond and others as Hu saw fit. Despite having no investment portfolio to manage or further analyzing the funds' returns, Bond received more than \$850,000 as compensation for work and repayment of expenses, nearly 20 percent of the funds raised from investors. In June 2012, a jury in the United States District Court for the Northern District of California found Hu guilty of seven counts of wire fraud related to the Asenqua 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's Offer.

Accordingly, it is hereby ORDERED pursuant to 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 five years to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by 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 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

September 24, 2013

In the Matter of

**AcuNetx, Inc.,
Alliance Pharmaceutical Corp.,
BBV Vietnam S.E.A. Acquisition Corp.,
Cash Technologies, Inc.,
Conspiracy Entertainment Holdings, Inc.,
Dematco, Inc., and
Interactive Systems Worldwide, 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 AcuNetx, Inc. because it has not filed any periodic reports since the period ended June 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Alliance Pharmaceutical Corp. 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 BBV Vietnam S.E.A. Acquisition Corp. because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cash Technologies, Inc. because it has not filed any periodic reports since the period ended February 28, 2009.

28 of 29

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Conspiracy Entertainment Holdings, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Dematco, 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 Interactive Systems Worldwide, Inc. because it has not filed any periodic reports since the period ended March 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 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 September 24, 2013, through 11:59 p.m. EDT on October 7, 2013.

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. 70481 / September 24, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15517

In the Matter of

AcuNetx, Inc.,
Alliance Pharmaceutical Corp.,
BBV Vietnam S.E.A. Acquisition Corp.,
Cash Technologies, Inc.,
Conspiracy Entertainment Holdings, Inc.,
Demateo, Inc., and
Interactive Systems Worldwide, 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. AcuNetx, Inc. ("ANTXQ")¹ (CIK No. 1097575) is a revoked Nevada corporation located in Torrance, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ANTXQ 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, 2010, which reported a net loss of \$38,414 for the prior six months. On August 1, 2012, ANTXQ filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Central District of California, which was dismissed on November 29, 2012. As of September 13, 2013, the common stock of ANTXQ was quoted on OTC Link (formerly "Pink Sheets") operated by OTC

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

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. Alliance Pharmaceutical Corp. ("ALLP") (CIK No. 736994) is a New York corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ALLP 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. As of September 13, 2013, the common stock of ALLP 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. BBV Vietnam S.E.A. Acquisition Corp. ("BBVVF") (CIK No. 1415586) is a Marshall Islands corporation located in Woodland Hills, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BBVVF 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. As of September 13, 2013, the common stock of BBVVF was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Cash Technologies, Inc. ("CTQN") (CIK No. 1022964) is a Delaware corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CTQN 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, 2009, which reported a net loss of \$5,886,520 for the prior nine months. On August 22, 2000, CTQN filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of Ohio, which was closed on November 29, 2001. As of September 13, 2013, the common stock of CTQN 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. Conspiracy Entertainment Holdings, Inc. ("CPYE") (CIK No. 1136424) is an expired Utah corporation located in Santa Monica, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CPYE 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, 2010, which reported a net loss of \$563,271 for the prior nine months. As of September 13, 2013, the common stock of CPYE was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Dematco, Inc. ("DMAT") (CIK No. 1250485) is a void Delaware corporation located in Encino, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DMAT 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 \$185,755 for the prior three months. As of September 13, 2013, the common stock of DMAT was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Interactive Systems Worldwide, Inc. ("ISWI") (CIK No. 1025995) is a forfeited Delaware corporation located in Carlsbad, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ISWI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2008, which reported a net loss of \$682,000 for the prior six months. As of September 13, 2013, the common stock of ISWI was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **September 2013** with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY JO WHITE, CHAIR

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(11 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70308 / September 4, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15450

In the Matter of

**China Lithium Technologies, Inc. and
China Wi-Max 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 the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. China Lithium Technologies, Inc. ("CLTT")¹ (CIK No. 888719) is a revoked Nevada corporation located in Flushing, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CLTT 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, 2012. As of August 28, 2013, the common stock of CLTT was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Wi-Max Communications, Inc. ("CHWM") (CIK No. 1434667) is a defaulted Nevada corporation located in Grafton, Wisconsin with a class of securities registered

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

with the Commission pursuant to Exchange Act Section 12(g). CHWM 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, 2011, which reported a net loss of \$521,944 for the prior six months. As of August 28, 2013, the common stock of CHWM was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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 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

September 4, 2013

In the Matter of

China Lithium Technologies, Inc. and
China Wi-Max 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 China Lithium Technologies, Inc. because it has not filed any periodic reports since the period ended March 31, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Wi-Max Communications, Inc. because it has not filed any periodic reports since the period ended June 30, 2011.

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 September 4, 2013, through 11:59 p.m. EDT on September 17, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

2 of 11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70310 / September 4, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15451

In the Matter of

K's Media,

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 the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. K's Media ("KVME")¹ (CIK No. 1368256) is a revoked Nevada corporation located in Beijing, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). KVME is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended April 30, 2010, which reported a net loss of \$3,854,270 for the prior year. As of August 28, 2013, the common stock of KVME was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

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

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports and failed to bring its filings current in response to the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires 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 fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 4, 2013

In the Matter of

K's Media,
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 K's Media because it has not filed any periodic reports since the period ended April 30, 2010.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on September 4, 2013, through 11:59 p.m. EDT on September 17, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

4 of 11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70323 / September 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15453

In the Matter of

China Cablecom Holdings Ltd.
(n/k/a China Cablecom Ltd.),

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS AND NOTICE OF HEARING
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. China Cablecom Holdings Ltd. (n/k/a China Cablecom Ltd.) ("CABL¹F") (CIK No. 1416569) is a British Virgin Islands corporation located in Shanghai, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CABLF 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, 2010, which reported a net loss, net of tax, of \$27,011,251 for the prior year. As of August 28, 2013, the ordinary shares of CABLF were quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had nine market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

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

5 of 11

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 bring its filings current in response to the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

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

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

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 5, 2013

In the Matter of

China Cablecom Holdings Ltd.,

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Cablecom Holdings Ltd. (n/k/a China Cablecom Ltd.) because it has not filed any periodic reports since the period ended December 31, 2010.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on September 5, 2013, through 11:59 p.m. EDT on September 18, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

6 of 11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 5, 2013

In the Matter of

Anhui Taiyang Poultry Co., Inc.
a/k/a The Parkview Group, Inc.,
Business Development Solutions, Inc., and
Tsingyuan Brewery Ltd.,

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Anhui Taiyang Poultry Co., Inc. a/k/a The Parkview Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Tsingyuan Brewery Ltd. because it has not filed any periodic reports since the period ended September 30, 2011.

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

7 of 11

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 September 5, 2013, through 11:59 p.m. EDT on September 18, 2013.

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. 70321 / September 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15452

In the Matter of

Anhui Taiyang Poultry Co., Inc.
a/k/a The Parkview Group, Inc.,
Business Development Solutions, Inc., and
Tsingyuan Brewery Ltd.,

Respondents.

ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Anhui Taiyang Poultry Co., Inc. a/k/a The Parkview Group, Inc. ("DUKS")¹ (CIK No. 1394120) is a Delaware corporation located in Ningguo City, Anhui Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DUKS 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, 2011. As of August 28, 2013, the common stock of DUKS was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had seven 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. Business Development Solutions, Inc. ("BDEV") (CIK No. 1136331) is a void Delaware corporation located in Shanghai, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BDEV is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2010, which reported a net loss of \$6,112,676 for the prior year. As of August 28, 2013, the common stock of BDEV was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Tsingyuan Brewery Ltd. ("BEER") (CIK No. 1103120) is a void Delaware corporation located in Linyi County, Shandong Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BEER 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, 2011. As of August 28, 2013, the common stock of BEER was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. 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.

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

6. 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 Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3660 / September 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15454

In the Matter of

RONALD YEE,

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 Ronald Yee ("Yee" 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 finding contained in Section III.2 below, which is admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Yee is a resident of Fremont, California. From 2005 to June 2008, he was the Chief Financial Officer of Value Act Capital Partners, L.P. ("ValueAct"), an unregistered

9 of 11

venture capital fund manager. During the relevant time period, Yee was associated with an investment adviser.

2. On March 7, 2013, a final judgment was entered by consent against Yee, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in the civil action entitled *SEC v. King Chuen Tang a/k/a Chen Tang, et al.* (Civil Action No. 3:09-cv-05146-JCS), in the United States District Court for the Northern District of California, San Francisco Division.

3. The Commission's complaint alleged that in 2007, Yee engaged in illegal insider trading by conveying to his brother-in-law material, non-public information about Acxiom Corporation, which Yee learned by virtue of his position as CFO of ValueAct, and which he had a duty to keep confidential.

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 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 5 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

September 6, 2013

In the Matter of

North China Horticulture, 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 North China Horticulture, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on September 6, 2013, through 11:59 p.m. EDT on September 19, 2013.

By the Commission.

Elizabeth M. Murphy
Secretary

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

10 of 11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70333 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15457

In the Matter of

North China Horticulture, 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 the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. North China Horticulture, Inc. ("IDCX")¹ (CIK No. 1280821) is a defaulted Nevada corporation located in Dandong City, Liaoning, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IDCX 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, 2011, which reported a net loss of \$2,640,775 for the prior nine months. As of August 28, 2013, the common stock of IDCX was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

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

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

reports and failed to bring its filings current in response to the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires 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 fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **July 2013**, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

ELISSE B. WALTER, CHAIRMAN

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(1 Document)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70329 / September 5, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3662 / September 5, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14906

In the Matter of

CRAIG KUGEL,

Respondent.

CORRECTED ORDER MAKING FINDINGS
AND IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940

I.

On June 5, 2012, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings 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 Craig Kugel ("Kugel," or "Respondent").

II.

In response to 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 Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 ("Order") as set forth below.

1 of 1

III.

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

1. Kugel, age 37, was employed by Bernard L. Madoff Investment Securities LLC ("BMIS") or its affiliated entity known as Primex Trading N.A., LLC ("Primex") from approximately 2001 until December 2008. For at least a portion of the time in which he engaged in the conduct underlying the criminal information described below, Kugel was associated with BMIS, and was responsible for or assisted in, among other things, budget forecasting for BMIS's proprietary trading and market-making operations, the administration of BMIS's health plan, and tasks associated with BMIS's retirement plan.

2. BMIS registered with the Commission as a broker-dealer in 1960 and as an investment adviser in August 2006, and had its principal place of business in New York, New York. BMIS purportedly engaged in three different operations – investment advisory operations ("IA Operations"), market-making, and proprietary trading. BMIS is currently under the control of a trustee appointed pursuant to the Securities Investor Protection Act of 1970 (15 U.S.C. § 78aaa *et seq.*).

3. On June 5, 2012, Respondent pleaded guilty to (1) conspiracy to (a) obstruct or impede the lawful government functions of the Internal Revenue Service; and to (b) falsify statements in relation to documents required by ERISA; (2) making false statements in relation to documents required by ERISA; (3) and subscribing to false U.S. Individual Tax Returns, in United States v. Craig Kugel, Crim. Information No. 10 Cr. 228 (LTS).

4. The information to which Respondent pleaded guilty alleged, *inter alia*, that:

(a) Bernard L. Madoff engaged in a long-standing Ponzi scheme through BMIS. While Bernard L. Madoff promised to clients and prospective clients that he would invest their money in shares of common stock, options, and other securities of well-known corporations, he never invested the client funds in the securities as he promised.

(b) Respondent was an employee of BMIS or its affiliated entity, Primex, from in or about 2001, through on or about December 11, 2008. Respondent's responsibilities included, among other things, budget forecasting for BMIS's market making and proprietary trading operations and overseeing BMIS's health care plan.

(c) From at least in or about 2003 through 2008, Kugel was aware that there were individuals on BMIS's payroll who did not work for the firm but who nevertheless received salaries and benefits. Despite this knowledge, Kugel submitted to the United States Department of Labor fraudulent forms that included a number of fake employees who in fact did not work at BMIS; and

(d) Respondent subscribed to several U.S. Individual Income Tax Returns that falsely omitted income that Respondent was not entitled to omit.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Craig Kugel'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 Craig Kugel be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for September 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY L. SCHAPIRO, CHAIRMAN

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(1 Document)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70340/ September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15460

In the Matter of

DAVID G. BARTHOLOMEW,

Respondent.

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

I.

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

II.

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

III.

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

1. From January 2007 through July 2008, Bartholomew was the principal of LOA Capital, LLC a limited liability company that offered and sold high-yield promissory notes to

1 of 1

investors. During that time, Bartholomew was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On August 29, 2013, a permanent injunction was entered by consent against Bartholomew, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that, from at least January 2007 through July 2008, Bartholomew offered and sold purported high-yield promissory notes to investors which he claimed would pay 2% to 3% interest monthly and in so doing engaged in the business of effecting transactions in securities for the accounts of others. The funds raised by Bartholomew were given to Thomas R. Fry who funneled those funds into a Ponzi scheme run by Jeffrey L. Mowen, a convicted felon and securities law recidivist. The Commission alleged that Bartholomew distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans, and which misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Bartholomew conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money without any documentation or limitation on the use of the funds.

IV.

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

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

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

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

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

customer, whether or not related to the conduct that served as the basis for the Commission order;
and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct
that served as the basis for the Commission order.

By the Commission,

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for September 2013, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY L. SCHAPIRO, CHAIRMAN

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

(2 Documents)

*Chairman Schapiro
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70341 / September 6, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3665 / September 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15461

In the Matter of

TIMOTHY M. MCGINN and
DAVID L. SMITH,

Respondents.

**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
AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Timothy M. McGinn ("McGinn") and David L. Smith ("Smith") (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. McGinn and Smith were the founders and primary owners of McGinn, Smith & Co., Inc. (MS & Co.), a broker-dealer based in Albany, NY. McGinn and Smith were registered from 1981 through August 2012, and were associated with MS & Co. during that time. McGinn and Smith were also indirect owners of McGinn Smith Advisors, LLC, which was

registered with the Commission as an investment advisor from January 2006 to April 2009. Pursuant to a Default Decision dated September 14, 2011, McGinn and Smith were barred from associating with any FINRA member firm.

B. ENTRY OF RESPONDENTS' CRIMINAL CONVICTION

2. On February 6, 2013, following a four-week trial in *United States v. David L. Smith and Timothy M. McGinn*, 12-cr-0028 (N.D.N.Y.) (DNH), a jury in the United States District Court for the Northern District of New York found McGinn and Smith guilty on multiple counts charged in the Superseding Indictment, including conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud and filing a false tax return. On August 13, 2013, the Court entered judgments against McGinn and Smith. McGinn was sentenced to a prison term of 180 months, and ordered to pay a fine of \$100,000 and restitution of \$5,992,800. Smith was sentenced a prison term of 120 months, and ordered to pay a fine of \$50,000 and restitution of \$5,989,726.

3. The counts of the Superseding Indictment to which McGinn and Smith were found guilty alleged, among other things, that through various securities offerings from 2006 through 2009 they devised schemes to defraud investors, made misrepresentations and omissions in private placement memoranda, and misused investor funds.

III.

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

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

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

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

IV.

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

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

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

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

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

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

For the Commission, by its Secretary, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

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

*Commissioner Walter
Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9460 / September 30, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15540

In the Matter of

ADAM TROY DOOLY,

Respondent.

ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Adam Troy Dooly ("Dooly" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, 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 finds¹ that:

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

1. Dooly, age 49, is a resident of Destin, Florida. Through his entity Deep South Companies, he provides consulting and public relations services to direct selling businesses, including internet-based network marketers. He also operates numerous websites, including MLMHelpdesk.com, through which he broadcasts news and information about the direct selling industry.

2. From at least April 2012 until August 2012, Dooly served as a paid consultant to Rex Venture Group, LLC ("RVG"), the parent company of ZeekRewards.com ("ZeekRewards"), the self-described "affiliate advertising division" for a penny auction website known as Zeekler.com. ZeekRewards operated as a multi-level marketing program offering subscription memberships to affiliates who then recruited new affiliates and bought and gave away as samples, or sold, bid packages for the penny auction website. Rather than promoting penny auctions, however, RVG primarily marketed ZeekRewards to investors as an opportunity to earn passive income indefinitely through their participation in the program.

3. Under two successive contracts, RVG agreed to pay Dooly \$6,000 per month to provide various consulting and public relations services that included, among other things, responding to negative press about RVG and ZeekRewards; providing live reporting from company events; conducting video chat interviews to "promote company, founders, officers, products and culture"; and providing media exposure to facilitate market penetration and improve public perception. In furtherance of the foregoing, Dooly promoted ZeekRewards on his website, MLMHelpdesk.com; posted blog entries and youtube.com videos giving publicity to ZeekRewards; and conducted at least one radio interview promoting the company.

4. Dooly provided the agreed services until ZeekRewards was shut down by the SEC in August 2012 for operating an illegal pyramid and Ponzi scheme. For all his services, Dooly earned \$24,000 in consulting fees, but he never received the last \$6,000 payment because the company's assets were frozen (thus receiving only \$18,000). Of that total, \$3,000 or approximately 17% was attributed to public relations or promotion in various media outlets.

5. In each instance of public relations or promotion in various media outlets, Dooly failed to disclose to his readers and listeners that RVG was paying him for such publicity. Dooly believed that, pursuant to a non-disclosure agreement, RVG maintained the exclusive right to determine whether or not to disclose Dooly's consulting agreement and the amount of compensation. Because RVG did not authorize such disclosure, Dooly declined to reveal his compensation and, in at least one instance, Dooly denied (or misled his audience about) receiving compensation from RVG (apart from reimbursement of expenses) when asked about his compensation during a public radio program.

6. As a result of the conduct described above, Dooly violated Section 17(b) of the Securities Act, which prohibits publishing, giving publicity, or circulating "any notice, circular, advertisement . . . or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer . . . without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof."

7. In the pending case of *SEC v. Rex Venture Group LLC et al.*, Civil Action No. 3:12-CV-519 (W.D.N.C., filed Aug. 17, 2012), in which the complaint alleges violations arising from substantially similar facts as set forth herein, the Court has appointed Kenneth Bell, Esq. as receiver (the "Receiver").

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent Dooly cease and desist from committing or causing any violations and any future violations of Section 17(b) of the Securities Act.

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

C. Respondent shall pay disgorgement of \$3,000, prejudgment interest of \$98.81, and civil penalties of \$3,000 to the Receiver. Cf. 17 C.F.R. § 201.1102(a). Such payments, in accordance with the schedule set forth below, shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to Kenneth Bell, Esq., court-appointed Receiver for Rex Venture Group LLC d/b/a ZeekRewards.com; (C) hand-delivered or mailed to Kenneth Bell, Esq., McGuire Woods, LLP, 201 North Tryon Street, Charlotte, NC 28202-2146; and (D) submitted under cover letter that identifies Dooly 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 Brian M. Privor, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Mail Stop 5546, Washington, DC, 20549-5546. Such payment shall be made according to the following schedule:

- \$3,098.81, representing disgorgement and prejudgment interest, shall be paid within 10 days of the entry of this Order; and
- \$3,000.00, representing civil penalties, shall be paid within 90 days of the entry of this Order.

If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717.

By the Commission.

Elizabeth M. Murphy
Secretary

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