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 **March 2015**, 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

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 74404 / March 2, 2015

WHISTLEBLOWER AWARD PROCEEDING

File No. 2015-1

In the Matter of the Claim for Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

On December 15, 2014, the Claims Review Staff issued a Preliminary Determination related to Notice of Covered Action Redacted (the "Covered Action"). The Preliminary Determination recommended that Redacted ("Claimant") receive a whistleblower award because 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).[1]

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[1] Claimant was Redacted at the time Claimant obtained the information. As a result, in preliminarily determining that Claimant had provided original information, the Claims Review Staff considered whether Claimant's information was derived from Claimant's independent knowledge or independent analysis. Under Rule 21F-4(b)(1), "[i]n order for [a] whistleblower submission to be considered original information, it must," among other requirements, be "[d]erived from [the whistleblower's] independent knowledge or independent analysis." 17 C.F.R. § 240.21F-4(b)(1). In turn, Rule 21F-4(b)(4)(iii)(A) provides that, unless an exception applies, "[t]he Commission will not consider information to be derived from [a whistleblower's] independent knowledge or independent analysis" if the whistleblower "obtained the information because" the whistleblower was "[a]n officer, director, trustee, or partner of an entity and another person informed you of allegations of misconduct, or you learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law[.]" 17 C.F.R. § 240.21F-4(b)(4)(iii)(A). But the Claims Review Staff preliminarily determined that Rule 21F-4(b)(4)(iii)(A) did not apply here to disqualify Claimant's information from treatment as original information pursuant to the exception in Rule 21F-4(b)(4)(v)(C), 17 C.F.R. § 240.21F-4(b)(4)(v)(C), because Claimant reported the information to other responsible persons at the entity, as provided for under our rules, or such persons knew about it, at least 120 days before Claimant reported the information to the Commission.

Further, the Claims Review Staff recommended that such award be set in the amount of Redacted of the monetary sanctions collected or to be collected in the Covered Action, which will be between $475,000 and $575,000. 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 Claimant's application.

On December 16, 2014, Claimant provided written notice to the Commission of Claimant's decision not to contest the Preliminary Determination within the 60-day deadline set out in Rule 21F-10(e) promulgated under the Exchange Act, 17 C.F.R. § 240.21F-10(e). Accordingly, pursuant to Rule 21F-10(f), 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 Rules 21F-10(f) and (h), 17 C.F.R. § 240.21F-10(f) and (h), and for the reasons set forth in the Preliminary Determination, it is hereby ORDERED that Claimant shall receive Redacted of the monetary sanctions collected in this Covered Action.

By the Commission.

Brent J. Fields
Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74401 / March 2, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3641 / March 2, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16413

In the Matter of

ROBERT W. ELLIOT

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 and in the public interest that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Robert W. Elliot ("Respondent" or "Elliot").

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, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Respondent

1. Respondent, 51 years old, is a resident of Delmar, MD. From August 2012 through January 2014, Respondent was the vice president of finance at Michael's Finer Meats, LLC ("MFM"), a wholly owned subsidiary of The Chefs' Warehouse, Inc. ("Chefs"). Respondent is not, and has never been, a certified public accountant. Respondent is currently employed as a credit manager at a private company in Seaford, Delaware.

Relevant Entities

2. The Chefs' Warehouse, Inc., a Delaware corporation with principal offices in Ridgefield, Connecticut, is a distributor of specialty food products. The company has securities registered under Section 12(b) of the Exchange Act, which trade on the Nasdaq Global Select Market.

3. Michael's Finer Meats, LLC was a private company headquartered in Columbus, Ohio, specializing in the sale of frozen meat and seafood. On or around August 13, 2012, Chefs acquired MFM. MFM is now a wholly-owned subsidiary of Chefs.

Background

4. From May 2008 to August 2012, Elliot was the chief financial officer ("CFO") of MFM. As the CFO, Elliot had primary responsibility for all accounting functions at MFM, including accounting for the company's inventory and cost of goods sold.

5. In August 2012, Chefs acquired MFM, and MFM became a wholly-owned subsidiary of Chefs. Elliot remained with MFM after the acquisition in the role of vice president of finance, and continued to have primary responsibility for MFM's accounting functions, including accounting for the company's inventory and cost of goods sold. As a wholly-owned subsidiary of Chefs, MFM's books, records, and accounts were incorporated and reported in Chefs' consolidated financial statements.

6. Both before and after the acquisition, MFM conducted manual counts of its inventory at the end of every quarter. MFM employees recorded the inventory of products on "count sheets," which were then provided to Elliot. Elliot input the information from those count sheets into a spreadsheet that he maintained and controlled. Both before and after the acquisition, Elliot used the information in this spreadsheet to calculate certain financial results for MFM, including inventory values, cost of goods sold, and profit margins.

[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.

7. At the end of each quarter, after inputting the inventory information from the count sheets into the spreadsheet, Elliot would compare current profit margins to historical margins. If a particular product's profit margin deviated significantly from historical margins, Elliot normally worked with warehouse employees who conducted the inventory counts to determine whether an error had been made. At times, errors were discovered, and Elliot adjusted the inventory information in the spreadsheet. Elliot failed to prepare any documentation supporting these adjustments.

8. At other times, Elliot did not investigate or otherwise was unable to identify inventory count errors that explained why profit margins were lower than historical margins. In these instances, Elliot improperly increased the inventory amounts recorded in the spreadsheet to lower cost of goods sold, and increase profit margins, to a range consistent with historical margins. Elliot knew that these unsupported accounting adjustments were improper.

9. These improper accounting entries resulted in Chefs reporting inaccurate financial statements in its quarterly report filed on Form 10-Q for the third quarter of 2012, its annual report filed on Form 10-K for 2012, its quarterly report filed on Form 10-Q for the first quarter of 2013, its quarterly report filed on Form 10-Q for the second quarter of 2013, and its quarterly report filed on Form 10-Q for the third quarter of 2013.

10. Chefs terminated Elliot in January 2014.

11. On January 27, 2014, Chefs filed a Form 8-K disclosing that unsupported accounting adjustments made by an employee of its MFM subsidiary had resulted in an aggregate overstatement of inventory, and understatement of cost of goods sold, of approximately $905,000. The company further reported that it did not believe the impact of the improper adjustments was material to the company's consolidated financial statements for any one reporting period, and that it corrected the misstatements by recording a non-cash charge in the fourth quarter of 2013.

Violations

12. As a result of the conduct described above, Elliot violated Section 13(b)(5) of the Exchange Act, which provides that no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account, and Rule 13b2-1, which provides that no person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account, and caused a violation of Section 13(b)(2)(A) of the Exchange Act, which requires that every issuer of securities registered pursuant to 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.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Elliot cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(5) of the Exchange Act, and Rule 13b2-1 thereunder.

B. Respondent shall, within seven days of the entry of this Order, pay a civil money penalty in the amount of $25,000 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) 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 W. Elliot 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 Scott W. Friestad, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5010.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
Undertaking

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9735 / March 3, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74421 / March 3, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16416

In the Matter of

GARY EUGENE PATTERSON, Esq.,

Respondent.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, 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 Gary Eugene Patterson ("Respondent" or "Patterson") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 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)(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, 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, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, 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 (the "Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

Summary

From at least September 2010 through at least March 2011, Patterson, a lawyer in the State of Texas, violated the offering registration provisions of the Federal securities laws by issuing deficient and baseless opinion letters, that caused a fraudulent stock lending scheme directed by Ahmad Fnaikher Alyasin ("Alyasin") and his wholly-owned entity, Optima Global Financial, Inc. ("Optima"). Under three lending agreements, Alyasin loaned a total of $3.5 million to the former Chief Executive Officer, former President, and a current director (the "Borrower") of China North East Petroleum Holdings Limited ("CNEP"). The loan was secured by a pledge of 2.5 million shares of restricted CNEP stock. Under the provisions of the lending agreements,[4] Alyasin and Optima agreed not to sell the Borrower's CNEP shares for the one-year term of the loan. At the end of that one-year term, the Borrower could either extend the loan by mutual agreement or repay the loan and interest and redeem the shares. Rather than retain the shares as collateral, however, Alyasin and Optima, sold the shares into the public markets in unregistered transactions in violation of Sections 5(a) and (c) of the Securities Act and in contravention of the lending agreements with the Borrower.

This fraudulent lending scheme was caused in part by Patterson issuing two legally deficient and baseless legal opinions stating that the restrictive legends on the CNEP stock certificates could be removed. He issued those opinions without regard for the relevant securities laws and regulations. Moreover, Patterson knew or should have known that CNEP's transfer agent would rely on those legal opinions to remove the restrictive legends from the Borrower's CNEP stock certificates and then immediately transfer them as ostensibly

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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.

4 The lending agreements signed by Alyasin, Optima, and the Borrower are also referred to as the Funding Agreement, the Lock-out Agreement, and the Amendment to the Funding Agreement.

unrestricted shares to Optima's brokerage account. Without Patterson's issuance of the baseless legal opinions, the transfer agent would not have removed the restrictive legends from the Borrower's CNEP shares, and Alyasin and Optima would not have been able to offer and sell them into U.S. markets. By engaging in this conduct, Patterson also was a necessary participant or a substantial factor in the unregistered sale of securities in violation of the Federal securities laws.

Respondent

1. Gary Eugene Patterson, age 56, resides in Houston, Texas and is engaged in the general practice of law. He is licensed to practice law in the state of Texas. Aside from the conduct described herein, Patterson has not previously appeared or practiced before the Commission.

Related Parties

2. Ahmad Fnaikher Alyasin, age 56, is a resident of Houston, Texas and is the Chairman and CEO of Optima Global Financial, Inc.

3. Optima Global Financial, Inc. is a Texas corporation headed by Ahmad Alyasin engaged in various business ventures.

Facts

4. On September 29, 2010, Alyasin, Optima, and the Borrower entered into a Funding Agreement whereby Alyasin and Optima obtained 2 million shares of restricted CNEP stock with a market value of at least $13 million as collateral for a $3.5 million loan. Alyasin and Optima falsely represented the CNEP stock would be held as collateral, would not be sold for one year, and the Borrower would maintain the right and ability to vote the shares during the year. At the time the Funding Agreement was executed, the Borrower was an affiliate or control person of CNEP, rendering any securities sold by the Borrower in a private transaction subject to a six-month holding period.

5. On September 29, 2010, Alyasin, Optima, and the Borrower entered into the Lock-out Agreement that stated:

> The Lock-out agreement shall be for a term of 1 (one) year with an option to renew upon any extension of the loan set forth herein as agreed by both parties. During the term of the Lock-Out agreement [sic] shall disallow Optima's right to sell the Collateral. Additionally, during the term of the loan or extension of the term thereof, Optima, and or its affiliates, shall not sell, sell short, or otherwise cause any additional volume in the underlying collateral shares except in the event of a default.

6. Patterson knew or should have known that Alyasin was planning to margin the CNEP stock to fund the loan to the Borrower and that Optima's securities broker-dealer would only accept unrestricted stock for margin. Thus, on September 30, 2010, Patterson issued a baseless legal opinion letter to CNEP's transfer agent that the restrictive legend could be removed because the Lock-out Agreement between Optima and the Borrower disallowed Optima's right to sell any of the CNEP shares. Contrary to Patterson's purported legal opinion, the securities remained restricted; private agreements cannot render restricted securities unrestricted or otherwise alter the operation of Federal securities laws governing the sale of restricted securities. Accordingly, the securities pledged as collateral continued to be restricted for six months from the date of their transfer to Optima and Alyasin because they acquired them in an unregistered, private transaction from the Borrower, an affiliate of the issuer.

7. In contravention of the Funding and Lock-out Agreements and the Federal securities laws, Alyasin and Optima began selling the pledged shares into the market within two months of the loan. Between November 23, 2010 and February 7, 2011, Alyasin and Optima sold 1,463,800 shares of CNEP (over 73% of the initial collateral).

8. By late 2010, Patterson knew or should have known that the CNEP collateral shares had been sold in the market in breach of the Funding and Lock-out Agreements. Nevertheless, on January 21, 2011, in anticipation of an additional 500,000 shares being pledged by the Borrower as collateral for the loan, Patterson issued a second baseless legal opinion letter to CNEP's transfer agent stating that the restrictive legend could be removed because the Lock-out Agreement between Alyasin, Optima and the Borrower disallowed Optima's right to sell any of the CNEP shares. As with the initial collateral shares, because these additional collateral shares were transferred from an affiliate in a private transaction, such shares remained restricted for six months and could not be sold into the market.

9. Patterson issued both legal opinion letters to be relied on by the transfer agent, and knew or should have known that the opinion letters were to be used for the purpose of removing the restrictive legends and then immediately transferring purportedly unrestricted shares to Optima's broker. When Patterson prepared the opinions, he was not familiar with the requirements of the Federal securities laws regarding restricted stock, or with Rule 144 promulgated under the Securities Act, which, when certain conditions are met, provides a safe harbor from being considered an underwriter such that a person selling restricted securities may rely on the exemption for resales into the public market contained in Section 4(a)(1) of the Securities Act. Moreover, Patterson did not conduct any legal research prior to issuing the two erroneous opinion letters.

10. On February 7, 2011, Alyasin, Optima, and the Borrower entered into an Amendment to the Funding Agreement that provided, in part, that the Borrower would deposit an additional 500,000 shares of CNEP as collateral that also would be subject to the terms of the Lock-out Agreement.

11. Notwithstanding the Lock-out Agreement and restricted nature of the shares, Alyasin and Optima also sold in unregistered transactions the remaining 1,036,200 restricted CNEP shares, which had been pledged. Thus, in total, Alyasin and Optima sold all 2,500,000

shares of CNEP securities by March 17, 2011, approximately six months before the September 29, 2011 expiration of the Lock-out Agreement and prior to the end of the 6-month holding period to which the shares were subject.

12. By engaging in the conduct described above, Patterson willfully violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the sale of securities using any means or instruments of transportation or communication in interstate commerce or of the mails unless a registration statement has been filed and is effective or the transaction is effected pursuant to a valid exemption from registration.

13. By engaging in the conduct described above, Patterson caused Alyasin's and Optima's violations of Section 17(a) of the Securities Act, which prohibits, in connection with the offer or sale of securities, by the use of any means or instrumentalities of interstate commerce or of the mails, directly or indirectly, acting with the requisite degree of knowledge or state of mind, employing any device, scheme, or artifice to defraud; obtaining money or property by means of untrue statements of material facts or omissions of material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

14. By engaging in the conduct described above, Patterson caused Alyasin's and Optima's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit, directly or indirectly, in connection with the purchase or sale of securities, by the use of the means or instrumentalities of interstate commerce or of the mails, or of any facility of any national securities exchange, knowingly or recklessly employing any device, scheme, or artifice to defraud; making untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Findings

15. Based on the foregoing, the Commission finds that Patterson willfully violated Sections 5(a) and (c) of the Securities Act.

16. Based on the foregoing, the Commission finds that Patterson caused violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Undertakings

17. Patterson hereby undertakes not to provide professional legal services to any person or entity in connection with the offer or sale of securities, including, without limitation, participating in the preparation of any opinion letter related to such offerings. In determining whether to accept the Offer, the Commission has considered these undertakings.

18. Respondent hereby undertakes that he shall cooperate fully with the Commission in any and all investigations, litigations, administrative or other proceedings commenced by the Commission or to which the Commission is a party relating to or arising from the matters described in this Order. In connection with such investigations, litigation, administrative or other proceedings, the Respondent agrees to the following: (i) to produce, without service of a notice or subpoena, any and all documents and other materials and information as requested by the Commission; (ii) to appear and testify without service of a notice or subpoena in such investigations, interviews, depositions, hearings and trials, at such times and places as reasonably requested by the Commission; and (iii) to respond promptly to all inquiries from the Commission. In determining whether to accept the Offer, the Commission has considered these undertakings.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Sections 4C and 21C of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice, it is hereby ORDERED, effective immediately, that:

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

B. Respondent shall comply with the undertakings enumerated in Section III, paragraph 17 above.

C. Respondent is denied the privilege of appearing or practicing before the Commission as an attorney for ten (10) years from the date of the Order.

D. After ten (10) years from the date of the Order, Respondent may request that the Commission consider his application to resume appearing and practicing before the Commission as an attorney. The application should be sent to the attention of the Office of the General Counsel.

E. In support of such an application, Respondent must provide a certificate of good standing from each state bar where Respondent is a member.

F. In support of such an application, Respondent must also submit an affidavit truthfully stating, under penalty of perjury:

1. that Respondent has complied with the Order, including the undertakings required by Paragraph B and the payments required by Paragraph I;

2. that Respondent:

a. is not currently suspended or disbarred as an attorney by a court of the United States (or any agency of the United States) or the bar or court of any state, territory, district, commonwealth, or possession; and

b. since the entry of the Order, has not been suspended as an attorney for an offense involving moral turpitude by a court of the United States (or any agency of the United States) or the bar or court of any state, territory, district, commonwealth, or possession, except for any suspension concerning the conduct that was the basis for the Order;

3. that Respondent, since the entry of the Order, 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; and

4. that Respondent, since the entry of the Order:

a. has not been found by the Commission or a court of the United States to have committed a violation of the Federal securities laws, except for any finding concerning the conduct that was the basis for the Order;

b. has not been charged by the Commission or the United States with a violation of the Federal securities laws, except for any charge concerning the conduct that was the basis for the Order;

c. has not been found by a court of the United States (or any agency of the United States) or any state, territory, district, commonwealth, or possession, or any bar thereof, to have committed an offense involving moral turpitude, except for any finding concerning the conduct that was the basis for the Order; and

d. has not been charged by the United States (or any agency of the United States) or any state, territory, district, commonwealth, or possession, or any bar thereof, with having committed an offense involving moral turpitude, except for any charge concerning the conduct that was the basis for the Order.

G. If Respondent provides the documentation required in Paragraphs E and F, and the Commission determines that he truthfully attested to each of the items required in his affidavit, he shall by Commission order be permitted to resume appearing and practicing before the Commission as an attorney.

H. If Respondent is not able to truthfully attest to the statements required in Subparagraphs F(2)(b) or F(4), Respondent shall provide an explanation as to the facts and circumstances pertaining to the matter and the Commission may hold a hearing to determine whether there is good cause to permit him to resume appearing and practicing before the Commission as an attorney.

I. Respondent shall, within 15 days of the entry of this Order, pay a civil money penalty in the amount of $30,000 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) 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 Gary Eugene Patterson 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 Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5720.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
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. 4037 / March 3, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16415

In the Matter of **KEENAN R. HAUKE,** **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 Keenan R. Hauke ("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 admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2 and III.3. below, and 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 1999 until the firm's liquidation in 2012, Respondent was the sole principal of Samex Capital Advisors, LLC ("Samex Advisors"), an Indiana-based investment adviser. Samex Advisors was registered with the Commission from July 2009 to December 2010, and with Indiana and Ohio at various times between 2004 and 2012. From 1999 to 2012, Respondent was also managing member of and, along with Samex Advisors, investment adviser to Samex Capital Partners LLC ("Samex Partners"), a private hedge fund. Respondent, 43 years old, was a resident of Fishers, Indiana; however, Respondent is currently incarcerated at McCreary Federal Prison in Pine Knot, Kentucky.

2. On December 11, 2011, Respondent pleaded guilty to one count of securities fraud in violation of Title 18 United States Code Section 1348(2) before the United States District Court for the Southern District of Indiana, in United States v. Hauke, Crim. Case No. 1:11-CR-235-TWP-KPF (S.D. Ind.). On April 23, 2012, the Court entered a judgment against Hauke, sentenced him to 121 months in prison followed by five years of supervised release, and ordered him to repay $7,132,820.12 to his 67 victims.

3. The count of the criminal information to which Respondent pleaded guilty alleged, among other things, that Respondent devised and knowingly executed a scheme to obtain money and funds from Samex Partners investors by means of false or fraudulent pretenses, representations, or promises in connection with the purchase or sale of securities. In particular, from at least 2004 to 2011, Respondent perpetrated a scheme to defraud the Samex Partners investors by, among other things, soliciting millions of dollars of investment funds under false pretenses, failing to invest the money as promised, falsely reporting to investors that his purchases and sales of securities resulted in high rates of returns to the fund, and misappropriating and converting investor funds to his own benefit without knowledge and authorization of investors.

IV.

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

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

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to Municipal
Advisor and NRSRO
Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74413 / March 3, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4036 / March 3, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16414

In the Matter of **Thomas Kevin Keough,** **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 Thomas Kevin Keough ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Keough, 53 years old, is a former registered representative and a resident of North Reading, Massachusetts.

2. On February 20, 2015, a final judgment was entered by consent against Keough, 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. Inofin, Inc., et al., Civil Action Number 11-CV-10633, in the United States District Court for the District of Massachusetts.

3. Between its founding in 1994 and its involuntary bankruptcy in February 2011, Inofin, Inc. raised approximately $110 million from investors by selling securities to investors. Neither Inofin, nor its securities offerings were ever registered with the Commission.

4. Beginning in approximately 2002 and continuing through 2009, Keough, who was then a registered representative with a registered broker-dealer, and for part of that period with a dually-registered broker-dealer and investment adviser, supported Inofin's securities sales activities as a commission-based sales agent. During this period, Keough offered and sold Inofin securities to his brokerage customers and other members of the investing public. Keough would mention Inofin securities as an investment option for those who were looking for a fixed income investment or set return. Keough told some of his customers that he was invested in Inofin and that he was receiving a 13% return and that they might receive as much as an 11% return. If solicited investors were interested, Keough either provided them with Inofin's offering documents, which he kept in his office, or provided them with the contact information for Inofin's President, Michael Cuomo, and suggested that they tell Cuomo that they were referred by Keough when they called. Inofin then paid Keough a referral fee on each investor that originated with Keough.

5. During the entire period that Keough offered and sold Inofin's unregistered securities to prospective investors, he did so away from the supervision of his broker-dealer employer. Keough never sought or received approval from his broker-dealer employer to offer or sell Inofin's unregistered securities. To prevent his broker-dealer employer from discovering this activity, Keough arranged to have Inofin pay his commissions to his wife. Pursuant to this arrangement, from 2002 through 2009, Inofin paid Keough's wife over $368,000 in investor-based commissions.

IV.

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

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Keough be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock with the right to apply for reentry after 3 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.

Brent J. Fields
Secretary

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

Commissioner Gallagher
Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74427 / March 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16418

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against China Infrastructure Investment Corp. ("CIIC" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondent

1. **China Infrastructure Investment Corporation** (CIK No. 0001311369) was incorporated in the state of Nevada on January 11, 2011, originally under the name Learning Quest Technologies, Inc. CIIC is headquartered in Zhengzhou, Henan Province, The People's Republic of China, and operates exclusively in China. On February 8, 2008, through a share exchange agreement, CIIC acquired 100% of the stock of Color Man Holdings Limited, a holding company for Wise On China Limited, which is a holding company for Pingdingshan Pinglin Expressway Co., Ltd. ("Ping"). Through Ping, CIIC operates a portion of the Pinglin Expressway toll road, located in Henan Provence. CIIC's primary source of revenue is the tolls paid by vehicles using the Pinglin Expressway. CIIC's stock is registered pursuant to Section 12(g) of the Exchange Act, and the company has filed annual reports on Form 10-K and quarterly reports on Form 10-Q, pursuant to Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder. CIIC's stock traded on NASDAQ from 2008 until it was delisted in 2012. CIIC's stock is currently traded in the over-the-counter market.

B. Reporting Violations

1. CIIC filed a Form 10-K on October 13, 2011, and a Form 10-K/A on November 14, 2011, for the year ending June 30, 2011. CIIC filed a Form 10-Q on November 14, 2011, for the quarter ending September 30, 2011. CIIC has failed to file any annual or quarterly reports since November 14, 2011.

2. On December 16, 2011, CIIC filed a Form 8-K stating that CIIC former Chief Financial Officer Lei Li had resigned on September 21, 2011, and that "the Company's Form 10-K for the fiscal year ended June 30, 2011 filed October 13, 2011, its Quarterly Report on 10-Q for the quarter ended September 30, 2011, filed on November 14, 2011 and its Annual Report on Form 10-K/A for the fiscal year ended June 30, 2011, filed on November 14, 2011, all of which included Mr. Li's signatures had in fact not been prepared or reviewed by Mr. Li, and Mr. Li had not personally signed such reports or consented to the use of his signature on such reports."

3. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Rules 13a-1 and 13a-13 require issuers to file annual and quarterly reports. Rule 12b-20 requires that the information contained in the reports not be misleading.

4. As a result of the foregoing, Respondent failed to comply with Section 13(a) and Rules 12b-20, 13a-1 and 13a-13 thereunder.

III.

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

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

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

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, 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 201.310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 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.

Brent J. Fields
Secretary

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

Commissioner Aguilar Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74425 / March 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16176

In the Matter of CHINA VALVES TECHNOLOGY, INC., Respondent.	ORDER 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 (the "Commission") deems it necessary and appropriate for the protection of investors to accept the Offer of Settlement submitted by China Valves Technology, Inc. ("CVVT" or "Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on September 29, 2014, pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

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

III.

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

1. CVVT (CIK No. 0001080360), a Nevada corporation with operations solely in the People's Republic of China ("China"), purports to develop, manufacture, supply, and provide services related to water flow management products in China. CVVT's common stock was registered with the Commission pursuant to Sections 12(b) and 12(g) of the Exchange Act, and listed on the NASDAQ Global Market ("NASDAQ"). On September 21, 2012, CVVT filed a

Form 25 voluntarily withdrawing its securities from listing and registration on NASDAQ, effective October 1, 2012. At that time, CVVT's obligations to file reports pursuant to Exchange Act Section 12(b) were suspended, but its obligations to file reports pursuant to Exchange Act Section 12(g) continued. As of September 26, 2014, CVVT's securities were quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. at 60 cents per share.

2. CVVT has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since the fiscal year ending September 30, 2011 or periodic or quarterly reports on Form 10Q for any fiscal period subsequent to its fiscal quarter ending March 31, 2012.

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 of instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

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

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

For the Commission, by its Secretary, pursuant to delegated authority.

Brent J. Fields
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. 74429 / March 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16419

In the Matter of **H.D. Vest Investment Securities, Inc.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that 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 H.D. Vest Investment Securities, Inc. d/b/a H.D. Vest Investment Services ("H.D. Vest" or "Respondent").

II.

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

III.

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

Summary

H.D. Vest failed to reasonably supervise Lewis J. Hunter ("Hunter") with a view to preventing and detecting Hunter's violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. As part of a fraudulent scheme, Hunter misappropriated approximately $300,000 from H.D. Vest brokerage customers by soliciting customers to invest in both foreign and domestic bank investments and promising guaranteed returns. In reality, Hunter used the funds to pay for personal and business expenses and concealed his actions by making false and misleading representations to his customers, including fabricating bank documents that purported to memorialize investments.

Had H.D. Vest established reasonable supervisory policies and procedures prior to the start of Hunter's fraudulent scheme, H.D. Vest likely would have discovered Hunter's misappropriation of customer funds. Specifically, as part of his fraudulent scheme, Hunter conducted unauthorized and deceptive wire transfers from customer brokerage accounts to bank accounts and other brokerage accounts in the name of his outside business activities ("OBAs") without H.D. Vest's detection. If H.D. Vest had reasonable policies and procedures concerning the review of third-party disbursements to its registered representatives from customer brokerage accounts or to entities controlled by its registered representatives, H.D. Vest likely could have prevented and detected Hunter's misappropriation of customer funds.

Moreover, in addition to Hunter, certain other registered representatives deposited or transferred customer funds into OBA bank accounts and misused the funds for their personal benefit. Because these actions created customer liabilities for H.D. Vest, and H.D. Vest did not perform the required reserve formula calculations or maintain cash and/or qualified securities in a reserve bank account for amounts owed to customers when the firm determined that it owed money to customers due to its representatives' actions, H.D. Vest violated certain provisions of the Commission's customer protection requirements.

Additionally, H.D. Vest's e-mail policy allowed registered representatives to communicate with customers on investment-related matters using non-H.D. Vest e-mail accounts, so long as registered representatives copied or forwarded those customer communications to H.D. Vest. H.D. Vest has learned, however, that some registered representatives failed to forward investment-related customer e-mails to the firm. Because H.D. Vest did not obtain and preserve those customer communications, H.D. Vest failed to maintain all required business-related e-mails in violation of certain books and records provisions.

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

Respondent

1. H.D. Vest is a Texas corporation headquartered in Irving, Texas. H.D. Vest has been registered as a broker-dealer with the Commission since 1983. H.D. Vest has a network of over 4,500 independent contractor registered representatives located in branch offices throughout the United States. The overwhelming majority of H.D. Vest's independent contractor registered representatives are tax professionals that operate tax businesses through OBAs. For many H.D. Vest registered representatives, OBAs are their primary source of income and they are associated with H.D. Vest in an effort to provide additional financial and investment services to their tax clients.

Other Relevant Person

2. Lewis J. Hunter was a H.D. Vest registered representative from November 15, 2006 through October 19, 2011. On May 30, 2013, pursuant to a settlement with Hunter, the Commission found that Hunter willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. As a result, Hunter was: (i) ordered to cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; (ii) barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization, or participating in an offering of a penny stock; (iii) 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 (iv) ordered to pay disgorgement of $295,875, along with prejudgment interest, and a civil penalty in the amount of $150,000. In the Matter of Lewis J. Hunter, Exchange Act Rel. No. 69668 (May 30, 2013) (settled Order).

Misappropriation of Customer Funds by Lewis Hunter

3. In or around September 2010 and February 2011, Hunter recommended an investment in a Canadian bank to two long-time, elderly customers (collectively, "Victim 1"). Hunter told Victim 1 that the investment had to be funded and held outside of their H.D. Vest brokerage account because the investment was not offered on H.D. Vest's trading platform. Unbeknownst to Victim 1, Hunter caused H.D. Vest to wire a total of $250,000 from their brokerage account into a bank account held in the name of one of his OBAs.

4. After being confronted by Victim 1, Hunter informed Victim 1 that the funds were used to purchase guaranteed investments in a Canadian bank and provided Victim 1 with bank documents as proof of the investment. Pursuant to the investment, Victim 1 was guaranteed monthly interest payments of 15% for two years. Hunter, however, fabricated the bank documents and used Victim 1's funds to pay for various personal and business expenses. In addition, Hunter

used the funds to make interest payments to Victim 1 pursuant to the investment and repay a loan that Victim 1 had made to Hunter.

5. Similarly, in August 2010, Hunter recommended that another long-time, elderly customer ("Victim 2") make a guaranteed investment in "US Bank." Based on Hunter's representations, Victim 2 signed a wire transfer form that authorized the transfer of $54,000 to "US Bank," although the actual recipient was a brokerage account in the name of another Hunter OBA. The funds were subsequently transferred into a bank account of Hunter's OBA, and Hunter then used the funds to pay for personal and business expenses, including personal loan repayments to Victim 1.

H.D. Vest's Failure to Supervise Lewis Hunter

6. All broker-dealers have a duty to reasonably supervise their employees by means of effective and established procedures. See In the Matter of Shearson, Hammill & Co. Inc., Exchange Act Rel. 7743 (Nov. 12, 1965) (Commission Opinion). The independent contractor model employed by certain broker-dealers, including H.D. Vest, entails greater supervisory challenges than typically presented at traditional wire house brokerage firms. Therefore, to discharge their supervisory duties, firms employing that model must establish policies and procedures reasonably designed to address those challenges. See, e.g., In the Matter of Quest Capital Strategies, Inc. and David Chen Yu, Exchange Act Rel. No. 44935 (Oct. 15, 2001) (Commission Opinion); In the Matter of 1st Discount Brokerage, Inc. and Michael R. Fisher, Exchange Act Rel. No. 66212A (Jan. 23, 2012) (settled Order); In the Matter of Royal Alliance Assocs., Inc., Exchange Act Rel. No. 38174 (Jan. 15, 1997) (settled Order).

7. As part of his fraudulent scheme, Hunter conducted unauthorized and deceptive wire transfers from customer brokerage accounts to bank accounts and other brokerage accounts in the name of his OBAs. At the time of Hunter's actions, H.D. Vest did not identify the unauthorized and deceptive wire transfers to Hunter's OBAs and did not discover Hunter's misappropriation of customer funds. H.D. Vest only learned of Hunter's actions after complaints from the victims.

8. H.D. Vest's policies and procedures were not reasonably designed to prevent or detect the type of fraudulent behavior conducted by Hunter. Specifically, despite the fact that H.D. Vest knew that the overwhelming majority of its registered representatives operate their securities business through their OBAs, H.D. Vest had no policies and procedures in place to review third-party disbursements from customer brokerage accounts to determine whether funds were being transmitted to registered representative OBAs or other entities controlled by its registered representatives.

9. At H.D. Vest, independent contractors like Hunter typically operate their securities and other businesses through an OBA and pay expenses for the businesses by an account under the OBA's name. H.D. Vest did not establish procedures governing reviews of OBA accounts from which representatives paid their securities business expenses.

10. If H.D. Vest had such policies and procedures in place at the time of Hunter's conduct, it is likely that H.D. Vest would have detected Hunter's unauthorized and deceptive wire transfers to his OBAs and his subsequent misappropriation of customer funds would have been prevented.

11. Based on the conduct described above, H.D. Vest failed reasonably to supervise Hunter within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to preventing and detecting his violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

H.D. Vest's Failure to Comply with Customer Protection Requirements

12. From at least December 2007, certain H.D. Vest registered representatives, including Hunter, transferred customer funds from H.D. Vest brokerage accounts to OBA bank accounts or directed customers to write investment-related checks to their OBAs rather than H.D. Vest, and subsequently misappropriated the funds.

13. Section 15(c)(3) of the Exchange Act authorizes the Commission to prescribe rules and regulations with respect to the financial responsibility and related practices of broker-dealers including, but not limited to, the acceptance of custody and use of customers' deposits or credit balances. Such rules and regulations must provide for, among other things, the maintenance of reserves with respect to customers' deposits or credit balances. Rule 15c3-3 under the Exchange Act was adopted pursuant to Section 15(c)(3) and requires, among other things, that broker-dealers subject to the rule perform a calculation to determine the amount of funds that must be maintained in a special reserve account for the exclusive benefit of customers. Rule 15c3-3 is intended to protect customer funds and securities in the possession of broker-dealers.

14. Although H.D. Vest claimed an exemption from Rule 15c3-3, the firm was not permitted to rely on the exemption when its registered representatives deposited or transferred customer funds into OBA bank accounts and misused the funds for their personal benefit. See, e.g., In the Matter of Clinger & Co., Inc. and Norman E. Clinger, Exchange Act Rel. No. 31620 (Dec. 17, 1992) (Commission Opinion) (Commission affirming NASD finding that broker-dealer "could not rely on the customer protection rule exemption on those occasions when it handled its customers funds in a manner inconsistent with the exemption's terms"). These actions created customer liabilities for H.D. Vest, which subjected the firm to the substantive provisions of Rule 15c3-3, including the reserve formula calculation and reserve bank account deposit requirements under Section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder. Further, when the firm determined that it owed money to customers due to its representatives' actions, it should have made a reserve formula calculation and any requisite reserve bank account deposit under Rule 15c3-3. See, e.g., In the Matter of Elvyn Q. Evans and Evans Trading Co., Inc., Exchange Act Rel. No. 25070 (Oct. 29, 1987) (settled Order); In the Matter of Henry A. Pawlik, Exchange Act Rel. No. 24568 (Jun. 10, 1987) (settled Order). Because H.D. Vest did not perform required reserve formula calculations or maintain cash and/or qualified securities in a reserve bank account for

amounts owed to customers, H.D. Vest failed to comply with Section 15(c)(3) under the Exchange Act and Rule 15c3-3 thereunder.

H.D. Vest's Failure to Preserve E-mails

15. Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder require registered broker-dealers to preserve "originals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker, or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public." Electronic communications, including e-mail, relating to a broker-dealer's business as such must be preserved under Rule 17a-4(b)(4). H.D. Vest was aware of this requirement and allowed its registered representatives to communicate with customers using non-H.D. Vest e-mail accounts, so long as investment-related communications were copied or forwarded to H.D. Vest. H.D. Vest believed that its e-mail policy complied with regulatory requirements because the copied or forwarded communications could be captured and reviewed by the firm.

16. H.D. Vest learned, however, that H.D. Vest registered representatives communicated with customers through their personal and OBA e-mail accounts and did not copy or forward those communications to H.D. Vest. Because H.D. Vest did not obtain and preserve those customer communications, H.D. Vest failed to maintain all required business-related e-mails under Rule 17a-4(b)(4).

Violations

17. As a result of the conduct described above, H.D. Vest failed reasonably to supervise Hunter within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to detecting his violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. H.D. Vest also willfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder by failing to maintain reserves for amounts owed to customers and Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder by failing to preserve e-mails.

Remedial Efforts

18. In determining to accept the Offer, the Commission considered remedial acts voluntarily undertaken by Respondent to improve its supervisory system for customer checks, wire transfers, and automated clearing house disbursements issued to registered representatives and/or OBAs.

Undertakings

Respondent H.D. Vest undertakes:

a. to retain, within 60 days of the date of the Order, at its own expense, the services of an Independent Consultant not unacceptable to the Division of Enforcement of the Commission ("Division of Enforcement"), to review H.D. Vest's written supervisory policies and procedures concerning (i) the maintenance and review of electronic communication with customers; and (ii) the handling of H.D. Vest customer funds by registered representatives.

b. to require the Independent Consultant, at the conclusion of the review, which shall be no more than 150 days after the entry of the Order, to submit a Report of the Independent Consultant to H.D. Vest and the Division of Enforcement. The report shall address the supervisory issues described above and shall include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies, procedures and practices of H.D. Vest and a procedure for implementing the recommended changes or improvements to such policies, procedures and practices.

c. to adopt, implement, and maintain all policies, procedures, and practices recommended in the Report of the Independent Consultant; provided, however, that within 180 days from the date of the entry of the Order, H.D. Vest will in writing advise the Independent Consultant and the Division of Enforcement of any recommendations that it considers to be unnecessary or inappropriate. With respect to any such recommendation, H.D. Vest need not adopt that recommendation at that time but will propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any of the Independent Consultant's recommendations about which H.D. Vest and the Independent Consultant do not agree, such parties shall attempt in good faith to reach agreement within 210 days of the date of the entry of the Order. In the event that H.D. Vest and the Independent Consultant are unable to agree on an alternative proposal, H.D. Vest will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

d. to cooperate fully with the Independent Consultant in its review, including making such information and documents available as the Independent Consultant may reasonably request, and by permitting and requiring H.D. Vest's employees and agents to supply such information and documents as the Independent Consultant may reasonably request.

e. that, in order to ensure the independence of the Independent Consultant, H.D. Vest (i) shall not have the authority to terminate the Independent Consultant without prior written approval of the Division of Enforcement; and (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates.

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

g. to certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), 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 David L. Peavler, Associate Regional Director, 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.

h. For good cause shown and upon timely application by the Independent Consultant or H.D. Vest, the Commission's staff may extend any of the deadlines set forth above.

IV.

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

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

A. Respondent H.D. Vest cease and desist from committing or causing any violations and any future violations of Sections 15(c)(3) and 17(a) of the Exchange Act and Rules 15c3-3 and 17a-4(b)(4) promulgated thereunder.

B. Respondent H.D. Vest is censured.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $225,000 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) 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 H.D. Vest 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 David L. Peavler, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Fort Worth Regional Office, 801 Cherry Street, Suite 1900, Fort Worth, TX 76102.

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

By the Commission.

Brent J. Fields
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. 74424 / March 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16417

In the Matter of Discovery Oil, Ltd., I/O Magic Corporation, Maydao Corporation, NX Global, Inc, and SensiVida Medical 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 the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Discovery Oil, Ltd. ("DSCY") (CIK No. 29071) is a void Delaware corporation located in Malibu, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DSCY 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 $38,921 for the prior nine months. As of March 3, 2015, the common stock of DSCY was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

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

2. I/O Magic Corporation ("IOMG") (CIK No. 1083663) is a Nevada corporation located in Irvine, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IOMG 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 $1,120,238 for the prior nine months. As of March 3, 2015, the common stock of IOMG was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Maydao Corporation ("MYDO") (CIK No. 1084662) is an expired Utah corporation located in Salt Lake City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MYDO 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 $5,551 for the prior nine months. As of March 3, 2015, the common stock of MYDO was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. NX Global, Inc ("NEGS") (CIK No. 1165336) is a revoked Nevada corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NEGS 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 October 31, 2011, which reported a net loss of $1,504,541 for the prior year. As of March 3, 2015, the common stock of NEGS 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. SensiVida Medical Technologies, Inc. ("SVMT") (CIK No. 64647) is a revoked New Jersey corporation located in West Henrietta, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SVMT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2011, which reported a net loss of $374,592 for the prior three months. As of March 3, 2015, the common stock of SVMT was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section

12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires 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.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating
Commissioner Gallagher
Commissioner Piwowar
Dissented to the
Municipal Advisor
and NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74442 / March 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16263

In the Matter of **Joshua Wayne Lankford** **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 accept the Offer of Settlement submitted by Joshua Wayne Lankford ("Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on November 7, 2014, pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. Respondent, 41 years old, currently resides in Fort Worth, Texas. Through September 15, 2005, Respondent was a registered representative associated with Barron Moore, a broker-dealer that was registered with the Commission until its registration was terminated on November 25, 2008.

2. On July 27, 2011, a final judgment by default was entered against Respondent, permanently enjoining him from future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and barring him from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock in the civil action entitled *Securities and Exchange Commission v. George David Gordon et al.*, Case No. 09 CV-061 CVE, in the United States District Court for the Northern District of Oklahoma.

3. The Commission's complaint alleged that from spring 2005 through December 2006, the Respondent and others engaged in the following conduct in connection with the purchase or sale of securities: selling shares of targeted stocks whose prices they had artificially inflated by engaging in coordinated trading and distributing deceptive promotional materials to the public, which generated illegal profits totaling in excess of $20 million.

4. On May 16, 2013, Respondent was convicted by guilty plea of one count of Money Laundering in violation of 18 U.S.C. § 1957 in the United States District Court for the Northern District of Oklahoma in the case of *United States of America v. Joshua Wayne Lankford*, Case Number 09-CR-013-JHP. On May 21, 2013, Respondent was sentenced to a term of imprisonment of eighty-four months.

5. The count of the indictment to which Respondent pleaded guilty alleged, *inter alia,* that from in or about April 2004 until in or about December 2006, Respondent and others participated in a pump-and-dump scheme that involved the artificial manipulation and purchase and sale of three corporations whose securities traded on the over-the-counter market.

IV.

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

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

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

By the Commission.

Brent J. Fields
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. 74445 / March 5, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16420

In the Matter of **Aspire International, Inc.,** **Border Management, Inc.,** **EYI Industries, Inc., and** **Landmark Energy 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 Aspire International, Inc., Border Management, Inc., EYI Industries, Inc., and Landmark Energy Enterprises, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Aspire International, Inc. (CIK No. 1049861) is a forfeited Maryland corporation located in Markham, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Aspire International 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 $2,513,582 for the prior twelve months. As of February 19, 2015, the company's stock (symbol "APIT") was quoted on OTC Link, (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had ten market makers, and was eligible for the piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Border Management, Inc. (CIK No. 1377940) is a revoked Nevada corporation located in Potomac, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Border 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 September 30, 2011, which reported a net loss of $30,141 for the previous nine months. As of February 19, 2015, the company's stock (symbol "BRDN") was quoted on OTC Link, had two market makers, and was eligible for the piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. EYI Industries, Inc. (CIK No. 1104120) is a permanently revoked Nevada corporation located in Burnaby, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EYI Industries 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 $6,096,384 for the prior nine months. As of February 19, 2015, the company's stock (symbol "EYII") 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. Landmark Energy Enterprises, Inc. (CIK No. 1415936) is a revoked Nevada corporation located in Towson, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Landmark Energy Enterprises is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2012, which reported a net loss of $206,859 for the prior six months. As of February 19, the company's stock (symbol "LNDG") was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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.

Brent J. Fields
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. 74447 / March 5, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16421

In the Matter of **Black Sea Metals, Inc.,** **GigaBeam Corp.,** **Safe Technologies International, Inc., and** **Whitemark Homes, 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 Black Sea Metals, Inc., GigaBeam Corp., Safe Technologies International, Inc., and Whitemark Homes, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Black Sea Metals, Inc. (CIK No. 1174907) is a revoked Nevada corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Black Sea Metals is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2012, which reported a net loss of $489,931 for the prior six months. As of February 19, 2015, the company's stock (symbol "BLAK") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. GigaBeam Corp. (CIK No. 1279831) is a void Delaware corporation located in Durham, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GigaBeam 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 $9,546,809 for the prior nine months. As of February 19, 2015, the company's stock (symbol "GGBMQ") 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. Safe Technologies International, Inc. (CIK No. 829117) is a forfeited Delaware corporation located in Coral Springs, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Safe Technologies International 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 $614,199 for the prior twelve months. As of February 19, 2015, the company's stock (symbol "SFAZ") was quoted on OTC Link, had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Whitemark Homes, Inc. (CIK No. 42284) is a Colorado corporation located in Sarasota, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Whitemark Homes 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, 2012, which reported a net loss of $133,460 for the prior nine months. As of February 19, 2015, the company's stock (symbol "WTMK") 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

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.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74457 / March 6, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4040 / March 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16422

In the Matter of **REDONDA LAWRENCE RUSSELL,** **Respondent.**	**ORDER INSTITUTING ADMNISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b)(6) 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)(6) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Redonda Lawrence Russell ("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 admits the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Sections III.2 and III.3, below, and consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b)(6) of the Exchange Act and Section 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. Russell, 67 years old, resides in Fort Worth, Texas. From October 1991 through April 2013, Russell was employed by an entity dually registered with the Commission as a broker-dealer and investment adviser. In June 1993, she was registered as a registered representative and in April 2003 she was registered as an investment adviser representative. She remained registered in both capacities until her departure in April 2013.

2. On August 25, 2014, Redonda Russell pleaded guilty to one count of wire fraud in violation of 18 United States Code, Section 1343 before the United States District Court of the Northern District of Texas, in U.S. v. Redonda Russell, 4:14-cr-178-0 (N.D. Tex.). On December 22, 2014, a judgment was entered against Russell and she was sentenced to imprisonment of twelve months and one day. Further, she was ordered to pay restitution of $316,000.

3. The criminal information to which Russell pleaded guilty alleged that from April 2012 through April 2013, Russell obtained and used personal identifying information for at least 18 First Command Financial Planning clients, eight of whom were deceased. She used that information to gain control of the accounts, liquidate them, and transmit the proceeds, in excess of $316,000, to an account controlled by Russell.

IV.

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

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

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

By the Commission.

Brent J. Fields
Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74458 / March 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16425

In the Matter of **booktech.com, inc.,** **Cathel Partners, Ltd.,** **Direct Markets Holdings Corp.,** **Laidlaw Energy Group, Inc., and** **Willcox & Gibbs, 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 booktech.com, inc., Cathel Partners, Ltd., Direct Markets Holdings Corp., Laidlaw Energy Group, Inc., and Willcox & Gibbs, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. booktech.com, inc. (CIK No. 1090309) is a permanently revoked Nevada corporation located in Woburn, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). booktech.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of $5,932,056 for the previous three months.

2. Cathel Partners, Ltd. (CIK No. 773430) is a void Delaware corporation located in Harrington Park, New Jersey with a class of securities registered with the

Commission pursuant to Exchange Act Section 12(g). Cathel Partners 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, 2000, which reported a net loss of $1,313,424 from the company's June 7, 1985 inception through June 30, 2000.

3. Direct Markets Holdings Corp. (CIK No. 1054303) 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). Direct Markets Holdings 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, 2012, which reported a net loss of $8,990,000 for the prior three months. As of March 3, 2015, the company's stock (symbol "MKTSQ") was traded on the over-the-counter markets. On January 11, 2013, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case was still pending as of December 2, 2014.

4. Laidlaw Energy Group, Inc. (CIK No. 1538492) is a New York corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Laidlaw Energy Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012, which reported a net loss of $801,372 for the prior six months. As of March 3, 2015, the company's stock (symbol "LLEG") was traded on the over-the-counter markets.

5. Willcox & Gibbs, Inc. (CIK No. 1037070) is a void Delaware corporation located in Summit, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Willcox & Gibbs is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2001. On April 20, 1999, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was closed on February 26, 2003. On August 6, 2001, the company filed a Chapter 11 petition, which was converted to a Chapter 7 petition, in the U.S. Bankruptcy Court for the District of Delaware, and the case was closed on August 28, 2009.

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 ssuers 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 voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual ports, 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.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74459 / March 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16426

In the Matter of **Accelerated Acquisitions XIV, Inc.,** **Alternate Energy Holdings, Inc.,** **BW Acquisition, Inc.** **(n/k/a Malibu Enterprises, Inc.),** **MediStaff Corp.,** **Vista Technologies, Inc.,** **VitroTech Corp., and** **Xertech, 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 Accelerated Acquisitions XIV, Inc., Alternate Energy Holdings, Inc., BW Acquisition, Inc. (n/k/a Malibu Enterprises, Inc.), MediStaff Corp., Vista Technologies, Inc., VitroTech Corp., and Xertech, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Accelerated Acquisitions XIV, Inc. (CIK No. 1497920) is a void Delaware corporation located in Foster City, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Accelerated Acquisitions XIV is delinquent in its periodic filings with the Commission, having not filed any periodic

reports since it filed an amended Form 10-Q for the period ended December 31, 2011, which reported a net loss of $3,585 for the prior nine months.

2. Alternate Energy Holdings, Inc. (CIK No. 1421874) is a defaulted Nevada corporation located in Eagle, Idaho with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Alternate Energy Holdings 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, 2012, which reported a net loss of $27,151,034 from the company's August 29, 2005 inception through September 30, 2012. As of March 3, 2015, the company's stock (symbol "AEHI") was traded on the over-the-counter markets.

3. BW Acquisition, Inc. (n/k/a Malibu Enterprises, Inc.) (CIK No. 1128620) is a permanently revoked Nevada corporation located in Reno, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BW Acquisition is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2005. On July 31, 2012, Malibu Enterprises Inc. filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Nevada, and the case was discharged on November 5, 2012.

4. MediStaff Corp. (CIK No. 1434485) 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). MediStaff 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 $63,198 from the company's March 13, 2008 inception through September 30, 2011.

5. Vista Technologies, Inc. (CIK No. 895725) is a permanently revoked Nevada corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Vista 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 June 30, 1997, which reported a net loss of $218,613 for the prior three months.

6. VitroTech Corp. (CIK No. 1164155) is a permanently revoked Nevada corporation located in Santa Ana, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VitroTech is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of $11,805,008 for the prior nine months. As of March 3, 2015, the company's stock (symbol "VROT") was traded on the over-the-counter markets.

7. Xertech, Inc. (CIK No. 1427434) is a revoked Nevada corporation located in Westlake Village, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Xertech 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 $4,000 from the company's January 14, 2008 inception through March 31, 2009.

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.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4044 / March 10, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31503 / March 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of **EDGAR R. PAGE and PAGEONE FINANCIAL INC.,** **Respondents.**	**ORDER MAKING FINDINGS, IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER 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 ORDERING CONTINUATION OF PROCEEDINGS**

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 and a Cease-and-Desist Order Pursuant to 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") and Ordering Continuation of Proceedings against Edgar R. Page ("E. Page") and PageOne Financial, Inc. ("PageOne" and, together with E. Page, "Respondents").[1]

II.

Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and

[1] On August 26, 2014, the Commission instituted 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 against Respondents.

Imposing Remedial Sanctions and a Cease-and-Desist Order 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 Ordering Continuation of Proceedings ("Order"), as set forth below.

III.

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

A. <u>SUMMARY</u>

1. PageOne, a registered investment adviser, and E. Page, its sole owner and principal, hid serious conflicts of interest from their advisory clients in connection with recommending investments in three private investment funds (the "Private Funds").

2. Specifically, from early 2009 through approximately September 2011, Respondents knowingly or recklessly failed to tell their clients that:

a. One of the Private Funds' managers (the "Fund Manager") was in the process of acquiring at least 49% of PageOne for approximately $2.7 million;

b. As part of that acquisition, E. Page had agreed to raise millions of dollars for the Private Funds from his advisory clients; and

c. The Fund Manager was paying for the acquisition by making a series of installment payments over time, the timing and amounts of which were, at least partially, tied to Respondents' ability to direct client money into the Private Funds.

3. Indeed, the disclosures that Respondents did make in PageOne's Forms ADV materially misrepresented both the nature and amounts of the Fund Manager's payments to E. Page. For example—from approximately July 2009 to September 2010—PageOne's ADV stated that it received on an "annual basis, a referral fee" from the Fund Manager of "between 7.0% and 0.75% of the amount invested by" Respondents' clients in the Private Funds. However, as both Respondents knew or recklessly disregarded, (a) the Fund Manager's payments were not referral fees, but rather installments on the acquisition of PageOne; and (b) during that same period, those payments exceeded 15% of the PageOne clients' investment in the Private Funds. As set out below, Respondents' other disclosures concerning their interests in the Private Funds and the Fund Manager were similarly misleading.

4. As a result of Respondents' fraud, their clients were unaware of the nature and extent of Respondents' conflicts of interest in recommending the Private Funds. Not least of those conflicts was the fact that the Fund Manager's ability to finalize the acquisition—and, thus, complete its payments to E. Page—was, at least partially dependent

on the Respondents' continuing to raise money from PageOne clients for investment into the Private Funds.

5. From March 2009 through September 2011, Respondents' clients invested approximately between $13 and $15 million in the Private Funds at Respondents' recommendation. During roughly the same period, the Fund Manager paid Respondents (directly or indirectly) over $2.7 million in acquisition payments.

B. RESPONDENTS

6. **E. Page**, age 62, lives in Gansevoort, New York. E. Page owns more than 95% of PageOne and is the company's Chairman, Chief Executive Officer, Chief Operating Officer, Chief Compliance Officer, Lead Portfolio Manager, and Chairman of its Investment Committee. From 1981 to 2009, E. Page was a registered representative of a number of registered broker dealers. In addition, as PageOne's Chief Compliance Officer, E. Page was responsible for authorizing any changes to PageOne's client disclosures, including its Forms ADV. Indeed, PageOne directed all questions concerning its Forms ADV to E. Page.

7. **PageOne** is a New York corporation headquartered in Malta, New York. PageOne has been registered with the Commission as an investment adviser since December 31, 1986. PageOne reported assets under management of about $215 million on its Form ADV of March 31, 2014.

C. OTHER RELEVANT INDIVIDUALS AND ENTITIES

8. **The Fund Manager** is in the business of real estate management, development, and finance.

9. **The Private Funds** are private investment funds, not registered with the Commission. Their assets consist primarily of investments in real estate.

D. FACTS

The Acquisition Agreement

10. Sometime in late 2008, E. Page agreed that the Fund Manager would acquire PageOne. The parties further agreed that:

a. The Fund Manager would pay the acquisition price of approximately $3 million in installments over time; and

b. The acquisition would not close—and the Fund Manager would not make the final payments of the purchase price—until E. Page raised approximately $20 million for the Private Funds.

11. Sometime before April 2010, the Fund Manager and E. Page revised the acquisition terms to have the Fund Manager acquire 49% of PageOne for approximately $2.4 million, which was later increased by agreement to approximately $3 million.

12. Beginning in early 2009, Respondents began recommending that their clients invest in the Private Funds. From March 2009 through September 2011, Respondents' clients invested approximately between $13 and $15 million in the Private Funds as Respondents knew or recklessly disregarded. Respondents (a) could view their client's accounts; and (b) executed at least certain of the transfers of client funds from their existing investments into the Private Funds.

13. Over roughly the same time, the Fund Manager made installment payments on the acquisition of approximately $2.7 million, an amount equal to approximately 18% of PageOne clients' investments in the Private Funds. The Fund Manager made these payments directly to E. Page, or to PageOne and other entities and persons, at E. Page's direction.

14. The size and timing of the Fund Manager's payments was determined, at least partially, by when PageOne clients made investments into the Private Funds. This reflected both (a) E. Page's explicit agreement to raise money for the Private Funds as part of the acquisition; and (b) the fact that the Fund Manager had limited liquidity. In other words, the Fund Manager needed to receive investments from PageOne clients to free up cash to make the periodic acquisition payments.

15. Moreover, Respondents knew (or recklessly disregarded) that the timing of the Fund Manager's acquisition payments—which often followed very closely in time behind PageOne clients' investments in the Private Funds—was linked to those investments. First, Respondents had explicitly agreed to raise money for the Private Funds as a term of the acquisition. Thus, on at least one occasion, E. Page emailed the Fund Manager's founder and Chairman (the "Chairman") to notify him that a PageOne client had invested in the Private Funds and to ask for an acquisition payment. Moreover, E. Page understood that the Chairman and the Fund Manager did not have sufficient liquidity of their own to complete the acquisition of PageOne. Indeed, E. Page understood that the Chairman was, at the time, selling certain personal assets to keep the Fund Manager's business going.

<u>The Promissory Notes</u>

16. The acquisition payments were memorialized as promissory notes from E. Page to the Fund Manager. E. Page understood, from the Chairman, that—in the event that the acquisition was consummated—the Fund Manager would cancel the notes. However, he likewise understood that until the acquisition closed and the Fund Manager cancelled the notes, E. Page was personally liable for the notes. Indeed, E. Page expressed just this concern to the Chairman, writing in an email in January 2010 that, as a result of the acquisition not closing, "I have a large loan 'lliability' [sic] and no assets."

Respondents' Materially False and Misleading Statements and Omissions
<u>Concerning their Relationship to the Fund Manager and the Private Funds</u>

17. Respondents knowingly or recklessly failed to disclose accurately the acquisition agreement as well as the true nature and amounts of the Fund Manager's payments to Respondents. E. Page refused to do so because, as he testified, "It's too dangerous. It would cause thousands of clients to get extremely nervous if I was selling my firm." In other words, E. Page was concerned that the true nature of his interest in the Fund Manager—and, in turn, in the Private Funds he was recommending—would be important information to investors.

18. Initially, Respondents knowingly or recklessly omitted to make any disclosure at all to their clients. Thus, from March through July 2009, Respondents remained entirely silent concerning their relationship to the Fund Manager and the Private Funds. During this time (a) Respondents' clients invested over $4 million in the Private Funds; and (b) the Fund Manager paid Respondents approximately $300,000, equivalent to approximately 7% of the total invested.

19. Thereafter, E. Page—who was PageOne's Chief Compliance Officer, Chairman and CEO, as well as controlling person, at all relevant times—knowingly or recklessly had PageOne make a series of false and misleading disclosures concerning the Fund Manager's acquisition in its Forms ADV.

i. *<u>PageOne's False and Misleading Forms ADV: July 31, 2009 to September 14, 2010</u>*

20. On July 31, 2009, PageOne revised its Form ADV, Part II to include in the section relating to advisory services and fees disclosure concerning the Fund Manager and the Private Funds. That Form ADV stated that Respondents may recommend investments in the Private Funds, calling them "unaffiliated private funds." This latter statement was misleading as it suggested no relationship between Respondents and the Private Funds. By this point in time, however, the Fund Manager had agreed in principal to acquire at least 49% of PageOne and had made a $300,000 down payment on that acquisition.

21. That section of PageOne's Form ADV, Part II also purported to describe the financial relationship between PageOne and the Private Funds:

> *Fee Schedule*: PageOne Financial does not directly charge the client a fee for this service. PageOne Financial is compensated by a referral fee paid by the [Fund] Manager of the Private Fund(s) in which its clients invest. The management and other fees the client pays to the Private Funds are not increased as a result of Registrant's referral of clients to the Private Funds. PageOne Financial will typically receive, on an annual basis, a referral fee of between 7.0% and 0.75% of the amount invested by the client in the applicable Private Fund(s).

22. This disclosure was materially false and misleading. First, the Fund Manager's payments to Respondents were simply not fees for referring investments to the Private Funds—rather they were down payments on the acquisition of at least 49% of PageOne. Because of the false disclosure, investors did not know that: (a) Respondents had agreed to raise millions of dollars for the Private Funds as a condition to closing the acquisition; (b) as opposed to a "referral fee," Respondents had an expectation of future payments from the Fund Manager in the form of the full acquisition price, future payments that would only be made if the Fund Manager could afford to acquire PageOne and Respondents were able to raise the promised funds; and (c) if the acquisition did not close, E. Page was personally liable for the promissory notes.

23. Respondents, thus, had an undisclosed interest in ensuring the ongoing success of the Private Funds and the Fund Manager—i.e., to ensure that Respondents received the entire acquisition price. This interest represented, at least, a potential conflict with the purported objectivity of Respondents' investment advice to their clients.

24. Second, it was not true that the Fund Manager's payments to Respondents were limited to "between 7.0% and 0.75% of the amount invested" on an annual basis in the Private Funds. Indeed, in the approximately one year from July 31, 2009 to September 14, 2010—when PageOne again changed its disclosure concerning the Fund Manager (see below)—the Fund Manager paid Respondents $1,312,755, an amount in excess of 15% of the approximately $6.5 to $8 million that Respondents' clients invested into the Private Funds during that time.

25. Respondents knew or recklessly disregarded the false and misleading statements contained in the Form ADV, Part II. E. Page told his Assistant Compliance Officer that he did not want to disclose the true nature of the arrangement with the Fund Manager. Moreover, as PageOne's Chief Compliance Officer, Chairman and CEO, E. Page was ultimately responsible for PageOne's disclosures, including its Forms ADV. Indeed, he reviewed and approved the July 31, 2009 Form ADV, Part II.

ii. PageOne's False and Misleading Forms ADV: September 14, 2010 to March 1, 2011

26. On September 14, 2010, PageOne again amended the disclosure in its Form ADV, Part II concerning the Fund Manager and the Private Funds. And again, Respondents knew or recklessly disregarded that the new disclosure was materially false and misleading.

27. The September 14, 2010 Form ADV, Part II section concerning advisory services and fees was amended to remove the descriptions of the purported "referral fee" discussed above, as well as the amounts of that fee. In its place, the revised Form ADV stated that PageOne would charge its clients a 1% annual management fee on money invested in the Private Funds. The September 14, 2010 ADV, Part II, in the sections concerning "Other Business Activities" and "Participation or Interest in Client Transactions," went on to state that:

> Edgar R. Page . . . is also employed as a consultant to the [the Fund Manager]. [The Fund Manager] is a real estate investment and development firm. Mr. Page is compensated for the consulting services he provides to [the Fund Manager]. As disclosed above, PageOne Financial recommends private funds that are managed by [the Fund Manager] to PageOne Financial's advisory clients for which PageOne Financial receives an advisory fee. Advisory clients are under no obligation to participate in such investments.

28. Moreover, as had been true since early 2009, the Fund Manager continued to make installment payments on its acquisition of PageOne. Between September 14, 2010 and March 1, 2011 (when PageOne again changed its ADV disclosure), the Fund Manager paid Respondents approximately $460,000, equivalent to about 70% of the more-than $650,000 that Respondents' clients invested into the Private Funds during that time.

29. In addition—as with the July 31, 2009 Form ADV—the amended Form ADV continued to state that "[a]ll private investment funds recommended by [PageOne] are managed by unaffiliated investment advisors." This statement was misleading. Despite its suggestion that the Private Funds were entirely unaffiliated with PageOne, by September 14, 2010, the Fund Manager had paid E. Page $1.6 million, or more than 50% of the agreed-upon $3 million acquisition price.

30. As with the prior false statements and omissions, Respondents knew or recklessly disregarded that the September 14, 2010 Form ADV, Part II was false and misleading.

a. As E. Page knew, he was never a consultant to the Fund Manager, provided no consulting services, and, thus, was never compensated for any such services;

b. E. Page understood the true terms of the acquisition; and

c. E. Page authorized the amendments and was, thus, aware of their wording.

iii. *<u>PageOne's False and Misleading Forms ADV: March 1, 2011 to September 29, 2011</u>*

31. On March 1, 2011, PageOne again amended its Form ADV, Part 2A, this time deleting all references to the Fund Manager and the Private Funds. Despite the deletions, Respondents' undisclosed conflict of interest did not disappear. Between March 1, 2011 and September 29, 2011, PageOne clients invested as much as $1.9 million in the Private Funds. At the same time, the Fund Manager made installment payments to E. Page during this period of approximately $700,000, equivalent to more than 35% of PageOne clients' investment in the Private Funds during that time.

32. Respondents knew or were reckless in not knowing that the March 1, 2011 Form ADV, Part 2A omitted to disclose the acquisition agreement. E. Page was the Chief Compliance Officer, Chairman and CEO at the time and, as such, it was his responsibility to approve any changes to the Form ADV.

33. In addition to the above false and misleading statements and omissions, Respondents also intentionally or recklessly omitted to tell their clients about the promissory notes at all relevant times.

34. PageOne published its Forms ADV on its website and delivered them to prospective clients during the relevant time period.

35. In addition to the above—by failing to tell their clients about the true nature of their relationship to the Fund Manager and the Private Funds and by preparing and disseminating Forms ADV that falsely described those relationships—Respondents failed to act as a reasonably careful person would in similar circumstances.

The Fund Manager's Acquisition Collapses

36. Over the course of 2010 and 2011, E. Page became increasingly concerned that the acquisition would not close. He understood that he had not been able to raise the $20 million, a condition precedent for the acquisition. And, he knew or recklessly disregarded that the Fund Manager had not been able to otherwise raise sufficient funds to pay the balance on the acquisition price. In both 2010 and 2011, the Chairman made increasingly urgent appeals to E. Page to assist the Fund Manager in fund-raising, for example, telling him of his "need" to raise money and saying that he "[d]esperately need[ed]" E. Page's help in doing so.

37. Respondents' clients made their last investments in the Private Funds in September 2011, shortly after the Fund Manager made its last payment to E. Page.

38. Despite paying approximately $2.7 million to Respondents, the Fund Manager never consummated its acquisition of 49% of PageOne.

39. In April 2013, the Fund Manager wrote to E. Page seeking repayment of the promissory notes of $2,751,345 in principal and $933,486.32 in interest on the grounds that the acquisition had not closed.

E. VIOLATIONS

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

41. As a result of the conduct describe above, Respondents 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."

42. As a result of the conduct described above, E. Page willfully aided and abetted and caused PageOne's violations of:

a. Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser; and

b. 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."

IV.

Additional proceedings shall be conducted to determine what, if any, disgorgement, prejudgment interest, civil penalties and/or other remedial action is appropriate in the public interest against Respondents pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company Act. In connection with such additional proceedings: (a) Respondents will be precluded from arguing that they did not violate the federal securities laws described in this Order; (b) Respondents may not challenge the validity of this Order; (c) solely for the purposes of such additional proceedings, the findings of this Order shall be accepted as and deemed true by the hearing officer; and (d) the hearing officer may determine the issues raised in the additional proceedings on the basis of the record as it exists on January 31, 2015, including but not limited to any exhibits, affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence; provided that Respondents may introduce documentary and testimonial evidence concerning his inability to pay or other mitigating factors solely relevant to relief and the Division of Enforcement will have the opportunity to rebut any such evidence.

V.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer, and to continue the proceedings to determine what, if any, additional remedial action is appropriate in the public interest against Respondents, including, but not limited to, disgorgement, interest and civil penalties pursuant to Sections 9(d) and (e) of the Investment Company Act, and Sections 203(i) and (j) of the Advisers Act.

VI.

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

A. Respondents' cease and desist from committing or causing violations or any future violations of Sections 206(1), 206(2), and 207 of the Advisers Act.

B. Respondents are censured.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANCE ACT OF 1934
Release No. 74469 / March 10, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4043 / March 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16427

In the Matter of **Robert J. Lunn,** **Respondent.**	**ORDER INSTITUTING PUBLIC 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 Robert J. Lunn ("Respondent" or "Lunn").

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondent

1. Lunn, age 65, is a resident of Chicago, Illinois. From 1970 through at least 2004, Lunn was employed in the securities industry by a variety of registered broker-dealers and investment advisers. From approximately April 1996 to October 2004, Lunn was a registered principal of Chicago, Illinois-based Lunn Partners Securities, LLC, a registered broker-dealer that Lunn owned and operated. During the same time frame, Lunn also owned and operated Chicago-based Lunn Partners, LLC, a registered investment adviser. Until 2004, Lunn held the following

securities licenses with the Financial Industry Regulatory Authority ("FINRA"): General Securities Sales Supervisor, General Securities Principal, and Registered Representative.

B. Respondent's Criminal Conviction

2. On May 30, 2012, Lunn was indicted in the United States District Court for the Northern District of Illinois, alleging five counts of bank fraud in violation of 18 U.S.C. §1344 based on Lunn's scheme to defraud a financial institution and two of his investment advisory clients. *United States v. Robert J. Lunn, Case No. 12 CR 402 (N.D. Ill.).*

3. On October 17, 2014, the jury in *U.S. v. Robert J. Lunn* returned a verdict finding Lunn guilty of each count of the Indictment.

4. The counts of the criminal Indictment alleged that between May 2001 and September 2004, Lunn knowingly devised and participated in a scheme to defraud Leaders Bank, an Oak Brook, Illinois financial institution, and two of his investment advisory clients and to obtain money by materially false and fraudulent pretenses, representations, promises and omissions. Among other things, the Indictment alleged that Lunn fraudulently obtained approximately $3.2 million in loans from Leaders Bank based on a series of misrepresentations about his own financial assets, the purposes of the loans, and the authorization of his advisory clients purportedly seeking the loans. Lunn used substantially all of the funds for his own benefit, including misappropriating $1.4 million to make payments to unrelated complaining investment advisory clients. According to the Indictment, Lunn submitted and caused to be submitted two personal financial statements that contained false information. Lunn also misrepresented the purpose of a loan obtained in the name of one of his investment advisory clients and caused a loan application with a forged signature to be submitted on behalf of another investment advisory client without the client's knowledge, authorization or consent.

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; 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 as provided for in the Commission's Rules of Practice.

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

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

Commissioner Aguilar
Not participating
Commissioner Piwowar
Commissioner Gallagher
Dissented as to
Municipal Advisors
and NRSRO bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9737 / March 11, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74480 / March 11, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4045 / March 11, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16429

In the Matter of **THOMAS C. PRIORE,** **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 Thomas C. Priore ("Priore").

II.

In anticipation of the institution of these proceedings, Priore 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, Priore consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From 2006 to 2014, Priore served as majority owner, president, and chief investment officer of ICP Asset Management, LLC ("ICP"), an investment adviser registered with the Commission. Priore also was president and registered general securities principal and representative of ICP Securities, LLC, a formerly-registered broker-dealer affiliated with ICP. Priore is 46 years old and is a resident of Westchester, New York.

2. On September 5, 2012, a judgment was entered by consent against Priore in the civil action entitled *Securities and Exchange Commission v. ICP Asset Management, LLC, et al.*, No. 10 Civ. 4791 in the United States District Court for the Southern District of New York, permanently enjoining Priore from violating, or aiding and abetting violations of, Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15(c)(1)(A) of the Exchange Act and Rules 10b-3 and 10b-5 thereunder, Sections 206(1), (2), (3), and (4) of the Advisers Act and Rule 206(4)-8 thereunder, and controlling any person who violates Sections 10(b) or15(c)(1)(A) of the Exchange Act and Rules 10b-3 and 10b-5 thereunder.

3. The Commission's complaint against Priore alleged that, in connection with ICP's management of the assets of four collateralized debt obligations, Priore violated his fiduciary duties and obligations under the CDOs' governing documents by failing to conduct trades for the CDOs at fair market prices and on an arms' length basis and by failing to manage the CDOs in a commercially reasonable manner contrary to specific requirements set forth in the CDOs' governing documents. The complaint further alleged that Priore engaged in fraudulent conduct by, among other things, knowingly causing the CDOs to overpay for securities, conducting principal trades without obtaining requisite approvals, misrepresenting the nature of trades to CDO investors, and substituting the CDOs as counterparties on trades to seize trading profits.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Priore'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 Priore 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;

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 Priore 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 Priore, 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.

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74494 / March 12, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4047 / March 12, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16432

In the Matter of **JOHN GRAY,** **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 John Gray ("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 over the subject matter of these proceedings and the findings contained in Section III.2. and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Respondent was employed as an equity research analyst (CRD # 4327738) and was associated with Barclays Capital Inc. ("Barclays Capital"), a registered broker-dealer and investment adviser, from 2008 through August 2011. Previously, Respondent was employed as an equity research analyst and was associated with Lehman Brothers Inc., a registered broker-dealer

and investment adviser. Respondent, age 38, is a resident of Redondo Beach, California and is currently unemployed.

2. On March 2, 2015, a final judgment was entered by consent against Respondent, permanently enjoining him from future violations of Sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder, in the civil action entitled Securities and Exchange Commission v. Gray, et al., Civil Action No.04:15-cv-00551-JSW, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that Respondent engaged in insider trading in advance of two different public company announcements while he was associated with Barclays Capital, including the announcement of an acquisition by tender offer, based on material, nonpublic information that Respondent learned from his source, who learned the information through his employment. The complaint further alleges that Respondent knew at the time of the illegal trades that the information was confidential and had been disclosed by the source in breach of a duty of confidentiality in exchange for a personal benefit.

4. The conduct that is the basis of Respondent's final judgment of permanent injunction occurred in part while Respondent was associated with a registered broker-dealer and investment adviser.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

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

Any reapplication for association by 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.

Brent J. Fields
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. 74493 / March 12, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3642 / March 12, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16431

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

I.

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

II.

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

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

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

proceedings, and the findings contained in Section III, paragraph 3 below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions (the "Order"),.as set forth below.

III.

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

1. Sabol, age 51, is and has been a certified public accountant licensed to practice in the Commonwealth of Virginia. From February 2004 through September 23, 2011, Sabol served as Executive Vice President, Chief Financial Officer, Secretary of the Board of Directors and principal accounting officer of Commonwealth Bankshares, Inc. ("Commonwealth").

2. Commonwealth was, at all relevant times, a Virginia corporation with its principal place of business in Norfolk, Virginia. Commonwealth's common stock was initially registered with the Commission pursuant to Section 12(g) of the Exchange Act and was quoted on the NASDAQ National Market under the stock symbol "CWBS." On July 31, 2006, after the NASDAQ became a national exchange, pursuant to Commission global order, all NASDAQ National Market issuers became Section 12(b) registrants listed on the new NASDAQ Global Market ("NASDAQ"). On September 23, 2011, the Virginia State Corporation Commission's Bureau of Financial Institutions (the "SCC") and the Federal Deposit Insurance Corporation (the "FDIC"), which insured the deposits held by the Bank, closed the Bank and entered into a purchase and assumption agreement with a subsidiary of a privately held bank holding company to assume the deposits of the Bank. Commonwealth remained an inactive corporate entity until May 31, 2013, when the SCC terminated Commonwealth's corporate registration. On July 31, 2013, the Commission revoked Commonwealth Section 12(g) registration by consent.

3. On March 12, 2015, a final judgment was entered against Sabol, permanently enjoining her from future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rules 10b-5, 13a-14, 13b2-1 and 13b2-2 thereunder, and from aiding and abetting violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11 and 13a-13 thereunder, in the civil action entitled *United States Securities and Exchange Commission v. Edward J. Woodard, et al.*, Civil Action Number 2:13-civ-16, in the United States District Court for the Eastern District of Virginia. Sabol was also ordered to pay a $55,000 civil money penalty, and was barred from serving as an officer or director of a public company for a period of five years.

4. The Commission's complaint alleged, among other things, that:

a. Sabol and others engaged in conduct that significantly misrepresented the health of the construction and development loan portfolio of Commonwealth's bank subsidiary and, as a consequence, of Commonwealth itself.

b. Eager to give the impression that, despite the financial crisis, all was well, between in or about November 6, 2008 and August 16, 2010, Sabol and others materially understated Commonwealth's allowance for loan and lease losses (the "ALLL"), materially underreported Commonwealth's non-performing loans, and materially understated and underreported Commonwealth's other real estate owned in its filings with the Commission.

c. In addition, throughout this period, Sabol and others made, or aided and abetted Commonwealth and each other in making, false and misleading disclosures in Commonwealth's filings and earnings releases regarding Commonwealth's asset quality, underwriting practices, credit monitoring and adequacy of its ALLL based on current collateral values.

IV.

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

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

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

B. After five (5) years from the date of this order, Respondent may request that the Commission consider her reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

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

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

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

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

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

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74497 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16435

In the Matter of **SHUIPAN LIN** **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 Shuipan Lin ("Lin" 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.

III.

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

Summary

1. This matter concerns violations of the reporting provisions of Section 13(d) of the Exchange Act by Lin, the Chairman and Chief Executive Office of Exceed Company Ltd. ("Exceed"), a China-based sports apparel and footwear company. Section 13(d)(1) of the

Exchange Act, together with Rule 13d-1(a), requires the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Section 13(d)(2) and corresponding Rule 13d-2(a) thereunder also require the filing of an amendment when there is a material change in the facts contained in the Schedule 13D.

2. As early as October 2012 Lin began to take steps to take Exceed private, an extraordinary corporate transaction that triggers a reporting obligation. Lin, however, failed to file an amendment to his Schedule 13D Item 4 disclosure until August 20, 2013 to report that his plans or proposals concerning Exceed's shares had materially changed. In addition, Lin incurred a reporting obligation under Section 13(d) on October 21, 2009, when he owned approximately 20% of Exceed's ordinary shares, but did not file his initial Schedule 13D until May 16, 2011. Finally, Lin failed to amend his Schedule 13D to report a subsequent acquisition of Exceed's shares.

Respondent

3. Shuipan Lin, age 45, is Chairman and Chief Executive Officer of Exceed Company Ltd., a sports apparel and footwear company incorporated in the British Virgin Islands with business operations and headquarters in China.[1] Lin was formerly a controlling shareholder of Windrace International Company Ltd. ("Windrace"), a Chinese company that Exceed acquired in 2009. On December 19, 2013, Lin and a group of other shareholders filed a Schedule 13E-3 in connection with a going-private transaction that will have the effect of taking Exceed private and eliminating all public shareholders of the company. Lin is a Chinese national, who currently resides in China.

Legal Framework

4. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein,* 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten days after they accumulate beneficial ownership of more than five percent of the class of equity security.

5. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition,

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[1] Exceed is a foreign private issuer as defined in Exchange Act Rule 3b-4, and its ordinary shares are registered under Exchange Act Section 12(b). Exceed's shares trade on the NASDAQ Global Select Market.

[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly,

(cont'd)

including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Industries*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d), however. *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

6. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer[subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

7. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require that a Schedule 13D must be promptly amended when there are material changes or developments in the information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corporation*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (September 3,

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through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

Lin's Failure to Timely File his Initial Schedule 13D

8. On October 21, 2009, Exceed completed its acquisition of all of the issued and outstanding ordinary shares of Windrace from Lin, the controlling shareholder of Windrace, and other selling shareholders. Exceed issued shares to Windrace's sellers, including Lin, in a private placement as consideration for the acquisition. As reflected in the selling shareholders disclosure on the Form F-1 filed by Exceed, Lin owned 20.31% of Exceed as of November 16, 2009. In subsequent filings, including the security ownership disclosure in Exceed's 2009 Form 20-F, Lin is reflected as owning 19.5% of Exceed as of March 31, 2010. Lin, however, did not file his initial Schedule 13D until May 16, 2011, nineteen months after October 2009—when he had incurred a reporting obligation.

Lin's Failure to Amend his Schedule 13D to Report Later Acquisition of Exceed Shares

9. At the time Lin filed his initial Schedule 13D on May 16, 2011, he reported that he beneficially owned 10,395,571 ordinary shares of Exceed, representing 40.9% of Exceed (based on 25,411,730 ordinary shares outstanding). At the time, Lin also disclosed that he acquired the shares in Exceed as consideration for his interest in Windrace, which Exceed acquired in 2009. In addition, Lin disclosed that he might acquire additional shares pursuant to escrow and earn-out arrangements[4] if Exceed achieved certain performance targets.

10. In Exceed's 2012 Form 20-F, filed February 28, 2013, the company disclosed that Lin owned 12,822,986 of Exceed's ordinary shares. Lin's ownership increase in Exceed's shares resulted from additional shares that he acquired in 2012 pursuant to an earn-out arrangement from the acquisition of Windrace. Specifically, Lin acquired additional shares as a result of Exceed achieving its performance targets under the earn-out arrangement. Although Mr. Lin disclosed the existence of these arrangements in his Initial May 2011 Schedule 13D, he failed to amend his report to reflect that he acquired additional shares.

Lin's Failure to Report Material Change to Plans or Proposals for Exceed

11. In May 2011, when Lin filed his Initial Schedule 13D Item 4 disclosure, a required disclosure pertaining to the filer's plans, proposals or purpose with regard to the beneficial ownership of shares, he stated: "[t]he Reporting Person may acquire or dispose of the Shares in market transactions or negotiated purchase transactions from time to time but does not

[4] Earn-out arrangements are generally agreements providing that additional compensation will be provided to affiliates of a target company in a business combination if certain specified future performance measures are met by the target company after the acquisition occurs.

have current plans or proposals that relate or would result in any of the actions set forth in items (b) to (j) of Item 4 of Schedule 13D."

12. As early as October 2012, as described in Exceed's Schedule 13E-3 and related amended proxy statement, filed February 26, 2014 ("Exceed Amended Proxy Statement"), Lin began to consider a going-private transaction involving Exceed. The Exceed Amended Proxy Statement states, in October 2012, "Mr. Lin began to consider and evaluate a going private transaction as one of the potential alternatives to his stake in the Company."

13. By November 2012, as later described in Exceed's Amended Proxy Statement, Lin took significant steps to further the going-private transaction, including studying the feasibility of such a transaction and reviewing other going-private transactions involving China-based issuers. In the same month, Lin discussed a going private transaction with Wisetech Holdings Ltd. ("Wisetech") and Windtech Holdings Ltd. ("Windtech"), two other significant shareholders of Exceed who ultimately formed part of the consortium of shareholders participating in the going-private transaction. Exceed's Amended Proxy Statement, in fact, disclosed that "[a]fter studying the feasibility of a going private transaction and learning about the successful completion of going private transactions involving a number of U.S.-listed China-based issuers, Mr. Lin began to seriously consider a going private transaction." Exceed's filing also disclosed that Lin held discussions with Wisetech Holdings Ltd. and Windtech Holdings Ltd. At this point, his intentions for purposes of Item 4 of Schedule 13D had materially changed; he was no longer considering a sale of his shares; and had taken steps in pursuit of a going private transaction.

14. By July 2013, as later described in Exceed's Amended Proxy Statement, Lin took additional steps towards the going-private transaction, including having discussions with attorneys and the consortium members about working together to submit a proposal to Exceed's board of directors to take Exceed private.

15. On August 17, 2013, Lin and the Consortium submitted a "preliminary non-binding letter" to Exceed's board of directors proposing to take Exceed private for $1.72 per share.

16. Notwithstanding his steps to take Exceed private that began as early as October 2012—an extraordinary corporate transaction that triggers a reporting obligation—Lin did not file an amendment to his Schedule 13D Item 4 disclosure until August 20, 2013.

Violations

17. As a result of the conduct described above, Lin violated Sections 13(d)(1) and 13(d)(2) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder.

Lin's Cooperation

18. In determining to accept the Offer, the Commission considered cooperation by Lin afforded to Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Lin shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(1) and 13(d)(2) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder;

B. Lin shall within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of $30,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 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) 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 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 Lin 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by

Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74498 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16436

In the Matter of

BERJAYA LOTTERY MANAGEMENT (H.K.) 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 Berjaya Lottery Management (H.K.) Ltd. ("Berjaya" 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.

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, acquires, directly or indirectly, beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Berjaya Lottery Management (H.K.) Limited ("Berjaya") is a Hong Kong corporation holding investments in subsidiaries involved in the manufacture and distribution of computerized lottery and voting systems and the leasing of on-line lottery equipment and provision of ancillary software support. Berjaya violated its beneficial ownership disclosure requirements under the Exchange Act in connection with actions it took to have International Lottery & Totalizator Systems, Inc. ("ILTS"), a publicly-held company that is based in California, enter into a going-private transaction.

3. Between July 7 and July 10, 2013, Berjaya took significant steps to further a going-private transaction and discussed in an email its intention to privatize ILTS. Berjaya, already a majority holder of ILTS securities, had an obligation to promptly amend its Item 4 disclosure to report this material change. Berjaya, however, filed an amendment to its Schedule 13D concerning the transaction in March 2014.

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

Respondent

4. Berjaya's principal place of business is in Kuala Lumpur, Malaysia. Berjaya is a private company and does not have shares registered with the Commission. Since approximately September 1999, Berjaya owned at least 71.3% of the ILTS shares outstanding and was a controlling shareholder of ILTS. On January 31, 2014, ILTS filed a Schedule 13E-3 in connection with a going-private transaction, announcing a reincorporation merger and reverse stock split to take ILTS private and eliminate all public shareholders of the company. The filing was subsequently amended on March 25, 2014 to also identify Berjaya as a filing person. On December 30, 2014, the going-private transaction was completed.

Legal Framework

5. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

6. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

7. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public

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[2] Whether a person is a "beneficial owner," a term not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989).

company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

8. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the information previously reported. "Material" is defined as information regarding those matters where there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered. *United States v. Bilzerian*, 926 F.2d 1285, 1298-99 (2d. Cir. 1991) (applying *TSC Industries, Inc., et al. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *SEC v. Savoy Indus.*, 587 F.2d at 1165-67; *see also* Exchange Act Section 13(d)(2), 15 U.S.C. § 78m(d)(2); Exchange Act Rule 13d-2, 17 C.F.R. § 240.13d-2; Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2; *see also* Exchange Act Rule 12b-1, 17 C.F.R. § 240.12b-1.

9. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

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[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going-private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going-private" transaction).

Berjaya's Failure to Report Material Change to Plans or Proposals for ILTS

10. As a greater than 5% beneficial owner of ILTS common stock, Berjaya was subject to the reporting requirements of Exchange Act Section 13(d).

11. Berjaya failed to timely amend its Schedule 13D Item 4 disclosure after Berjaya had undertaken affirmative steps in furtherance of its previously undisclosed plan designed to effectuate a going-private transaction for ILTS—an extraordinary corporate transaction. By July 2013, Berjaya had engaged in serious discussions and took significant steps to further its plan to take ILTS private. Among other things, Berjaya submitted a concept paper to ILTS and informed ILTS that its intention was to privatize the company. Notwithstanding the fact that Berjaya incurred a reporting obligation as early as July 2013, the company failed to amend its Schedule 13D Item 4 disclosure until March 2014. In the intervening period, Berjaya took additional, significant steps to further the going-private transaction, including: (i) deciding on a reincorporation merger followed by a reverse stock split and (ii) approving by written consent in lieu of a shareholder meeting such transactions in order to facilitate taking ILTS private. By waiting eight months to update its disclosure, Berjaya did not amend promptly. As a result, Berjaya violated Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) thereunder.

Violations

12. As a result of the conduct described above, Berjaya violated Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) thereunder.

Berjaya's Cooperation

13. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent, Berjaya, shall cease and desist from committing or causing any violations and any future violations of Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) thereunder;

B. Berjaya shall within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $75,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made on the civil money penalty, additional interest shall accrue pursuant to 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) 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 Berjaya 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.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74500 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16438

In the Matter of **Anthony J. Ciabattoni** **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 Anthony J. Ciabattoni ("Ciabattoni" 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 a Cease-and-Desist Order and Civil Penalty ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of insider information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to the prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.

3. Ciabattoni failed to file on a timely basis multiple required Schedule 13D amendments and Section 16(a) reports relating to his beneficial ownership of securities of First Physicians Capital Group, Inc. ("FPCG"). As of at least January 2014, Respondent took a series of steps to take FPCG private, an extraordinary corporate transaction that triggers a reporting obligation. Respondent, however, failed to file an amendment to his Schedule 13D Item 4 disclosure until June 20, 2014. At that time, Respondent finally reported that he was "evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act" and that his "inten[t]" was "to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration." Also, between February 6, 2010 and

[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.

April 7, 2014, Respondent engaged in twelve transactions acquiring or disposing of his beneficial ownership of FPCG securities, but did not report any of these transactions on a Form 4 or Schedule 13D amendment until June 20, 2014.

Respondent

4. Anthony J. Ciabattoni, age 70, is a beneficial owner of FPCG shares directly owned by The Ciabattoni Living Trust dated August 17, 2000 ("the Trust"), a family trust that he and his wife Jane G. Ciabattoni created by agreement on August 17, 2000, and for which both are grantors and trustees. Both he and his wife, as trustees of the Trust, have shared power to vote and dispose of the FPCG shares held by the Trust. As of June 2014, the Trust, Respondent and Mrs. Ciabattoni reported beneficial ownership of 10,270,400 shares of FPCG, representing approximately 39% of the class. On June 20, 2014, Ciabattoni filed a Schedule 13E-3 jointly with other insiders of FPCG disclosing the company's plans to go private by effectuating a 1-for-2,000 reverse stock split so as to reduce the number of record shareholders and allow the company to deregister. Ciabattoni is a resident of Laguna Beach, California, and his principal business activity is investment in various public and private business ventures.

Issuer

5. First Physicians Capital Group, Inc. ("FPCG") is a Delaware company whose principal executive offices are located in California. FPCG's business is to provide management, financial, and ancillary healthcare and IT services to the rural and community hospital market. FPCG's common stock was at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the OTCBB with the ticker FPCG. However, after filing a Form 10-Q on February 22, 2011, FPCG failed to file quarterly or annual reports with the Commission until April 2014. FPCG also failed to file any reports on Form 8-K after September 2011 and before December 2013. In order to deregister and go private, FPCG became current in its filings on April 4, 2014. Then, on June 20, 2014, the Company filed a preliminary proxy statement on Schedule 14A and, jointly with Respondent and others, a Schedule 13E-3, disclosing its plans to go private by conducting a reverse stock split and deregistering its securities. On October 15, 2014, FPCG's shareholders approved the reverse stock split of the company's common stock, which would permit FPCG to deregister and cease to be a public company. On October 27, 2014, FPCG filed a final amendment to its Schedule 13E-3 announcing the completion of the going private transaction. On December 19, 2014, FPCG filed Form 15-12G terminating its securities registration.

Legal Framework

6. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

7. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

8. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the

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[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means "any person who is deemed a beneficial owner pursuant to [S]ection 13(d) of the [Exchange] Act and the rules thereunder."[4]

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. Insiders must subsequently file Form 4 reports whenever they engage in transactions that result in a change in beneficial ownership. Such disclosures on Form 4 must be made within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities

[4] *See* Rule 16a-1(a)(1). This determination of beneficial ownership, though, does not apply to persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers. Such persons are not deemed the beneficial owner of any securities held by the qualified institution "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business ... as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

12. There is no state of mind requirement for violations of Section 16(a) and 13(d) and the rules thereunder.[5] The failure to timely file a required report, even if inadvertent, constitutes a violation.[6]

<u>Respondent's Failure to Report Material Change to Plans or Proposals for FPCG</u>

13. As a greater than 5% beneficial owner of FPCG common stock, Respondent was subject to the reporting requirements of Exchange Act Section 13(d).

14. Respondent filed his initial Schedule 13D on November 8, 2007 and subsequently filed four amendments between April 24, 2008 and February 25, 2009. In his fourth amendment to Schedule 13D, Item 4 disclosure, filed on February 25, 2009, Respondent stated that the acquisition of securities beneficially owned was for "investment purposes" and that he "do[es] not have any present plans or proposals that relate to or would result in any of the actions required to be disclosed in Item 4 of Schedule 13D." Respondent further stated that he had "no present intention of" reviewing or reconsidering his "position with respect to the Issuer" or formulating any such "plans or proposals."

15. Respondent made no further amendments to his Schedule 13D Item 4 disclosures over the next five years.

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[5] *See Lexington Resources Inc., et al.*, 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (initial decision) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]"); *Robert G. Weeks, et al.*, 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 4, 2002) (initial decision) ("No showing of scienter is required to prove violations of these reporting provisions"); *see also Savoy Indus.*, 587 F.2d at 1167 ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

[6] *Cf. Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) (Commission opinion) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation"); *see generally Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, SEC Release No. 34-47809 (May 7, 2003) (noting that an issuer's eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders "does not change the fact that *any* Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)") (emphasis added); *Herbert Moskowitz*, 77 SEC Docket 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (Commission opinion) ("evidence of both motive for non-disclosure and actual market impact ... is irrelevant" to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

16. However, as FPCG and Respondent disclosed in their amended Schedule 13E-3 and the company's definitive proxy statement on Schedule 14A, both filed on September 15, 2014, Respondent and FPCG began considering a going-private transaction in early 2011. Between 2011 and 2014, Respondent continued to have discussions with FPCG regarding the advisability of and the reasons for undertaking a going private transaction.

17. By January 2014, Respondent took a series of steps in furtherance of undertaking a going-private transaction involving FPCG. Specifically, by this time, Respondent had informed FPCG management that the Trust would support going private and assisted FPCG in that effort, including by securing waivers from certain shareholders to remove a registration requirement on certain FPCG preferred stock. Thus, by no later than January 2014, Respondent's "intention" as previously disclosed in Item 4 of his Schedule 13D had materially changed, and he was required to disclose *at that time* that he had taken steps in support of a going private transaction.

18. Between February 2014 and June 2014, Respondent took additional steps towards taking the company private through a reverse stock split transaction. By March 2014, Respondent discussed with FPCG officers and directors the fractional share repurchase and reverse stock split transaction and a proposal from a third party to conduct related valuation work. Respondent also received information about Board meetings discussing valuation issues, ratio stock split analyses, public company cost estimates, and the preliminary proxy statement. In May 2014, Respondent assisted FPCG with shareholder vote projections on the reverse stock split and going private transaction.

19. Notwithstanding these facts, including Respondent's steps in support of taking FPCG private as early as January 2014—an extraordinary corporate transaction that triggers a reporting obligation—Respondent did not file an amendment to his Schedule 13D Item 4 disclosure until five months later, on June 20, 2014. The amended Schedule 13D Item 4 disclosure, jointly filed by Respondent, his wife Jane G. Ciabattoni, and the Trust on June 20, 2014, stated, "The Reporting Persons are evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act. As of the date of this Statement, the Issuer has approximately 355 record stockholders, a significant portion of which hold small positions in the Issuer's Common Stock. The Reporting Persons intend to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration."

Respondent's Failure to Amend Schedule 13D to Report Later Acquisition of FPCG Shares

20. In his fourth amendment to Schedule 13D filed on February 25, 2009, Respondent disclosed beneficial ownership of 8,385,000 shares of FPCG stock, which constituted 44.82% of the class (based on 10,322,922 shares outstanding).

21. Although he continued to acquire or dispose of beneficial ownership of FPCG stock, Respondent made no further amendments to his Schedule 13D over the next five years.

22. On June 20, 2014, Respondent filed a fifth amendment to his Schedule 13D, disclosing beneficial ownership of 10,270,400 shares of FPCG stock, which constituted 38.95% of the class (based on 19,659,507 shares outstanding), and twelve transactions in the stock occurring between February 6, 2010 and April 7, 2014. Respondent had not previously disclosed these transactions, each of which was required to be reported months to years prior to June 20, 2014.

Respondent's Failure to Timely File Required Section 16(a) Reports

23. As a greater than 10% beneficial owner of FPCG's common stock, Respondent was subject to the reporting requirements of Exchange Act Section 16(a). Respondent filed an initial statement of beneficial ownership on Form 3 on November 8, 2007.

24. Respondent subsequently filed several Form 4 reports between November 2007 and February 13, 2009. Respondent did not file Form 4 or Form 5 reports after February 2009 for over five years, even though Respondent continued to acquire and dispose of FPCG stock or derivative securities.

25. On June 20, 2014, Respondent finally filed a Form 4 disclosing twelve transactions in FPCG stock that occurred between February 6, 2010 and April 7, 2014. Each of these transactions was required to be disclosed within two business days of their occurrence. When Respondent finally disclosed the transactions on June 20, 2014, the disclosures were months to many years late.

Violations

26. As a result of the conduct described above, Respondent violated Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder.

Respondent's Cooperation

27. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to 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 21C of the Exchange Act, Respondent Anthony J. Ciabattoni shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder;

B. Respondent shall, within fourteen (14) days of the entry of this Order and on a joint and several basis with The Ciabattoni Living Trust Dated August 17, 2000, and with Jane G. Ciabattoni, pay a civil money penalty in the amount of $75,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

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) 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 Anthony J. Ciabattoni 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 Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74499 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16437

In the Matter of **The Ciabattoni Living Trust Dated August 17, 2000** **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 The Ciabattoni Living Trust dated August 17, 2000 ("the Trust" 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.

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of insider information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to the prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.

3. The Trust failed to file on a timely basis multiple required Schedule 13D amendments and Section 16(a) reports relating to its beneficial ownership of securities of First Physicians Capital Group, Inc. ("FPCG"). As of at least January 2014, Respondent took a series of steps to take FPCG private, an extraordinary corporate transaction that triggers a reporting obligation. Respondent, however, failed to file an amendment to its Schedule 13D Item 4 disclosure until June 20, 2014. At that time, Respondent finally reported that it was "evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act" and that its "inten[t]" was "to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration." Also, between February 6, 2010 and

[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.

April 7, 2014, Respondent engaged in twelve transactions acquiring or disposing of its beneficial ownership of FPCG securities, but did not report any of these transactions on a Form 4 or Schedule 13D amendment until June 20, 2014.

Respondent

4. The Ciabattoni Living Trust dated August 17, 2000 is a family trust created by agreement dated August 17, 2000 under the laws of the State of California. Anthony J. Ciabattoni and, his wife, Jane G. Ciabattoni, are the grantors and the trustees of the Trust. As of June 2014, The Trust reported beneficial ownership of 10,270,400 shares of FPCG, representing approximately 39% of the class. On June 20, 2014, the Trust filed a Schedule 13E-3 jointly with other insiders of FPCG disclosing the company's plans to go private by effectuating a 1-for-2,000 reverse stock split so as to reduce the number of record shareholders and allow the company to deregister. The trustees of the Trust reside in Laguna Beach, California.

Issuer

5. First Physicians Capital Group, Inc. ("FPCG") is a Delaware company whose principal executive offices are located in California. FPCG's business is to provide management, financial, and ancillary healthcare and IT services to the rural and community hospital market. FPCG's common stock was at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the OTCBB with the ticker FPCG. However, after filing a Form 10-Q on February 22, 2011, FPCG failed to file quarterly or annual reports with the Commission until April 2014. FPCG also failed to file any reports on Form 8-K after September 2011 and before December 2013. In order to deregister and go private, FPCG became current in its filings on April 4, 2014. Then, on June 20, 2014, the Company filed a preliminary proxy statement on Schedule 14A and, jointly with Respondent and others, a Schedule 13E-3, disclosing its plans to go private by conducting a reverse stock split and deregistering its securities. On October 15, 2014, FPCG's shareholders approved the reverse stock split of the company's common stock, which would permit FPCG to deregister and cease to be a public company. On October 27, 2014, FPCG filed a final amendment to its Schedule 13E-3 announcing the completion of the going private transaction. On December 19, 2014, FPCG filed Form 15-12G terminating its securities registration.

Legal Framework

6. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

7. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

8. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in

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[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means "any person who is deemed a beneficial owner pursuant to [S]ection 13(d) of the [Exchange] Act and the rules thereunder."[4]

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. Insiders must subsequently file Form 4 reports whenever they engage in transactions that result in a change in beneficial ownership. Such disclosures on Form 4 must be made within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

12. There is no state of mind requirement for violations of Section 16(a) and 13(d) and the rules thereunder.[5] The failure to timely file a required report, even if inadvertent, constitutes a violation.[6]

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[4] *See* Rule 16a-1(a)(1). This determination of beneficial ownership, though, does not apply to persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers. Such persons are not deemed the beneficial owner of any securities held by the qualified institution "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business ... as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

[5] *See Lexington Resources Inc., et al.*, 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (initial decision) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]");

Respondent's Failure to Report Material Change to Plans or Proposals for FPCG

13. As a greater than 5% beneficial owner of FPCG common stock, Respondent was subject to the reporting requirements of Exchange Act Section 13(d).

14. Respondent filed its initial Schedule 13D on November 8, 2007 and subsequently filed four amendments between April 24, 2008 and February 25, 2009. In its fourth amendment to Schedule 13D, Item 4 disclosure, filed on February 25, 2009, Respondent stated that the acquisition of securities beneficially owned was for "investment purposes" and that it does "not have any present plans or proposals that relate to or would result in any of the actions required to be disclosed in Item 4 of Schedule 13D." Respondent further stated that it had "no present intention of" reviewing or reconsidering "its position with respect to the Issuer" or formulating any such "plans or proposals."

15. Respondent made no further amendments to its Schedule 13D Item 4 disclosures over the next five years.

16. However, as FPCG and Respondent disclosed in their amended Schedule 13E-3 and the company's definitive proxy statement on Schedule 14A, both filed on September 15, 2014, Respondent and FPCG began considering a going-private transaction in early 2011. Between 2011 and 2014, Respondent continued to have discussions with FPCG regarding the advisability of and the reasons for undertaking a going private transaction.

17. By January 2014, Respondent took a series of steps in furtherance of undertaking a going-private transaction involving FPCG. Specifically, by this time, Respondent had informed FPCG management that it would support going private and assisted FPCG in that effort, including by securing waivers from certain shareholders to remove a registration requirement on certain FPCG preferred stock. Thus, by no later than January 2014, Respondent's "intention" as

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Robert G. Weeks, et al., 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 4, 2002) (initial decision) ("No showing of scienter is required to prove violations of these reporting provisions"); *see also Savoy Indus.*, 587 F.2d at 1167 ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

[6] *Cf. Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) (Commission opinion) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation"); *see generally Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, SEC Release No. 34-47809 (May 7, 2003) (noting that an issuer's eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders "does not change the fact that *any* Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)") (emphasis added); *Herbert Moskowitz*, 77 SEC Docket 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (Commission opinion) ("evidence of both motive for non-disclosure and actual market impact … is irrelevant" to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

previously disclosed in Item 4 of its Schedule 13D had materially changed, and it was required to disclose *at that time* that it had taken steps in support of a going private transaction.

18. Between February 2014 and June 2014, Respondent took additional steps towards taking the company private through a reverse stock split transaction. By March 2014, Respondent discussed with FPCG officers and directors the fractional share repurchase and reverse stock split transaction and a proposal from a third party to conduct related valuation work. Respondent also received information about Board meetings discussing valuation issues, ratio stock split analyses, public company cost estimates, and the preliminary proxy statement. In May 2014, Respondent assisted FPCG with shareholder vote projections on the reverse stock split and going private transaction.

19. Notwithstanding these facts, including Respondent's steps in support of taking FPCG private as early as January 2014—an extraordinary corporate transaction that triggers a reporting obligation—Respondent did not file an amendment to its Schedule 13D Item 4 disclosure until five months later, on June 20, 2014. The amended Schedule 13D Item 4 disclosure, filed by Respondent on June 20, 2014, stated, "The Reporting Persons are evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act. As of the date of this Statement, the Issuer has approximately 355 record stockholders, a significant portion of which hold small positions in the Issuer's Common Stock. The Reporting Persons intend to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration."

Respondent's Failure to Amend Schedule 13D to Report Later Acquisition of FPCG Shares

20. In its fourth amendment to Schedule 13D filed on February 25, 2009, Respondent disclosed beneficial ownership of 8,385,000 shares of FPCG stock, which constituted 44.82% of the class (based on 10,322,922 shares outstanding).

21. Although it continued to acquire or dispose of beneficial ownership of FPCG stock, Respondent made no further amendments to its Schedule 13D over the next five years.

22. On June 20, 2014, Respondent filed a fifth amendment to its Schedule 13D, disclosing beneficial ownership of 10,270,400 shares of FPCG stock, which constituted 38.95% of the class (based on 19,659,507 shares outstanding), and twelve transactions in the stock occurring between February 6, 2010 and April 7, 2014. Respondent had not previously disclosed these transactions, each of which was required to be reported months to years prior to June 20, 2014.

Respondent's Failure to Timely File Required Section 16(a) Reports

23. As a greater than 10% beneficial owner of FPCG's common stock, Respondent was subject to the reporting requirements of Exchange Act Section 16(a). Respondent filed an initial statement of beneficial ownership on Form 3 on November 8, 2007.

24. Respondent subsequently filed several Form 4 reports between November 2007 and February 13, 2009. Respondent did not file Form 4 or Form 5 reports after February 2009 for over five years, even though Respondent continued to acquire and dispose of FPCG stock or derivative securities.

25. On June 20, 2014, Respondent finally filed a Form 4 disclosing twelve transactions in FPCG stock that occurred between February 6, 2010 and April 7, 2014. Each of these transactions was required to be disclosed within two business days of their occurrence. When Respondent finally disclosed the transactions on June 20, 2014, the disclosures were months to many years late.

Violations

26. As a result of the conduct described above, Respondent violated Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder.

Respondent's Cooperation

27. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent The Ciabattoni Living Trust Dated August 17, 2000's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent The Ciabattoni Living Trust Dated August 17, 2000 shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder;

B. Respondent shall, within fourteen (14) days of the entry of this Order and on a joint and several basis with Anthony J. Ciabattoni and Jane G. Ciabattoni, pay a civil money penalty in the amount of $75,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

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) 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 The Ciabattoni Living Trust Dated August 17, 2000 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 Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74502 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16440

In the Matter of **SMP Investments I, 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 SMP Investments I, LLC ("SMP" 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.

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of insider information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to the prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.

3. SMP failed to file on a timely basis multiple required Schedule 13D amendments and Section 16(a) reports relating to its beneficial ownership of securities of First Physicians Capital Group, Inc. ("FPCG"). As of at least January 2014, Respondent took a series of steps to take FPCG private, an extraordinary corporate transaction that triggers a reporting obligation. Respondent, however, failed to file an amendment to its Schedule 13D Item 4 disclosure until April 8, 2014, three months later. At that time, SMP finally reported that it was "evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act" and that its "inten[t]" was "to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders and becoming eligible to terminate the Issuer's registration." Also, between September 13, 2007 and April 7, 2014, Respondent engaged in eleven transactions acquiring or disposing of its beneficial

[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.

ownership of FPCG securities, but did not report any of these transactions on a Form 4 or Schedule 13D amendment until April 2014 and June 2014.

Respondent

4. SMP Investments I, LLC, is a private family-owned company formed under the laws of the State of Michigan, the primary business of which is investing in securities for its own account. Its principal place of business is in Beverly Hills, California. SMP is not and never has been a registered investment adviser with the Commission. Brian Potiker ("Potiker") is the manager of SMP, the beneficial owner of a trust that owns a one-third beneficial interest in SMP, and the trustee of two trusts that each own a one-third beneficial interest in SMP. As of June 2014, SMP reported beneficial ownership of approximately 16.05 million shares of First Physicians Capital Group, Inc., ("FPCG"), representing approximately 54.05% of the class. Potiker, in his capacity as manager with sole power to vote and dispose of SMP's shares, signed each of SMP's Schedule 13D and Form 3 and Form 4 filings reflecting ownership of FPCG stock. On June 20, 2014, SMP filed a Schedule 13E-3 jointly with other insiders of FPCG disclosing the company's plans to go private by effectuating a 1-for-2,000 reverse stock split so as to reduce the number of record holders and allow the company to deregister.

Issuer

5. First Physicians Capital Group, Inc. ("FPCG") is a Delaware company whose principal executive offices are located in California. FPCG's business is to provide management, financial, and ancillary healthcare and IT services to the rural and community hospital market. FPCG's common stock was at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the OTCBB with the ticker FPCG. However, after filing a Form 10-Q on February 22, 2011, FPCG failed to file quarterly or annual reports with the Commission until April 2014. FPCG also failed to file any reports on Form 8-K after September 2011 and before December 2013. In order to deregister and go private, FPCG became current in its filings on April 4, 2014. Then, on June 20, 2014, the Company filed a preliminary proxy statement on Schedule 14A and, jointly with Respondent and others, a Schedule 13E-3, disclosing its plans to go private by conducting a reverse stock split and deregistering its securities. On October 15, 2014, FPCG's shareholders approved the reverse stock split of the company's common stock, which would permit FPCG to deregister and cease to be a public company. On October 27, 2014, FPCG filed a final amendment to its Schedule 13E-3 announcing the completion of the going private transaction. On December 19, 2014, FPCG filed Form 15-12G terminating its securities registration.

Legal Framework

6. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or

individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

7. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

8. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the

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[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means "any person who is deemed a beneficial owner pursuant to [S]ection 13(d) of the [Exchange] Act and the rules thereunder."[4]

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. Insiders must subsequently file Form 4 reports whenever they engage in transactions that result in a change in beneficial ownership. Such disclosures on Form 4 must be made within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

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[4] *See* Rule 16a-1(a)(1). This determination of beneficial ownership, though, does not apply to persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers. Such persons are not deemed the beneficial owner of any securities held by the qualified institution "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business … as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

12. There is no state of mind requirement for violations of Section 16(a) and 13(d) and the rules thereunder.[5] The failure to timely file a required report, even if inadvertent, constitutes a violation.[6]

<u>Respondent's Failure to Report Material Change to Plans or Proposals for FPCG</u>

13. As a greater than 5% beneficial owner of FPCG common stock, Respondent was subject to the reporting requirements of Exchange Act Section 13(d).

14. Respondent filed its initial Schedule 13D on November 8, 2007 and subsequently filed four amendments between April 24, 2008 and November 18, 2009. In its fourth amendment to the Schedule 13D Item 4 disclosure, filed on November 18, 2009, Respondent stated that the acquisition of securities beneficially owned was for "investment purposes" and that it did not "have any present plans or proposals that relate to or would result in any of the actions required to be described in Item 4 of Schedule 13D." Respondent further stated that it had "no present intention of" reviewing or reconsidering "its position with respect to the Issuer" or formulating any such "plans or proposals."

15. Respondent made no further amendments to its Schedule 13D for over four years.

16. However, as FPCG and Respondent disclosed in their amended Schedule 13E-3 and the company's definitive proxy statement on Schedule 14A, both filed on September 15, 2014, Respondent and FPCG began considering a going-private transaction in early 2011. Between 2011 and 2014, Respondent continued to have discussions with FPCG regarding the advisability of and the reasons for undertaking a going private transaction.

17. By January 2014, Respondent took a series of steps in furtherance of undertaking a going-private transaction involving FPCG. Specifically, by this time, Respondent had informed

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[5] *See Lexington Resources Inc., et al.*, 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (initial decision) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]"); *Robert G. Weeks, et al.*, 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 4, 2002) (initial decision) ("No showing of scienter is required to prove violations of these reporting provisions"); *see also Savoy Indus.*, 587 F.2d at 1167 ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

[6] *Cf. Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) (Commission opinion) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation"); *see generally Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, SEC Release No. 34-47809 (May 7, 2003) (noting that an issuer's eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders "does not change the fact that *any* Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)") (emphasis added); *Herbert Moskowitz*, 77 SEC Docket 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (Commission opinion) ("evidence of both motive for non-disclosure and actual market impact ... is irrelevant" to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

FPCG management that it would support going private and assisted FPCG in that effort, including by securing waivers from certain shareholders to remove a registration requirement on certain FPCG preferred stock. Respondent also discussed with FPCG management strategies for going private. Thus, by no later than January 2014, Respondent's "intention" as previously disclosed in Item 4 of its Schedule 13D had materially changed, and it was required to disclose *at that time* that it had taken steps in support of a going private transaction.

18. Between February 2014 and June 2014, Respondent took additional steps towards taking the company private through a reverse stock split transaction. In February and March 2014, Respondent worked with FPCG to obtain a valuation and fairness opinion in connection with the transaction and discussed with certain officers and directors a valuation proposal received from a third party. Respondent also received information about FPCG Board meetings discussing valuation issues, ratio stock split analyses, public company cost estimates, and the preliminary proxy statement. In May 2014, Respondent assisted FPCG with shareholder vote projections on the reverse stock split and going private transaction.

19. Notwithstanding these facts, including Respondent's steps in support of taking FPCG private as early as January 2014—an extraordinary corporate transaction that triggers a reporting obligation—Respondent did not file an amendment to its Schedule 13D Item 4 disclosure until three months later, on April 8, 2014. The amended Schedule 13D Item 4 disclosure, filed by Respondent on April 8, 2014, stated, "The Reporting Persons are evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act. As of the date of this Statement, the Issuer has approximately 353 stockholders, a significant portion of which hold small positions in the Issuer's Common Stock. The Reporting Persons intend to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders and becoming eligible to terminate the Issuer's registration."

<u>Respondent's Failure to Amend Schedule 13D to Report Later Acquisition of FPCG Shares</u>

20. In its fourth amendment to Schedule 13D filed on November 18, 2009, Respondent disclosed beneficial ownership of 12,789,285 shares of FPCG stock, which constituted 49.26% of the class (based in part on 13,322,179 shares outstanding as of August 10, 2009).

21. Although it continued to acquire or dispose of beneficial ownership of FPCG stock, Respondent made no further amendments to its Schedule 13D for over four years.

22. On April 8, 2014, Respondent filed a fifth amendment to its Schedule 13D, disclosing beneficial ownership of 16,728,365 shares of FPCG stock, which constituted 48.3% of the class (based on 23,909,507 shares outstanding), and three transactions in the stock occurring on February 3, 2014. These transactions were reported two months late.

23. Respondent also filed an untimely sixth amendment to the Schedule 13D on June 20, 2014. In this statement, Respondent disclosed beneficial ownership of 16,048,365 shares of FPCG stock, which constituted 54.05% of the class (based on 19,659,507 shares outstanding), and

eight transactions in the stock occurring between September 13, 2007 and April 7, 2014. These transactions were required to be reported months to several years earlier.

Respondent's Failure to Timely File Required Section 16(a) Reports

24. As a greater than 10% beneficial owner of FPCG's common stock, Respondent was subject to the reporting requirements of Exchange Act Section 16(a). Respondent filed an initial statement of beneficial ownership on Form 3 on November 8, 2007.

25. Respondent subsequently filed several Form 4 reports between March 2008 and November 3, 2009. Respondent did not file Form 4 or Form 5 reports after November 2009 for over four years, even though Respondent continued to acquire and dispose of FPCG stock or derivative securities.

26. On April 8, 2014, Respondent finally filed a Form 4 disclosing three transactions in FPCG stock that occurred on February 3, 2014. These transactions were required to be disclosed within two business days, but were instead two months late.

27. On June 20, 2014, Respondent filed another Form 4 disclosing eight additional transactions in FPCG stock that occurred between September 13, 2007 and April 7, 2014. Each of these transactions was required to be disclosed within two business days of their occurrence. When Respondent finally disclosed these transactions on June 20, 2014, however, the disclosures were months to many years late.

Violations

28. As a result of the conduct described above, Respondent violated Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder.

Respondent's Cooperation

29. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent SMP Investments I, LLC Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent SMP Investments I, LLC shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder;

B. Respondent SMP Investments I, LLC shall, on a joint and several basis with Brian Potiker and within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of $63,750 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

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) 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 SMP Investments I, LLC 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 Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74503 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16441

In the Matter of **Brian Potiker** **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 Brian Potiker ("Potiker" 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 a Cease-and-Desist Order and Civil Penalty ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of insider information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to the prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.

3. Potiker failed to file on a timely basis multiple required Schedule 13D amendments and Section 16(a) reports relating to his beneficial ownership of securities of First Physicians Capital Group, Inc. ("FPCG"). As of at least January 2014, Respondent took a series of steps to take FPCG private, an extraordinary corporate transaction that triggers a reporting obligation. Respondent, however, failed to file an amendment to his Schedule 13D Item 4 disclosure until April 8, 2014, three months later. At that time, Potiker finally reported that he was "evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act" and that his "inten[t]" was "to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders and becoming eligible to terminate the Issuer's registration." Also, between September 13, 2007 and April 7, 2014, Respondent engaged in eleven transactions acquiring or

[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.

disposing of beneficial ownership of FPCG securities, but did not report any of these transactions on a Form 4 or Schedule 13D amendment until April 2014 and June 2014.

Respondent

4. Brian Potiker, age 49, is the manager of SMP Investments I, LLC ("SMP"), a private, family-owned company formed under the laws of the State of Michigan, the primary business of which is investing in securities for its own account. Potiker is also of the beneficial owner of a trust that owns a one-third beneficial interest in SMP. He is also the trustee of two trusts that each own a one-third beneficial interest in SMP. Neither SMP nor Potiker is a registered investment adviser with the Commission. As of June 2014, SMP reported beneficial ownership of approximately 16.05 million shares of First Physicians Capital Group, Inc., ("FPCG"), representing approximately 54.05% of the class. In his capacity as manager, Potiker has sole power to vote and dispose of SMP's shares, and is a beneficial owner of all shares in FPCG owned by SMP. Potiker signed each of SMP's Schedule 13D and Form 3 and Form 4 filings reflecting ownership of FPCG stock. Potiker also was a joint filer with SMP on each filing as a beneficial owner of SMP's holdings in FPCG stock. In addition to his role at SMP, Potiker is the Chief Investment Officer of HSP Group, LLC, a private pooled investment vehicle. Potiker's principal place of business is in Beverly Hills, California. On June 20, 2014, Potiker filed a Schedule 13E-3 jointly with other insiders of FPCG disclosing the company's plans to go private by effectuating a 1-for-2,000 reverse stock split so as to reduce the number of record holders and allow the company to deregister.

Issuer

5. First Physicians Capital Group, Inc. ("FPCG") is a Delaware company whose principal executive offices are located in California. FPCG's business is to provide management, financial, and ancillary healthcare and IT services to the rural and community hospital market. FPCG's common stock was at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the OTCBB with the ticker FPCG. However, after filing a Form 10-Q on February 22, 2011, FPCG failed to file quarterly or annual reports with the Commission until April 2014. FPCG also failed to file any reports on Form 8-K after September 2011 and before December 2013. In order to deregister and go private, FPCG became current in its filings on April 4, 2014. Then, on June 20, 2014, the Company filed a preliminary proxy statement on Schedule 14A and, jointly with Respondent and others, a Schedule 13E-3, disclosing its plans to go private by conducting a reverse stock split and deregistering its securities. On October 15, 2014, FPCG's shareholders approved the reverse stock split of the company's common stock, which would permit FPCG to deregister and cease to be a public company. On October 27, 2014, FPCG filed a final amendment to its Schedule 13E-3 announcing the completion of the going private transaction. On December 19, 2014, FPCG filed Form 15-12G terminating its securities registration.

Legal Framework

6. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

7. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

8. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the

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[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

[Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means "any person who is deemed a beneficial owner pursuant to [S]ection 13(d) of the [Exchange] Act and the rules thereunder."[4]

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. Insiders must subsequently file Form 4 reports whenever they engage in transactions that result in a change in beneficial ownership. Such disclosures on Form 4 must be made within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been,

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[4] *See* Rule 16a-1(a)(1). This determination of beneficial ownership, though, does not apply to persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers. Such persons are not deemed the beneficial owner of any securities held by the qualified institution "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business … as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

12. There is no state of mind requirement for violations of Section 16(a) and 13(d) and the rules thereunder.[5] The failure to timely file a required report, even if inadvertent, constitutes a violation.[6]

Respondent's Failure to Report Material Change to Plans or Proposals for FPCG

13. As a greater than 5% beneficial owner of FPCG common stock, Respondent was subject to the reporting requirements of Exchange Act Section 13(d).

14. Respondent filed his initial Schedule 13D on November 8, 2007 and subsequently filed four amendments between April 24, 2008 and November 18, 2009. In his fourth amendment to the Schedule 13D Item 4 disclosure, filed on November 18, 2009, Respondent stated that the acquisition of securities beneficially owned was for "investment purposes" and that he did not "have any present plans or proposals that relate to or would result in any of the actions required to be described in Item 4 of Schedule 13D." Respondent further stated that he had "no present intention of" reviewing or reconsidering his "position with respect to the Issuer" or formulating any such "plans or proposals."

15. Respondent made no further amendments to his Schedule 13D for over four years.

16. However, as FPCG and Respondent disclosed in their amended Schedule 13E-3 and the company's definitive proxy statement on Schedule 14A, both filed on September 15, 2014, Respondent and FPCG began considering a going-private transaction in early 2011. Between 2011

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[5] *See Lexington Resources Inc., et al.*, 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (initial decision) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]"); *Robert G. Weeks, et al.*, 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 4, 2002) (initial decision) ("No showing of scienter is required to prove violations of these reporting provisions"); *see also Savoy Indus.*, 587 F.2d at 1167 ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

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and 2014, Respondent continued to have discussions with FPCG regarding the advisability of and the reasons for undertaking a going private transaction.

17. By January 2014, Respondent took a series of steps in furtherance of undertaking a going-private transaction involving FPCG. Specifically, by this time, Respondent had informed FPCG management that he would support going private and assisted FPCG in that effort, including by securing waivers from certain shareholders to remove a registration requirement on certain FPCG preferred stock. Respondent also discussed with FPCG management strategies for going private. Thus, by no later than January 2014, Respondent's "intention" as previously disclosed in Item 4 of his Schedule 13D had materially changed, and he was required to disclose *at that time* that he had taken steps in support of a going private transaction.

18. Between February 2014 and June 2014, Respondent took additional steps towards taking the company private through a reverse stock split transaction. In February and March 2014, Respondent worked with FPCG to obtain a valuation and fairness opinion in connection with the transaction and discussed with certain officers and directors a valuation proposal received from a third party. Respondent also received information about FPCG Board meetings discussing valuation issues, ratio stock split analyses, public company cost estimates, and the preliminary proxy statement. In May 2014, Respondent assisted FPCG with shareholder vote projections on the reverse stock split and going private transaction.

19. Notwithstanding these facts, including Respondent's steps in support of taking FPCG private as early as January 2014—an extraordinary corporate transaction that triggers a reporting obligation—Respondent did not file an amendment to his Schedule 13D Item 4 disclosure until three months later, on April 8, 2014. The amended Schedule 13D Item 4 disclosure, filed by Respondent on April 8, 2014, stated, "The Reporting Persons are evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act. As of the date of this Statement, the Issuer has approximately 353 stockholders, a significant portion of which hold small positions in the Issuer's Common Stock. The Reporting Persons intend to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders and becoming eligible to terminate the Issuer's registration."

Respondent's Failure to Amend Schedule 13D to Report Later Acquisition of FPCG Shares

20. In his fourth amendment to Schedule 13D filed on November 18, 2009, Respondent disclosed beneficial ownership of 12,789,285 shares of FPCG stock, which constituted 49.26% of the class (based in part on 13,322,179 shares outstanding as of August 10, 2009).

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the class (based on 23,909,507 shares outstanding), and three transactions in the stock occurring on February 3, 2014. These transactions were reported two months late.

23. Respondent also filed an untimely sixth amendment to the Schedule 13D on June 20, 2014. In this statement, Respondent disclosed beneficial ownership of 16,048,365 shares of FPCG stock, which constituted 54.05% of the class (based on 19,659,507 shares outstanding), and eight transactions in the stock occurring between September 13, 2007 and April 7, 2014. These transactions were required to be reported months to several years earlier.

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24. As a greater than 10% beneficial owner of FPCG's common stock, Respondent was subject to the reporting requirements of Exchange Act Section 16(a). Respondent filed an initial statement of beneficial ownership on Form 3 on November 8, 2007.

25. Respondent subsequently filed several Form 4 reports between March 2008 and November 3, 2009. Respondent did not file Form 4 or Form 5 reports after November 2009 for over four years, even though Respondent continued to acquire and dispose of FPCG stock or derivative securities.

26. On April 8, 2014, Respondent finally filed a Form 4 disclosing three transactions in FPCG stock that occurred on February 3, 2014. These transactions were required to be disclosed within two business days, but were instead two months late.

27. On June 20, 2014, Respondent filed another Form 4 disclosing eight additional transactions in FPCG stock that occurred between September 13, 2007 and April 7, 2014. Each of these transactions was required to be disclosed within two business days of their occurrence. When Respondent finally disclosed these transactions on June 20, 2014, however, the disclosures were months to many years late.

Violations

28. As a result of the conduct described above, Respondent violated Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder.

Respondent's Cooperation

29. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Brian Potiker shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder;

B. Respondent Brian Potiker shall, on a joint and several basis with SMP Investments I, LLC and within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of $63,750 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

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) 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 Brian Potiker 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74504 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16442

In the Matter of **William A. Houlihan** **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 William A. Houlihan ("Houlihan" 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 them 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.

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of insider information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to the prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.

3. Houlihan failed to file on a timely basis required Schedule 13D amendments and Section 16(a) reports relating to his beneficial ownership of securities of First Physicians Capital Group, Inc. ("FPCG"). By no later than the end of January 2014, Houlihan initiated a series of steps to take FPCG private, an extraordinary corporate transaction that triggers a reporting obligation. However, Houlihan failed to amend his Schedule 13D Item 4 disclosure until June 20, 2014. At that time, Houlihan finally reported that he was "evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act" and that his "inten[t]" was "to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration." Also, on January 1, 2014, Houlihan received common stock warrants for 1,190,400 shares of FPCG common stock, which increased his reported percent

[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.

beneficial ownership in FPCG from 8.1% to 10.6%. Despite the material change in his previously reported beneficial ownership of FPCG securities and his status as both a director of FPCG and a greater than 10% beneficial owner, Houlihan did not disclose the transaction on a Form 4 or Schedule 13D amendment until June 20, 2014.

Respondent

4. William A. Houlihan, age 59, is a member of the Board of Directors of FPCG and a greater than 10% beneficial owner of FPCG securities. Houlihan is a private investor who also serves on the board of other public companies. On June 20, 2014, Houlihan filed a Schedule 13E-3 jointly with other insiders of FPCG disclosing the company's plans to go private by effectuating a 1-for-2,000 reverse stock split so as to reduce the number of record holders and allow the company to deregister. Houlihan resides in Allendale, New Jersey.

Issuer

5. First Physicians Capital Group, Inc. ("FPCG") is a Delaware company whose principal executive offices are located in California. FPCG's business is to provide management, financial, and ancillary healthcare and IT services to the rural and community hospital market. FPCG's common stock was at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the OTCBB with the ticker FPCG. However, after filing a Form 10-Q on February 22, 2011, FPCG failed to file quarterly or annual reports with the Commission until April 2014. FPCG also failed to file any reports on Form 8-K after September 2011 and before December 2013. In order to deregister and go private, FPCG became current in its filings on April 4, 2014. Then, on June 20, 2014, the Company filed a preliminary proxy statement on Schedule 14A and, jointly with Respondent and others, a Schedule 13E-3, disclosing its plans to go private by conducting a reverse stock split and deregistering its securities. On October 15, 2014, FPCG's shareholders approved the reverse stock split of the company's common stock, which would permit FPCG to deregister and cease to be a public company. On October 27, 2014, FPCG filed a final amendment to its Schedule 13E-3 announcing the completion of the going private transaction. On December 19, 2014, FPCG filed Form 15-12G terminating its securities registration.

Legal Framework

6. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

7. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

8. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in

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[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means "any person who is deemed a beneficial owner pursuant to [S]ection 13(d) of the [Exchange] Act and the rules thereunder."[4]

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. Insiders must subsequently file Form 4 reports whenever they engage in transactions that result in a change in beneficial ownership. Such disclosures on Form 4 must be made within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

12. There is no state of mind requirement for violations of Section 16(a) and 13(d) and the rules thereunder.[5] The failure to timely file a required report, even if inadvertent, constitutes a violation.[6]

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[4] *See* Rule 16a-1(a)(1). This determination of beneficial ownership, though, does not apply to persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers. Such persons are not deemed the beneficial owner of any securities held by the qualified institution "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business ... as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

[5] *See Lexington Resources Inc., et al.*, 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (initial decision) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]"); *Robert G. Weeks, et al.*, 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 4, 2002) (initial decision) ("No showing of scienter is required to prove violations of these reporting provisions"); *see also Savoy Indus.*, 587 F.2d at 1167 ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but

Respondent's Failure to Report Material Change to Plans or Proposals for FPCG

13. As a greater than 5% beneficial owner of FPCG common stock, Respondent was subject to the reporting requirements of Exchange Act Section 13(d).

14. Respondent filed his initial Schedule 13D on December 7, 2009, at which time he stated, under Item 4, that he "does not have any plans or proposals which relate to or would result in ... any extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the Issuer or any of its subsidiaries" or in "a class of equity securities of the Issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the Securities Exchange Act of 1934," or in "any action similar."

15. Respondent made no amendments to his Schedule 13D Item 4 disclosure until June 20, 2014.

16. However, as FPCG and Respondent disclosed in their amended Schedule 13E-3 and the company's definitive proxy statement on Schedule 14A, both filed on September 15, 2014, Respondent and FPCG began considering a going-private transaction in early 2011. Between 2011 and 2014, Respondent continued to have discussions with other FPCG insiders regarding the advisability of and the reasons for undertaking a going private transaction.

17. Between January 2014 and June 2014, Respondent took a series of steps in furtherance of undertaking a going-private transaction involving FPCG. In January, for example, Respondent, as an affiliate who was ultimately engaged in the Rule 13e-3 transaction and was a signatory to the disclosures in the Schedule 13E-3, requested that management engage outside counsel to consider the process and costs of going private. Respondent also discussed engaging an independent financial advisor to give an opinion regarding the fairness of the reverse stock split transaction. In February, Respondent agreed that the reverse stock split transaction was the most desirable alternative for taking the company private and decided that management should make recommendations as to the specific terms. In March, Respondent reviewed and discussed an independent valuation proposal as part of the going private effort and reverse stock split. Between May and June 2014, Respondent participated in a number of Board meetings, which discussed

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rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

[6] *Cf. Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) (Commission opinion) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation"); *see generally Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, SEC Release No. 34-47809 (May 7, 2003) (noting that an issuer's eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders "does not change the fact that *any* Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)") (emphasis added); *Herbert Moskowitz*, 77 SEC Docket 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (Commission opinion) ("evidence of both motive for non-disclosure and actual market impact ... is irrelevant" to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

valuation issues, ratio stock split analyses, public company cost estimates, and the preliminary proxy statement.

18. Respondent's amended Schedule 13D, later filed on June 20, 2014, moreover, acknowledged that the date of event requiring the filing of the amendment was January 1, 2014. Given this acknowledgement and the series of steps initiated in January 2014 in furtherance of undertaking a going private transaction—an extraordinary corporate transaction that triggers a separate filing obligation—Respondent's Item 4 disclosure in his prior Schedule 13D had materially changed by no later than the end of January 2014.

19. Notwithstanding these facts, Respondent did not file promptly an amendment to his Schedule 13D Item 4 disclosure and instead filed one approximately five months later on June 20, 2014. The amended Schedule 13D Item 4 disclosure stated, "Mr. Houlihan is evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act. As of the date of this Statement, the Issuer has approximately 355 record stockholders, a significant portion of which hold small positions in the Issuer's Common Stock. Mr. Houlihan intends to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration."

Respondent's Failure to Amend Schedule 13D to Report Later Acquisition of FPCG Shares

20. In his initial Schedule 13D filed on December 7, 2009, Respondent reported beneficial ownership of 1,100,000 shares of FPCG, representing 8.1% of the class.

21. Respondent made no further amendments to his Schedule 13D until June 20, 2014. At that time, Respondent filed an amendment to his Schedule 13D, disclosing beneficial ownership of 2,290,400 shares of FPCG stock, representing 10.6% of the class (based on 19,659,507 shares outstanding), and the acquisition of common stock warrants for 1,190,400 shares of common stock on January 1, 2014. This transaction was reported more than five months late.

Respondent's Failure to Timely File Required Section 16(a) Reports

22. As a Director and greater than 10% beneficial owner of FPCG's common stock, Respondent was subject to the reporting requirements of Exchange Act Section 16(a). Respondent filed an initial statement of beneficial ownership on Form 3 on December 7, 2009.

23. On June 20, 2014, Respondent filed his first Form 4 related to his beneficial ownership of FPCG securities and disclosed the acquisition of common stock warrants for 1,190,400 shares of common stock on January 1, 2014. This transaction was required to be disclosed within two business days, but was instead more than five months late.

Violations

24. As a result of the conduct described above, Respondent violated Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder.

Respondent's Cooperation

25. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to 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 21C of the Exchange Act, Respondent William A. Houlihan shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder;

B. Respondent William A. Houlihan shall within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of $15,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

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) 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 William A. Houlihan 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 Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74501 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16439

In the Matter of **Jane G. Ciabattoni** **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 Jane G. Ciabattoni ("Ciabattoni" or "Respondent").

II.

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

III.

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

Summary

1. These proceedings arise out of violations of the beneficial ownership reporting requirements of the federal securities laws. Section 13(d) of the Exchange Act, and the rules promulgated thereunder, require the filing of a Schedule 13D, commonly referred to as a "beneficial ownership report," when a person or group of persons acting together for the purpose of acquiring, holding, or disposing of securities, directly or indirectly acquires beneficial ownership of more than 5% of a voting class of a company's equity securities. Timely disclosure of beneficial ownership, and intentions regarding the equity securities held, substantially contribute to the pool of material information available to inform investment and voting decisions. Section 13(d)(2) and Rule 13d-2(a) thereunder also require the filing of amendments to Schedule 13D whenever there is a material change in the facts contained in the Schedule 13D.

2. Section 16(a) of the Exchange Act and the rules promulgated thereunder require officers and directors of a company with a registered class of equity securities, and any beneficial owners of greater than 10% of such class, to file certain reports of securities holdings and transactions. Section 16(a) was motivated by a belief that "the most potent weapon against the abuse of insider information is full and prompt publicity" and by a desire "to give investors an idea of the purchases and sales by insiders which may in turn indicate their private opinion as to the prospects of the company." H.R. Rep. 73-1383, at 13, 24 (1934). Reflecting this informational purpose, the obligation to file applies irrespective of profits or the filer's reasons for engaging in the transactions. The Sarbanes-Oxley Act of 2002 and Commission implementing regulations accelerated the reporting deadline for most transactions to two business days and mandated that all reports be filed electronically on EDGAR and posted on the company's website to facilitate rapid dissemination to the public.

3. Ciabattoni failed to file on a timely basis multiple required Schedule 13D amendments and Section 16(a) reports relating to his beneficial ownership of securities of First Physicians Capital Group, Inc. ("FPCG"). As of at least January 2014, Respondent took a series of steps to take FPCG private, an extraordinary corporate transaction that triggers a reporting obligation. Respondent, however, failed to file an amendment to her Schedule 13D Item 4 disclosure until June 20, 2014. At that time, Respondent finally reported that she was "evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act" and that her "inten[t]" was "to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration." Also, between February 6,

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

2010 and April 7, 2014, Respondent engaged in twelve transactions acquiring or disposing of her beneficial ownership of FPCG securities, but did not report any of these transactions on a Form 4 or Schedule 13D amendment until June 20, 2014.

Respondent

4. Jane G. Ciabattoni, age 70, is a beneficial owner of FPCG shares directly owned by The Ciabattoni Living Trust dated August 17, 2000 ("the Trust"), a family trust that she and her husband Anthony J. Ciabattoni created by agreement on August 17, 2000, and for which both are grantors and trustees. Both she and her husband, as trustees of the Trust, have shared power to vote and dispose of the FPCG shares held by the Trust. As of June 2014, the Trust, Respondent and Mr. Ciabattoni reported beneficial ownership of 10,270,400 shares of FPCG, representing approximately 39% of the class. On June 20, 2014, Ciabattoni filed a Schedule 13E-3 jointly with other insiders of FPCG disclosing the company's plans to go private by effectuating a 1-for-2,000 reverse stock split so as to reduce the number of record shareholders and allow the company to deregister. Ciabattoni is a resident of Laguna Beach, California, and is not employed.

Issuer

5. First Physicians Capital Group, Inc. ("FPCG") is a Delaware company whose principal executive offices are located in California. FPCG's business is to provide management, financial, and ancillary healthcare and IT services to the rural and community hospital market. FPCG's common stock was at all relevant times registered with the Commission under Section 12 of the Exchange Act and traded on the OTCBB with the ticker FPCG. However, after filing a Form 10-Q on February 22, 2011, FPCG failed to file quarterly or annual reports with the Commission until April 2014. FPCG also failed to file any reports on Form 8-K after September 2011 and before December 2013. In order to deregister and go private, FPCG became current in its filings on April 4, 2014. Then, on June 20, 2014, the Company filed a preliminary proxy statement on Schedule 14A and, jointly with Respondent and others, a Schedule 13E-3, disclosing its plans to go private by conducting a reverse stock split and deregistering its securities. On October 15, 2014, FPCG's shareholders approved the reverse stock split of the company's common stock, which would permit FPCG to deregister and cease to be a public company. On October 27, 2014, FPCG filed a final amendment to its Schedule 13E-3 announcing the completion of the going private transaction. On December 19, 2014, FPCG filed Form 15-12G terminating its securities registration.

Legal Framework

6. Section 13(d)(1) of the Exchange Act and Rule 13d-1(a) thereunder together require any person or group who has acquired, directly or indirectly, beneficial ownership of more than five percent of a class of a registered equity security to file a statement with the Commission disclosing the identity of its members and the purpose of its acquisition. *See generally GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). Entities or individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D with the

Commission no later than ten business days after they accumulate beneficial ownership of more than five percent of the class of equity security.

7. Schedule 13D requires disclosure of, among other things: (1) the identity of the acquirer, including beneficial owners;[2] (2) a description of the purpose(s) of the acquisition, including any plans (i) to affect the issuer's Board of Directors or (ii) to cause an extraordinary corporate transaction, such as a merger, reorganization, or going-private transaction; and (3) the interest of all persons making the filing, including those acting together as a group. A duty to file under Section 13(d) of the Exchange Act and Rule 13d-1 creates the duty to file truthfully and completely. *SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). Scienter is not required to establish a violation of Section 13(d). *Id.* at 1167; *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

8. Exchange Act Rule 13d-101, which sets forth reportable items covered in a Schedule 13D disclosure, requires filers to disclose "the purpose or purposes of the acquisition of securities of the issuer" in the Item 4 disclosure. Exchange Act Rule 13d-101 further provides a list of plans or proposals that a reporting person may have that would trigger an Item 4 reporting obligation, including additional purchases of securities or a going-private transaction by a public company.[3] Specifically, the Rule provides that any plan or proposal that relates to the "acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer [subpart (a)]" or "[c]ausing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association [subpart (h)]" or "[a] class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the [Exchange] Act [subpart (i)]" is a required disclosure under Item 4 of the Schedule 13D. A disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer. *SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cir. 2014).

9. Section 13(d)(2) of the Exchange Act and Rule 13d-2(a) together require a filer to promptly amend Schedule 13D when there are material changes or developments in the

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[2] Whether a person is a "beneficial owner," a term that is not defined under Section 13(d) of the Exchange Act, is determined through the application of Rule 13d-3, which broadly includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise" has or shares voting or investment power with respect to a registered equity security. *See* Rule 13d-3(a); *see also SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221 (D.C. Cir. 1989). More than one person may be a beneficial owner of the same securities. Because beneficial ownership includes persons who have both direct and indirect, as well as shared, voting and investment power, beneficial ownership by an entity is ordinarily also attributable to a control person of an entity and any parent company in a control relationship with such entity. *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 WL 7449, at *7-8 (Jan. 12, 1998).

[3] *See* Rule 13d-101 (Item 4). Generally, when an issuer becomes eligible to deregister under Section 12 or suspend periodic reporting under Section 15(d) with respect to a class of its equity securities in a transaction conducted by an affiliate of the issuer, the transaction type is defined as "going private" under Exchange Act Rule 13e-3(a)(3). *See* Rule 13e-3(a)(3) (defining a "going private" transaction).

information previously reported. Rule 13d-2(a) provides that a one percent or larger change in beneficial ownership is a *per se* material change. Qualitative disclosures providing narrative in response to line item requirements of Rule 13d-101 also are subject to material changes. For example, generic disclosure that indicates the beneficial owner is reserving the right to engage in any of the kinds of transactions enumerated in Item 4 (a)-(j) of Exchange Act Rule 13d-101 must be amended when a plan with respect to a disclosable matter has been formulated. *See In the Matter of Tracinda Corp.*, Rel. No. 34-58451, 2008 SEC LEXIS 3036 (Sept. 3, 2008) (settled order). Depending on the facts and circumstances, however, an amendment also may be required before a plan has been formulated because the obligation to revise arises under Section 13(d)(2) and corresponding Rule 13d-2(a) promptly after a "material change occurs in the facts set forth in the" Schedule 13D.

10. Section 16(a) of the Exchange Act and the rules promulgated thereunder apply to every person who is the beneficial owner of more than 10% of any class of any equity security registered pursuant to Section 12 of the Exchange Act, and any officer or director of the issuer of any such security (collectively, "insiders"). For purposes of determining status as a greater than 10% beneficial owner under Section 16(a), the term means "any person who is deemed a beneficial owner pursuant to [S]ection 13(d) of the [Exchange] Act and the rules thereunder."[4]

11. Pursuant to Section 16(a) and Rule 16a-3, insiders are required to file initial statements of holdings on Form 3 and keep this information current by reporting transactions on Forms 4 and 5. Specifically, within 10 days after becoming an insider, or on or before the effective date of Section 12 registration of the class of equity security, an insider must file a Form 3 report disclosing his or her beneficial ownership of all securities of the issuer. Insiders must subsequently file Form 4 reports whenever they engage in transactions that result in a change in beneficial ownership. Such disclosures on Form 4 must be made within two business days following the execution date of the transaction, except for limited types of transactions eligible for deferred reporting. Transactions required to be reported on Form 4 include purchases and sales of securities, exercises and conversions of derivative securities, and grants or awards of securities from the issuer. In addition, insiders are required to file an annual statement on Form 5 within 45 days after the issuer's fiscal year-end to report any transactions or holdings that should have been, but were not, reported on Form 3 or 4 during the issuer's most recent fiscal year and any transactions eligible for deferred reporting (unless the corporate insider has previously reported all such transactions).

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[4] *See* Rule 16a-1(a)(1). This determination of beneficial ownership, though, does not apply to persons eligible as Qualified Institution 13G Filers or Qualified Control Person 13G Filers. Such persons are not deemed the beneficial owner of any securities held by the qualified institution "for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business … as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

12. There is no state of mind requirement for violations of Section 16(a) and 13(d) and the rules thereunder.[5] The failure to timely file a required report, even if inadvertent, constitutes a violation.[6]

<u>Respondent's Failure to Report Material Change to Plans or Proposals for FPCG</u>

13. As a greater than 5% beneficial owner of FPCG common stock, Respondent was subject to the reporting requirements of Exchange Act Section 13(d).

14. Respondent filed her initial Schedule 13D on November 8, 2007 and subsequently filed four amendments between April 24, 2008 and February 25, 2009. In her fourth amendment to Schedule 13D, Item 4 disclosure, filed on February 25, 2009, Respondent stated that the acquisition of securities beneficially owned was for "investment purposes" and that she "do[es] not have any present plans or proposals that relate to or would result in any of the actions required to be disclosed in Item 4 of Schedule 13D." Respondent further stated that she had "no present intention of" reviewing or reconsidering her "position with respect to the Issuer" or formulating any such "plans or proposals."

15. Respondent made no further amendments to her Schedule 13D Item 4 disclosures over the next five years.

16. However, as FPCG and Respondent disclosed in their amended Schedule 13E-3 and the company's definitive proxy statement on Schedule 14A, both filed on September 15, 2014, the Trust and FPCG began considering a going-private transaction in early 2011, and continued to have discussions with FPCG regarding the advisability of and the reasons for undertaking a going private transaction through 2014.

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[5] *See Lexington Resources Inc., et al.*, 96 SEC Docket 229, 2009 WL 1684743, at *17-18 (June 5, 2009) (initial decision) ("A finding of scienter is not required to demonstrate a violation of either [Section 13(d) or 16(a)]"); *Robert G. Weeks, et al.*, 76 SEC Docket 2609, 2002 WL 169185, at *50 (Feb. 4, 2002) (initial decision) ("No showing of scienter is required to prove violations of these reporting provisions"); *see also Savoy Indus.*, 587 F.2d at 1167 ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct.").

[6] *Cf. Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) (Commission opinion) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation"); *see generally Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, SEC Release No. 34-47809 (May 7, 2003) (noting that an issuer's eligibility for temporary relief from disclosing Forms 4 filed one business day late by its insiders "does not change the fact that *any* Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)") (emphasis added); *Herbert Moskowitz*, 77 SEC Docket 446, 2002 WL 434524, at *7 (Mar. 21, 2002) (Commission opinion) ("evidence of both motive for non-disclosure and actual market impact … is irrelevant" to whether violations of Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder occurred).

17. By January 2014, Respondent took a series of steps in furtherance of undertaking a going-private transaction involving FPCG. Specifically, Respondent, by and through her husband as co-trustee of the Trust, informed FPCG management that the Trust would support going private and assisted FPCG in that effort, including by securing waivers from certain shareholders to remove a registration requirement on certain FPCG preferred stock. Thus, by no later than January 2014, Respondent's "intention" as previously disclosed in Item 4 of her Schedule 13D had materially changed, and she was required to disclose *at that time* that she and the Trust had taken steps in support of a going private transaction.

18. Between February 2014 and June 2014, Respondent, by and through her husband as co-trustee, took additional steps towards taking the company private through a reverse stock split transaction, including: (a) by March 2014, discussing with FPCG officers and directors the fractional share repurchase and reverse stock split transaction and a proposal from a third party to conduct related valuation work; (b) receiving information about Board meetings discussing valuation issues, ratio stock split analyses, public company cost estimates, and the preliminary proxy statement; and (c) in May 2014, assisting FPCG with shareholder vote projections on the reverse stock split and going private transaction.

19. Notwithstanding these facts, including Respondent's steps in support of taking FPCG private as early as January 2014—an extraordinary corporate transaction that triggers a reporting obligation—Respondent did not file an amendment to her Schedule 13D Item 4 disclosure until five months later, on June 20, 2014. The amended Schedule 13D Item 4 disclosure, jointly filed by Respondent, her husband Anthony J. Ciabattoni, and the Trust on June 20, 2014, stated, "The Reporting Persons are evaluating potential transactions that could allow the Issuer to become eligible to terminate its registration under Section 12(g)(4) of the Act. As of the date of this Statement, the Issuer has approximately 355 record stockholders, a significant portion of which hold small positions in the Issuer's Common Stock. The Reporting Persons intend to support a reverse stock split by the Issuer, which would result in the Issuer having fewer than 300 stockholders of record and becoming eligible to terminate the Issuer's registration."

Respondent's Failure to Amend Schedule 13D to Report Later Acquisition of FPCG Shares

20. In her fourth amendment to Schedule 13D filed on February 25, 2009, Respondent disclosed beneficial ownership of 8,385,000 shares of FPCG stock, which constituted 44.82% of the class (based on 10,322,922 shares outstanding).

21. Although she continued to acquire or dispose of beneficial ownership of FPCG stock, Respondent made no further amendments to her Schedule 13D over the next five years.

22. On June 20, 2014, Respondent filed a fifth amendment to her Schedule 13D, disclosing beneficial ownership of 10,270,400 shares of FPCG stock, which constituted 38.95% of the class (based on 19,659,507 shares outstanding), and twelve transactions in the stock occurring between February 6, 2010 and April 7, 2014. Respondent had not previously disclosed these transactions, each of which was required to be reported months to years prior to June 20, 2014.

Respondent's Failure to Timely File Required Section 16(a) Reports

23. As a greater than 10% beneficial owner of FPCG's common stock, Respondent was subject to the reporting requirements of Exchange Act Section 16(a). Respondent filed an initial statement of beneficial ownership on Form 3 on November 8, 2007.

24. Respondent subsequently filed several Form 4 reports between November 2007 and February 13, 2009. Respondent did not file Form 4 or Form 5 reports after February 2009 for over five years, even though Respondent continued to acquire and dispose of FPCG stock or derivative securities.

25. On June 20, 2014, Respondent finally filed a Form 4 disclosing twelve transactions in FPCG stock that occurred between February 6, 2010 and April 7, 2014. Each of these transactions was required to be disclosed within two business days of their occurrence. When Respondent finally disclosed the transactions on June 20, 2014, the disclosures were months to many years late.

Violations

26. As a result of the conduct described above, Respondent violated Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder.

Respondent's Cooperation

27. In determining to accept the Offer, the Commission considered the cooperation Respondent provided to 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 21C of the Exchange Act, Respondent Jane G. Ciabattoni shall cease and desist from committing or causing any violations and any future violations of Sections 13(d)(2) and 16(a) of the Exchange Act and Rules 13d-2 and 16a-3 thereunder;

B. Respondent Jane G. Ciabattoni shall, within fourteen (14) days of the entry of this Order and on a joint and several basis with The Ciabattoni Living Trust Dated August 17, 2000, and with Anthony J. Ciabattoni, pay a civil money penalty in the amount of $75,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

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) 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 Jane G. Ciabattoni 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 Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74510 / March 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16443

In the Matter of **ROBERT J. ANDRES, ESQ.,** **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 Robert J. Andres ("Andres") 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. Andres is an attorney, whom the State of Texas admitted to practice law in 1983.

2. On December 18, 2014, a judgment of conviction was entered against Andres in *United States v. Andres*, No. 2:11-CR-00985-RJS, in the United States District Court for the District of Utah, finding him guilty of one count of wire fraud in violation of 18 USC § 1343. In his statement to the Court in advance of his guilty plea, Andres acknowledged that he "recruited investors to invest in a trading operation" and "fraudulently obtained millions of dollars from investors." Andres further admitted that he disseminated false balance sheets to investors and

[1] Rule 102(e)(2) provides in pertinent part: "Any attorney who has been suspended or disbarred by a court of the United States or of any State; . . . or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission." See 17 C.F.R. 201.102(e)(2).

failed to disclose that new investors' funds would be partially used to make distributions to earlier investors. Finally, Andres acknowledged that he used more than $2.2 million of investor funds for personal use and invested $1.2 million in unauthorized investments and other investment schemes.

3. As a result of this conviction, Andres was sentenced to fifty-six months in prison, three years of probation and ordered to pay restitution in the amount of $3,291,310.39.

III.

In view of the foregoing, the Commission finds that Andres 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 Robert J. Andres 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.

Brent J. Fields
Secretary

Jill M. Peterson

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. 4049 / March 16, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31504 / March 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16444

In the Matter of

JOSEPH STILWELL and
STILWELL VALUE LLC,

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, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 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 Joseph Stilwell ("J. Stilwell") and Stilwell Value LLC ("Stilwell Value" and, together with J. Stilwell, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents 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, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, 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 Respondents' Offers, the Commission finds that:

Summary

1. These proceedings arise out of the failure of an investment adviser and its principal to adequately disclose conflicts of interest presented by inter-fund loans made between certain private funds (the "Stilwell Funds" or the "Funds") managed by the adviser and principal. From at least 2003 to 2013, Respondents directed certain Stilwell Funds to make a series of loans totaling approximately $20 million to other Stilwell Funds to help finance significant aspects of the borrowing Funds' investment strategies, e.g., to purchase securities and repay margin. All of the loans were repaid; however, Respondents did not adequately disclose to client Funds or to the investors in the Funds the existence and terms of the loans, as well as the conflicts of interest arising from such loans.

Respondents

2. **J. Stilwell**, age 53 and a resident of New York, New York, is the principal, owner and Managing Member of Stilwell Value, which J. Stilwell founded in 1993. J. Stilwell owns approximately 99% of Stilwell Value.

3. **Stilwell Value** is an investment adviser with its principal place of business in New York, New York. Stilwell Value registered with the Commission as an investment adviser in March 2012.

Other Entities

4. **The Stilwell Funds** are Delaware limited partnerships and private funds. The Stilwell Funds are Stilwell Associates, L.P. ("Associates"), Stilwell Partners, L.P. ("Partners"), Stilwell Value Partners I, L.P. ("SVP-I"), Stilwell Value Partners II, L.P. ("SVP-II"), Stilwell Value Partners III, L.P. ("SVP-III"), Stilwell Value Partners IV, L.P. ("SVP-IV"), Stilwell Value Partners V, L.P. ("SVP-V") and Stilwell Value Partners VI, L.P. ("SVP-VI", and together with SVP-I, SVP-II, SVP-III, SVP-IV and SVP-V, the "Value Partnerships"). At all relevant times, J. Stilwell was the general partner of Partners, while Stilwell Value was the general partner of Associates and the Value Partnerships.

Background

5. The Stilwell Funds' offering memoranda and limited partnership agreements did not provide expressly that the Funds would make inter-Fund loans, nor did they describe the potential or actual conflicts of interest associated with such loans. Respondents J. Stilwell and Stilwell Value were responsible for the Funds' investment decisions and for administering the affairs of the Funds, including whether and how to make disclosures (including the Funds' financial statements) to investors. In addition, at all relevant times until approximately September

2012, J. Stilwell had sole signatory authority over all of the Stilwell Funds' bank and brokerage accounts.

6. At all relevant times, Respondents were responsible for preparing, authorizing, and disseminating the Stilwell Funds' audited financial statements. The statements for a given year were finalized in approximately the summer of the following year. From 2004, the Value Partnerships' annual financial statements were audited by the Funds' auditor ("First Auditor"). Between fiscal years 2010 and 2011, Respondents transitioned the Funds' audits to a new auditor (the "Second Auditor"). The Funds' audited financial statements state that Stilwell Value (or, in the case of Stilwell Partners, J. Stilwell) is responsible for the content of the audited financial statements.

7. Certain of the Funds' offering documents stated that "investors in the Partnership will receive an annual financial statement compiled by the Partnership's accountants." However, prior to at least October 2012, Respondents did not send the Stilwell Funds' audited financial statements to investors as a matter of course. Rather, Respondents provided the Funds' audited financials to investors only upon request, however, very few of the Stilwell Funds' investors actually requested audited financial statements.

The Undocumented Loans

8. From at least 2003 through mid-2010, on at least eight occasions, Respondents caused certain Stilwell Funds—including Associates, Partners, SVP-II, and SVP-VI—to lend or transfer more than $11 million to certain other Stilwell Funds. The borrower Funds used these proceeds to, among other things, acquire securities.

9. While these loans were generally of a relatively short duration—lasting from a period of days to six months—none were documented and no terms (such as interest or maturity) were established at the time they were made. Instead, Respondents directed the borrower Fund to repay each loan and determined the interest rate after the fact and at Respondents' discretion.

10. These loans presented potential or actual conflicts of interest because Respondents were solely responsible for (a) directing the lender Funds to make the loans, (b) determining their terms, and (c) determining when and whether the borrower Funds repaid those loans. Moreover, because there was no documentation concerning the loans, the lender Funds were exposed to the risk that they would have no recourse should the borrower Funds default. Nonetheless, with one exception, no disclosure was ever made to the Funds (e.g., to an independent representative of the fund) or the Funds' investors concerning these inter-Fund loans or the conflicts of interest arising from them.

11. The only disclosure concerning the undocumented loans concerned a $2 million loan from Partners to SVP-IV, which occurred in November 2006 and was repaid with interest in March 2007. That loan was disclosed in Partners' 2006 audited financial statements, which were finalized in July 2007. However, this disclosure was inadequate because (a) few of Partners' investors actually received the audited financial statements, which Respondents knew; and (b) the loan had been made eight months before the disclosures in the financial statements. Thus,

investors (even those who requested and received the financial statements) were not informed of the conflicts at the time they arose.

The Public Company Loans

12. Starting in 2008, Respondents—acting for J. Stilwell's own account and through SVP-III and Associates—began accumulating stock in a public company ("Public Company") to gain influence over the company's management. By the end of 2008, SVP-III held more than 5% of the Public Company's common stock and Respondents, through all of their holdings, held nearly 10% of the Public Company's common stock. In addition, by April 2009, J. Stilwell personally held over $1 million worth of Public Company stock.

13. By 2009, Public Company stock comprised virtually the entirety of SVP-III's assets. SVP-III was, thus, unable to generate liquidity without selling its Public Company holdings, something that Respondents did not want to do because they believed that doing so would have caused losses for SVP-III's investors and jeopardized Respondents' ability to maintain an influential position in the Public Company.

14. However, in 2008 and 2009, SVP-III needed cash in order (a) to acquire or maintain its position in Public Company stock; (b) to repay margin loans it had taken to acquire Public Company stock; and (c) to repay a prior loan from Associates (a fund in which J. Stilwell owned an approximate 24% interest). Respondents, therefore, directed Associates, SVP-I, and SVP-IV to make a series of loans totaling approximately $7.8 million to SVP-III from late 2008 through 2009. When SVP-III was unable to pay interest or principal on these loans, Respondents either directed SVP-III to borrow from other Stilwell Funds or allowed SVP-III to default, without adequately disclosing these borrowing arrangements, the defaults, or Respondent J. Stilwell's personal interest in the transactions to the Funds or the Funds' investors.

15. Certain of the Funds' audited financial statements contained limited disclosures, described below, which were drafted by Stilwell Value's outside accountant (the "Accountant") and reviewed by J. Stilwell. However, those disclosures were inadequate to inform the Funds or the Funds' investors of the conflicts of interest posed by the Public Company loans.

November 2008: SVP-IV Lends $1.2 Million to SVP-III

16. From November 6 - 21, 2008, Respondents directed SVP-IV to lend $1.2 million to SVP-III. SVP-III used that money to buy Public Company stock and/or to repay a margin loan from a broker, which also had been used to acquire Public Company stock. SVP-IV's $1.2 million loan was undocumented. Because no promissory note, guarantee or collateral agreement was ever executed for this loan, SVP-IV was exposed to the risk that it would have no recourse should SVP-III default. No disclosures were made to the investors or the SVP-IV concerning this loan. On December 31, 2008, Respondents directed SVP-III to repay the $1.2 million loan, along with $10,225 in interest. SVP-III repaid the $1.2 million to SVP-IV by borrowing on margin from one of its prime brokers. The $1.2 million loan represented over 7.5% of SVP-IV's total assets.

January 29, 2009: Associates Lends $3 Million to SVP-III

17. By December 31, 2008, SVP-III had an outstanding margin loan from its prime broker of approximately $3 million, comprised of the $1.2 million used to repay SVP-IV and additional purchases of Public Company stock.

18. On January 29, 2009, Respondents caused Associates to lend $3 million to SVP-III in order to repay this loan without having to liquidate any of its Public Company holdings. This loan and the $1.2 million loan discussed above allowed Respondents (a) to avoid selling any of SVP-III's Public Company holdings to repay the margin loan; and (b) to purchase additional Public Company shares. Respondents did not contemporaneously document this loan, determine its terms, or disclose it to Associates' investors or Associates itself.

19. In connection with the audit for the year ended December 31, 2008, in approximately June 2009, Respondents directed their regular outside counsel (the "Attorney") to prepare a promissory note to memorialize the loan. In approximately July 2009, J. Stilwell signed a promissory note prepared by the Attorney and dated January 29, 2009. Per the terms of that note:

a. The loan had no fixed maturity date; rather, Respondents had discretion to determine when to require SVP-III to repay the loan to Associates;

b. SVP-III was to pay interest of 6% annually; and

c. The failure of SVP-III timely to pay interest constituted an "Event of Default," rendering all outstanding principal and interest immediately due.

20. At approximately the same time, J. Stilwell also signed a personal guarantee for the loan, by which he unconditionally guaranteed to the lender Fund the payment of principal and interest on the promissory note, in accordance with its terms.

21. This loan, as with the prior inter-Fund loans, presented conflicts of interest because (a) Respondents, as both Funds' advisers, had potentially differing interests in determining when to repay the loan; and (b) J. Stilwell had an incentive not to exercise the personal guarantee. In addition, this loan presented a conflict of interest because J. Stilwell personally owned Public Company stock and served on the Public Company's board of directors. Respondents did not seek or obtain advice from the Attorney concerning their obligations to disclose the inter-Fund loans or conflicts of interest to investors or the Funds.

22. On or about July 23, 2009, Associates' 2008 audited financial statements were finalized. Those statements disclosed that Associates had loaned $3,000,000 to SVP-III in February 2009 with a 6% annual interest rate, that Associates and the borrower Fund were both part of a joint filing group attempting to influence the Public Company and that J. Stilwell had personally guaranteed the loan.

23. Respondents did not issue the 2008 audited financial statements for Associates until seven months after Respondents had made the loan. In addition, few of the investors actually received the audited financial statements, as Respondents knew.

September 2009: SVP-I Lends $3.125 Million to SVP-III
<u>November 2009: SVP-IV Lends $500,000 to SVP-III</u>

24. In September 2009, Respondents caused SVP-I to repay (indirectly) SVP-III's $3 million debt to Associates. Specifically, on September 11, 2009, Respondents directed SVP-I to lend $3,125,000 to SVP-III and, then, directed SVP-III to use this money to repay the loan to Associates, along with $111,452 in interest.

25. In November 2009, Respondents then caused SVP-IV to lend $500,000 to SVP-III. SVP-III used this money to repay part of its $3.125 million debt to SVP-I. SVP-I, in turn, used the $500,000 to pay investor redemptions and to pay Stilwell Value an approximately $85,000 performance fee. These loans represented over 21% of SVP-I's and 4% of SVP-IV's total assets, respectively.

26. Again, these loans presented conflicts of interest, which Respondents failed to disclose to the Funds or to the investors in the Funds. Those conflicts were, as follows:

a. That SVP-III had virtually no assets other than its Public Company stock and, thus, was unlikely to be able to repay principal or interest in the near future without selling that stock at a loss; and

b. That in repaying Associates, Respondents paid back a loan to a Fund in which J. Stilwell owned an approximately 24% interest, from a Fund in which he owned virtually no interest.

27. The $3.625 million SVP-I and SVP-IV loans were documented in summer 2010. In late June 2010, the Attorney drafted new promissory notes and personal guarantees by J. Stilwell concerning the SVP-I and SVP-IV loans. The terms of these loans were essentially identical to the Associates' loan described above. The promissory notes and guarantees, signed by J. Stilwell in approximately June 2010, provided that (a) SVP-III owed interest payments to SVP-I and SVP-IV annually on September 11 and November 2, respectively; and (b) that the failure by SVP-III to make any payments when due constituted an "Event of Default," rendering all outstanding principal and interest immediately due and triggering J. Stilwell's personal guarantees in the event that SVP-III could not pay.

28. SVP-I's 2009 audited financial statements were finalized on or about July 15, 2010. That document contained the following concerning the loans:

> The Partnership loaned $3,125,000 in 2009 to [SVP-III]. The General Partner of [SVP-III] is Stilwell Value LLC. The loan provides for interest at 4% per annum and is personally guaranteed by Joseph Stilwell (managing member of Stilwell Value LLC). [SVP-III] repaid in 2009 $497,056 of the loan to [SVP-I] which was received with interest at 4% in the amount of $2,944.

29. SVP-IV's audited financial statements, also dated July 15, 2010, contained substantially similar disclosure concerning its loan to SVP-III.

30. Few of the Funds' investors received the 2009 audited financial statements for SVP-I and SVP-IV, as Respondents knew.

31. SVP-III's 2009 financial statements (dated July15, 2010) contained the following disclosures concerning the loans:

> [SVP-III] received loans during 2009 totaling $6,625,000 from [Associates], [SVP-I], and [SVP-IV]. The general partner of [Associates], [SVP-I], and [SVP-IV] is Stilwell Value LLC. [Associates], [SVP-I], [SVP-IV], and [SVP-III] are part of a joint filing group attempting to influence [Public Company]. The loans provide for interest at 4% and 6% per annum, respectively, and are personally guaranteed by Joseph Stilwell (managing member of Stilwell Value LLC). The loans repaid in 2009 totaled $3,497,056, which were paid with interest at 4% and 6% in the amount of $114,396.

32. Few of the investors received the 2009 financial statements, as Resondents knew.

2010: SVP-III Defaults on its Loans to SVP-I and SVP-IV

33. SVP-III did not make interest payments to SVP-I and SVP-IV on September 11 and November 2, 2010, respectively, per the terms of the promissory notes. J. Stilwell was, therefore, immediately responsible—under the terms of his guarantees—to repay the loans and interest, which he did not do.

34. In addition, in or about late 2010, the Accountant informed J. Stilwell that interest was due and owing on SVP-III's promissory notes and reminded J. Stilwell that such interest had to be paid annually. J. Stilwell told the Accountant (a) that interest was not being paid because SVP-III did not have sufficient cash; and (b) that to liquidate any Public Company stock would jeopardize the Respondents' ability to maintain an influential position in the Public Company.

35. SVP-I's 2010 audited financial statements, dated July 21, 2011, stated that:

> At December 31, 2010, the Partnership had a loan receivable from [SVP-III] in the amount of $2,627,944. The General Partner of [SVP-III] is Stilwell Value LLC. The loan provides for interest at 4% per annum and is personally guaranteed by Joseph Stilwell (managing member of Stilwell Value LLC). No repayment of principal and interest on the loan was received in 2010.

36. SVP-III's and SVP-IV's 2010 audited financial statements included similar disclosures concerning the outstanding loans. Few of the Funds' investors received the 2010 audited financial statements for SVP-I, SVP-III and SVP-IV, as Respondents knew.

37. The financial statements failed to disclose that: (a) SVP-III had defaulted on the loans; or (b) that J. Stilwell had not exercised his personal guarantees.

2011-2012: SVP-III's Defaults Continue

38. SVP-III again failed to pay interest to SVP-I and SVP-IV when due in both 2011 and 2012. In at least 2011, the Accountant again brought this to J. Stilwell's attention. J. Stilwell again made it clear (a) that SVP-III did not have the cash on hand to pay the interest; and (b) that generating such cash by liquidating Public Company stock would jeopardize the Respondents' ability to maintain an influential position in the Public Company.

39. In addition, during the Stilwell Funds' 2011 audits, the Funds' Second Auditor expressed concern that if SVP-I or SVP-IV called the loans, SVP-III would be unable to repay them. Respondents represented in writing to the Second Auditor that "[t]he loans will not be called and there will be no required repayments of any portion of the loans before January 1, 2013." Respondents never disclosed to their Fund clients or the Funds' investors that they had represented to the Second Auditor that they would not call the loans before 2013.

40. SVP-I's, SVP-III's, and SVP-IV's 2011 and 2012 audited financial statements' discussion of the loans were similar to those made in the 2010 audited financials.

Inadequate Disclosures in Monthly Capital Statements Sent to Investors

41. The First Auditor sent certain investors, including investors in SVP-I, SVP-III and SVP-IV, a monthly email summarizing the value of their investments in the Stilwell Funds (the "Monthly Account Emails").

42. Starting in or about Spring 2011, the Monthly Account Emails contained the following disclosure concerning SVP-III's holdings of Public Company stock:

> The Partnership's position was purchased with the use of borrowed funds. The value of the partnership's securities is currently below the amount of borrowed funds. Consequently, the value of your investment is currently shown at zero. As a limited partner, you are not liable for any funds other than your investment. The General Partner has guaranteed the borrowings by the Partnership. If the price of the securities held by the Partnership increases above the amount of the borrowings, your limited partnership interest will have a positive value.

43. This statement failed to disclose that (a) the source of the "borrowed funds" was SVP-I and SVP-IV; (b) SVP-III was in default on its loans; and (c) Respondents had not exercised the guarantees.

Fees Paid By The Lender Funds

44. The lender Funds paid management fees to Stilwell Value. The following represents management fees paid by the lender Funds to Stilwell Value, prorated to reflect the percentage of each loan in the respective lender Fund's portfolio and the length of time that loan was outstanding. Partners paid Stilwell Value $54,360 in management fees in connection with four undocumented loans from 2004 to 2006. SVP-II paid Stilwell Value $6,266 in management

fees in connection with one loan in 2003. Associates paid Stilwell Value $14,303 in management fees in connection with the 2003 loan and two undocumented loans in 2008. SVP-I paid Stilwell Value $92,848 in management fees in connection with the September 2009 loan to SVP-III. SVP-IV paid Stilwell Value $25,579 in management fees in connection with the November 2009 loan and the November 2008 loan.

Stilwell Value Failed to Adopt and Implement Written Policies and Procedures Reasonably Designed to Prevent Violations of the Advisers Act and the Rules Thereunder

45. Stilwell Value's compliance manual—which Stilwell Value adopted in or around April 2012—did not contain policies and procedures sufficient to address the compliance risks posed by the inter-Fund loans, including the mitigation of conflicts of interest arising from the loans and disclosure of such conflicts to the Funds and investors. Stilwell Value failed to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder. J. Stilwellreviewed and approved Stilwell Value's written policies and procedures, which, as he knew, were not reasonably designed to prevent violation of the Advisers Act and the rules thereunder.

Stilwell Value's Form ADV Disclosures Were Inadequate

46. In February and December 2012, respectively, Stilwell Value filed two Forms ADV, Part 2A, with the Commission. Respondent J. Stilwell received and reviewed drafts of these documents.

47. Stilwell Value's 2012 Forms ADV stated that:

> The Adviser may regularly examine its business activities to identify practices that may cause a conflict of interest between the Adviser and its clients, disclose such conflicts of interest to its clients and ensure that the Adviser always acts in the best interests of its clients.

48. Neither of these filings disclosed Stilwell Value's practice of inter-Fund lending, nor did they disclose the potential or actual conflicts of interest presented by such lending.

Violations

49. As a result of the conduct described above, Respondents willfully[1] violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from, directly or indirectly, engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

50. As a result of the conduct described above, Respondents willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit an investment adviser

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

from, directly or indirectly, engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative; and prohibit any investment adviser to a pooled investment vehicle from making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investors or prospective investor in the pooled investment vehicle; or otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

51. As a result of the conduct described above, Respondent Stilwell Value willfully violated, and Respondent J. Stilwell willfully aided and abetted and caused Stilwell Value's violations of, Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and its rules.

52. As a result of the conduct described above, Respondent Stilwell Value willfully violated, and Respondent J. Stilwell willfully aided and abetted and caused Stilwell Value's violations of, 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."

Undertakings

53. Independent Monitor. Respondent Stilwell Value has undertaken:

a. to hire at its own expense, within 30 days of the date of entry of the Order, an Independent Monitor ("IM") not unacceptable to the Commission staff and to retain the IM for a period of three years. Stilwell Value shall require the IM to review and assess, on an ongoing basis during the three-year engagement, the adequacy of Stilwell Value's policies, procedures, controls, recordkeeping and systems relating to: (i) cash management functions; (ii) affiliated transactions; (iii) conflicts of interest; (iv) disclosures regarding affiliated transactions and conflicts of interest; and (v) the distribution of annual audited financial statements of advisory clients to limited partners. Stilwell Value shall provide to the Commission staff a copy of an engagement letter detailing the IM's responsibilities, which includes the Reports described below;

b. to require that, no later than 180 days after being retained by Stilwell Value, the IM conduct a review (the "Review") to assess the adequacy of Stilwell Value's policies, procedures, controls, recordkeeping and systems relating to: (i) cash management functions; (ii) affiliated transactions; (iii) conflicts of interest; (iv) disclosures regarding affiliated transactions and conflicts of interest; and (v) the distribution of annual audited financial statements of advisory clients to limited partners. Within 45 days from the completion of the Review, Stilwell Value will require the IM to submit a written and detailed report to the Commission staff (the "Report") including a description of the monitoring and review performed, the names of the individuals who performed the review, the conclusions reached, and the IM's recommendations for changes or improvements (the "Recommendations");

c. to further require that, every twelve months after the date of the Review through the end of the three-year engagement, the IM submit to the Commission staff a Report describing its review and the adequacy of Stilwell Value's policies, procedures, controls, recordkeeping and systems relating to: (i) cash management functions; (ii) affiliated transactions; (iii) conflicts of interest; (iv) disclosures regarding affiliated transactions and conflicts of interest; and (v) the distribution of annual audited financial statements of advisory clients to limited partners. The Report shall be provided to the Commission staff no later than 45 days following the end of each twelve month review period, and shall include a description of the monitoring and review performed, the names of the individuals who performed the review, the conclusions reached, and the IM's Recommendations;

d. to require that the IM report to the Commission staff any potential irregularities at Stilwell Value or misconduct by the Respondents that the IM becomes aware of during the course of the engagement;

e. to adopt all Recommendations of the IM within 60 days of the Report; provided, however, that within 45 days of the Report, Stilwell Value shall in writing advise the IM and the Commission staff of any Recommendations that it considers to be unnecessary, inappropriate or unduly burdensome. With respect to any Recommendation that Stilwell Value considers to be unnecessary, inappropriate or unduly burdensome, Stilwell Value need not adopt that Recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any Recommendation on which Stilwell Value and the IM do not agree, such parties shall attempt in good faith to reach an agreement within 30 days after Stilwell Value serves the advice described above. In the event that Stilwell Value and the IM are unable to agree on an alternative proposal, Stilwell Value will abide by the determinations of the IM;

f. to certify in writing to the IM and the Commission staff, within 90 days of Stilwell Value's adoption of all of the Recommendations as determined pursuant to the procedures set forth herein, that it has adopted and implemented all of the Recommendations. Unless otherwise directed by the Commission staff, all Reports, certifications and other documents required to be provided to the Commission staff shall be sent to Valerie A. Szczepanik, Assistant Director, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281-1022, or such other person or address as the Commission staff may provide;

g. to cooperate fully with and to provide the IM with access to any of its files, books, records and personnel reasonably requested for review, including those of third-party accounting and/or auditing firms retained by Stilwell Value on behalf of the Stilwell Funds; provided, however, that Stilwell Value need not provide access to materials as to which it may assert a valid claim of attorney-client privilege. Stilwell Value shall not be in, and shall not have any attorney-client relationship with the IM and shall not seek to invoke the attorney-client privilege or any other doctrine or privilege to prevent the IM from transmitting any information, reports or documents to the Commission staff. The IM shall maintain the confidentiality of any materials and information provided by Stilwell Value, except to the extent such materials or information are included in the Reports;

h. to ensure the independence of the IM, such that Stilwell Value: (i) shall not have the authority to terminate the IM or substitute another independent consultant for the IM, without the prior written approval of the Commission staff; and (ii) shall compensate the IM and persons engaged to assist the IM for services rendered pursuant to this Order at their reasonable and customary rates; and

i. to require the IM to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the IM shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Stilwell Value, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the IM 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 IM in performance of his/her duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Stilwell Value, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

54. Payments to Investors and Distribution. Respondent Stilwell Value has undertaken to distribute a total payment in the amount of $239,157 (the "Distribution") in satisfaction of this proceeding and in accordance with Section IV.D below, which represents a proportionate amount of the total management fees paid by the lender Funds to Respondent Stilwell Value, prorated to reflect the percentage of each loan in the respective lender Fund's portfolio and the length of time in which each loan was outstanding plus reasonable interest thereon. Respondent Stilwell Value shall be responsible for administering the payment of the Distribution to the affected Fund investors. Respondent Stilwell Value shall:

a. deposit the amount of the Distribution into a segregated account such as a separate bank account (the "Distribution Account") within 60 days of the entry of the Order and provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff;

b. submit to the Commission staff for its approval, within 90 days of the date of entry of the Order, a disbursement calculation (the "Calculation") that identifies (1) each Fund investor that will receive a portion of the Distribution;[2] (2) the exact amount of that payment as to each Fund investor; and (3) the methodology used to determine the exact amount of that payment as to each Fund investor;

c. complete payment to all affected Fund investors within 60 days of the staff's approval of the Calculation;

d. if Respondent Stilwell Value does not distribute any portion of the Distribution Account, or any portion of the Distribution Account is returned for any reason, including an inability to locate an affected Fund investor or for any reason beyond Respondent's control, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury after the final accounting provided for in this paragraph 54 is approved by the Commission. Commission staff will provide payment instructions upon request;

e. Respondent Stilwell Value agrees to be responsible for all tax compliance responsibilities associated with the Distribution and shall retain any professional services necessary. The costs and expenses of any such professional services shall be borne by Respondent Stilwell Value, and the payment of taxes applicable to the Distribution Account, if any, shall not be paid out of Distribution funds;

f. within 90 days after Respondent Stilwell Value has completed payment of the Distribution, Respondent Stilwell Value shall submit to the Commission staff a final accounting, in a form acceptable to the Commission, and certification of the disposition of the Distribution. The final accounting and certification shall include but not be limited to: (1) the amount paid to each payee; (2) the date of each payment; (3) the check number or other identifier of money transferred or proof of payment made; (4) the date and amount of any returned payment; and (5) a description of any effort to locate a prospective payee whose payment was returned, or to whom payment was not made due to factors beyond Respondent's control. Any and all supporting documentation for the accounting and certification shall be provided to the Commission staff upon request. Respondent Stilwell Value shall cooperate with reasonable requests for information in connection with the accounting and certification; and

g. after Respondent Stilwell Value has submitted the final accounting to the Commission staff, the staff shall submit the final accounting to the Commission

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2 For the purposes of this Order and the Calculation, affected Fund investors shall not include Respondents Stilwell Value and Joseph Stilwell.

for approval, and shall request Commission approval to send any remaining amount to the United States Treasury.

55. Recordkeeping. Stilwell Value has undertaken to preserve for a period of not less than six (6) years from the end of the fiscal year last used any record of Stilwell Value's compliance with the undertakings set forth in this Order.

56. Notice to Advisory Clients and Fund Investors. Stilwell Value has undertaken to provide notice of these proceedings to its clients, fund investors and prospective clients or fund investors as follows:

a. Within thirty (30) days of the date of entry of this Order, Stilwell Value undertakes to revise the Form ADV to disclose the existence of this Order in accordance with such form and its instructions;

b. Within thirty (30) days of the date of entry of this Order, Stilwell Value undertakes to provide a copy of the Order to each of Stilwell Value's existing advisory clients and investors in private funds managed by Stilwell Value as of the date of entry of this Order via mail, email, 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; and

c. Stilwell Value further undertakes, for a period of one year from the date of entry of this Order, to the extent that Respondent Stilwell Value is required to deliver a brochure to a client, fund investor and/or prospective client or fund investor pursuant to Rule 204-3 of the Advisers Act, to provide a copy of this Order to such client and/or prospective client at the same time that Stilwell Value delivers the brochure.

57. Certification of Compliance by Stilwell Value. Respondent Stilwell Value 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 Stilwell Value agrees to provide such evidence. The certification and supporting material shall be submitted to Valerie A. Szczepanik, Assistant Director, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281-1022, or such other person or address as the Commission staff may provide, 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.

58. Affidavit of Compliance by J. Stilwell. Respondent J. Stilwell has undertaken to provide to the Commission staff, within thirty (30) days after the end of the twelve-month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent J. Stilwell agrees to provide such evidence. The affidavit shall be submitted to Valerie A. Szczepanik, Assistant Director, Asset Management Unit, New

York Regional Office, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281-1022, or such other person or address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division.

59. Deadlines. Deadlines for dates shall be counted in calendar days, except that if the last day falls on a weekend or a federal holiday, the next business day shall be considered the last day. The Commission staff may extend any of the procedural dates for good cause shown.

IV.

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

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

A. Respondents J. Stilwell and Stilwell Value cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(4) and 207 of the Advisers Act and Rules 206(4)-7 and 206(4)-8 promulgated thereunder.

B. Respondent Stilwell Value is censured.

C. Respondent J. Stilwell be, and hereby is:

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

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter,

for a period of twelve (12) months, effective on the second Monday following the date of entry of this Order.

D. Respondents shall, within 90 days of the date of entry of this Order, pay disgorgement, which represents management fees as described in paragraph 54 above of $193,356 and prejudgment interest of $45,801, by depositing the funds into a separate account to be used for the Distribution in accordance with paragraph 54. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

E. Respondent Stilwell Value shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $250,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717.

F. Respondent J. Stilwell shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $100,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717.

G. Payments of civil money penalties under this Order 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) 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 Stilwell Value and/or J. Stilwell 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 Valerie A. Szczepanik, Assistant Director, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281-1022, and to Timothy Casey, Assistant Director, Legal Operations, New York Regional Office, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281-1022, or such other person or address as the Commission staff may provide.

H. Respondent Stilwell Value shall comply with the undertakings enumerated in Section III, paragraphs 53 through 57 above.

I. Respondent J. Stilwell shall comply with the undertakings enumerated in Section III, paragraph 58 above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent J. Stilwell, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent J. Stilwell under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent J. Stilwell of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9738 / March 17, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74520 / March 17, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31505 / March 17, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16447

In the Matter of CORAL REEF MEDIA, LLC and DAVID E. FLAKE, 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, 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 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Respondent Coral Reef Media, LLC ("Coral Reef") and Respondent David E. Flake ("Flake") (collectively, "Respondents").

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 Respondents and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative And Cease-And-Desist Proceedings ("Order"), as set forth below.

III.

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

Summary

These proceedings arise out of a fraudulent securities offering conducted by Respondents David E. Flake ("Flake") and Coral Reef Media, LLC ("Coral Reef") (together, "Respondents"). During the relevant period, Respondents relied on fabricated documents and materially false and misleading statements to offer and sell securities in Coral Reef. In addition, Respondents never registered with the Commission in any capacity, and the securities they offered and sold were neither registered with the Commission nor subject to an exemption from registration. Respondents' conduct violated Sections 5(a), 5(c), and 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated under the Exchange Act, and Respondent Flake's conduct additionally violated Section 15(a) of the Exchange Act.

Respondents

1. Flake founded Coral Reef, controlled Coral Reef's bank accounts and, at all relevant times, was the sole officer and manager of Coral Reef. He is 60 years old, resides in Menifee, California, and was never registered with the Commission in any capacity.

2. Coral Reef is a California limited liability company located in Menifee, California. It was controlled entirely by Respondent Flake and was never registered with the Commission in any capacity. Although formally still extant, Coral Reef appears to have no ongoing operations.

Background

3. From approximately May 2012 through approximately April 2013, Flake and Coral Reef relied on material misrepresentations and fabricated documents to offer and sell shares of Coral Reef stock to members of the public. Respondents also coordinated a network of paid sales representatives to offer and sell those shares for commissions. Respondents raised a total of $26,000 in the Coral Reef offering from investors in California and New Mexico. The shares offered and sold of Coral Reef were securities.

4. In connection with the offering of Coral Reef securities, Flake personally prepared offering materials that he and his sales representatives provided to investors by mail and electronic mail. The offering materials, which Flake also made available to potential investors on Coral Reef's

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

publicly available website, represented that Coral Reef was a successful company that produced television shows about "green companies and products," that Coral Reef had licensed those shows to cable television companies, and that Coral Reef had commitments from cable television companies to license Coral Reef's shows in the future. In fact, Coral Reef never produced or licensed any television shows and had no commitments from cable companies to license television shows.

5. In connection with the offering of Coral Reef securities, Flake also fabricated "commitment letters" in which cable companies purportedly agreed to license future productions from Coral Reef. He provided those letters to investors by mail and electronic mail, and directed Coral Reef's sales representatives to provide them to potential investors as well. Flake also made material misrepresentations to investors about Coral Reef in person and in telephone conversations.

6. Flake knew that the descriptions of Coral Reef provided to investors were materially false and misleading because he personally prepared Coral Reef's offering materials and personally fabricated the purported commitment letters from cable companies. As Coral Reef's founder, sole officer, and sole manager, he knew that Coral Reef was not a successful production business, that Coral Reef never produced or licensed television shows, and that Coral Reef did not have commitments from cable companies to license shows.

7. Flake used a portion of the funds raised from investors to pay commissions to at least one of Coral Reef's sales representatives. He also used a portion of the funds raised from investors to pay for his own personal expenses.

8. During the relevant period, Flake was never registered as or associated with a broker-dealer registered with the Commission.

9. During the relevant period, no registration statement was in effect as to Coral Reef's securities, and no exemption from registration applied to those securities.

10. As a result of the conduct described above, Respondent Coral Reef violated, and Respondent Flake willfully violated, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated under the Exchange Act, which prohibit fraudulent conduct in the offer or sale of securities and in connection with the purchase or sale of securities. Respondent Coral Reef also violated, and Respondent Flake also willfully violated, Sections 5(a) and 5(c) of the Securities Act, which prohibit the offer or sale of securities as to which no registration statement was or is in effect or on file with the Commission, and for which no exemption from registration was or is available. Respondent Flake 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 as a broker or dealer or associated with a registered broker or dealer.

IV.

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

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

A. Respondents Flake and Coral Reef cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated under the Exchange Act, and that Respondent Flake also cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Respondent Flake 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
>
> 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.

C. Any reapplication for association by Respondent Flake 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. Respondents Flake and Coral Reef shall, within 14 days of the entry of this Order, pay disgorgement of $26,000, which represents profits gained as a result of the conduct described herein, prejudgment interest of $395.03, and a civil penalty of $26,000 to the Securities and

Exchange Commission. Respondents shall be jointly and severally liable for that disgorgement, prejudgment interest, and civil penalty. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 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 David E. Flake and Coral Reef 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 Lorraine B. Echavarria, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 S. Flower Street, Suite 900, Los Angeles, CA 90071.

E. 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 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, 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 Securities and Exchange Commission. 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 Respondents, or either of them, 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in the Order are true, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Flake under the Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Flake of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Brent J. Fields
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. 74517 / March 17, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16446

In the Matter of	
Alternate Energy Solutions, Inc., Butler International, Inc., Cheval Resources Corp., and Scorpion Performance, Inc.,	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
Respondents.	

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 Alternate Energy Solutions, Inc., Butler International, Inc., Cheval Resources Corp., and Scorpion Performance, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Alternate Energy Solutions, Inc. (CIK No. 1421816) is a revoked Nevada corporation located in Fayetteville, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Alternate Energy Solutions 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, which reported a net loss of $677,247 from the company's August 1, 2008 inception through December 31, 2011.

2. Butler International, Inc. (CIK No. 786765) is a forfeited Maryland corporation located in Fort Lauderdale, Florida with a class of securities registered with

the Commission pursuant to Exchange Act Section 12(g). Butler International is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2007, which reported a net loss of $4,221,000 for the prior nine months. On June 1, 2009, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was dismissed on April 1, 2010.

3. Cheval Resources Corp. (CIK No. 1515800) is a forfeited Delaware corporation located in Vero Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(b). Cheval Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended Form 10-Q for the period ended June 30, 2012, which reported a net loss of $9,699 from the company's March 2, 2011 inception through June 30, 2012.

4. Scorpion Performance, Inc. (CIK No. 1414792) is a Florida corporation located in Ocala, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Scorpion Performance 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 $349,893 for the prior three months.

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.

Brent J. Fields
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. 74516 / March 17, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16445

In the Matter of **The AppleTree Companies, Inc., RoomStore, Inc., and Saveene Group 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 The AppleTree Companies, Inc., RoomStore, Inc., and Saveene Group Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. The AppleTree Companies, Inc. (CIK No. 881106) is a void Delaware corporation located in Norfolk, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). The AppleTree Companies 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 2, 1997, which reported a net loss of $3,259,000 for the prior six months. On April 4, 1997, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Virginia, and the case was dismissed on December 20, 1999.

2. RoomStore, Inc. (CIK No. 1448064) is a terminated Virginia corporation located in Richmond, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RoomStore is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2011, which reported a net loss of $15,668,000 for the prior nine months. As of January 15, 2015, the company's stock (symbol "ROOMQ") was traded on the over-the-counter markets. On December 12, 2011, the company filed a Chapter 11 petition, subsequently converted to Chapter 7, in the U.S. Bankruptcy Court for the Eastern District of Virginia, and the case was still pending as of December 2, 2014.

3. Saveene Group Corp. (CIK No. 1488087) is a void Delaware corporation located in Mississauga, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Saveene Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2013, which reported a net loss of $127,095 for the prior six months.

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.

Brent J. Fields
Secretary

Jill M. Peterson

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. 4050 / March 18, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31508 / March 18, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16448

In the Matter of **Acamar Global Investments, LLC** **and** **Rudolph A. Martin,** **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, 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 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 Acamar Global Investments, LLC ("Acamar") and Rudolph A. Martin ("Martin") (collectively, the "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 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, 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 finds that:

Summary

Acamar Global Investments, LLC ("Acamar"), a formerly SEC-registered investment adviser, and its principal, Rudolph A. Martin, made material misstatements about the firm's assets under management, the past performance of its proprietary investment models, and the strategy and amount of investor subscriptions for a hedge fund Acamar managed. From October 2011, until the firm de-registered in May 2014, Acamar's Forms ADV falsely claimed that it managed assets in excess of $180 million in order to qualify for SEC registration. In fact, during the relevant time period, Acamar managed less than $200,000, all of which was managed on behalf of only one client – an individual client with a separately managed account ("SMA Client"). In addition to the SMA Client, Acamar advised three additional clients, the Acamar Global Growth Master Fund (the "Fund") and its two feeder funds. Acamar's website and promotional materials included misleading reports that purported to detail the past performance of investment models that Acamar used in managing assets for its advisory clients. The reports failed to disclose that the performance data were hypothetical and were not based on actual trading.

In August 2013, Martin convinced Acamar's SMA Client to liquidate his existing portfolio and invest the proceeds in the Fund. The Fund's Private Placement Memorandum ("PPM") stated that the Fund would not commence operations until aggregate investor subscriptions totaled at least $5 million. In fact, the Fund started trading with less than $200,000 from the SMA Client. The PPM also misrepresented the strategy of the Fund as being equity based, when, in fact, the Fund lost more than 90% of its value within the first two months of trading, with 95% of the losses attributable primarily to options trading.

Respondents

1. **Acamar**, a Florida limited liability company, formerly known as Latin Capital Management, LLC, was formed in October 2007. Acamar was registered with the Commission as an investment adviser from October 2011 until May 2014, when it de-registered. The firm is wholly owned by Acamar Global Holdings, Inc., a Florida corporation controlled by Martin. Acamar is the general partner of the Acamar Global Growth funds.

2. **Rudolph A. Martin**, age 60, was Acamar's President, Director of Research, and Senior Portfolio Manager. Martin does not hold any securities licenses.

Other Relevant Entities

3. **Acamar Global Growth Master Fund, Ltd. (the "Fund")**, a British Virgin Islands exempt company organized on March 15, 2013, is the master fund for two feeder funds. Acamar is the Fund's general partner and investment manager. The Fund is registered with the British Virgin Islands Financial Services Commission.

4. **Acamar Global Growth Fund, LP**, a Delaware limited partnership formed in December 2012, is a feeder fund for the Acamar Global Growth Master Fund. The Acamar Global Growth Fund, LP commenced operations in September 2013. Acamar is the fund's general partner and investment manager.

5. **Acamar Global Growth Fund, Ltd.**, a British Virgin Islands corporation, is a feeder fund to the Acamar Global Growth Master Fund for foreign investors. The Acamar Global Growth Fund, Ltd. is registered with the British Virgin Islands Financial Services Commission. Acamar is the fund's general partner and investment manager.

Background

6. Acamar was formed in October 2007, under the name Latin Capital Management, LLC. In October 2011, Acamar registered with the Commission as an investment adviser.

7. According to Forms ADV filed between 2011 and 2013, Acamar offered investment management services to institutional and high net-worth clients through separately managed accounts. Acamar claimed to provide customized investment advice and passive asset allocation to clients based on the firm's proprietary stock models.

8. In addition to the Fund (and its feeder funds), Acamar had only one other advisory client, the SMA Client who executed an advisory agreement with Acamar in February 2013. Acamar and Martin initially invested the SMA Client's funds (approximately $200,000) in a basket of equities through a separately managed account.

9. In August 2013, Martin convinced the SMA Client to liquidate the holdings in his separately managed account and invest the proceeds in the Fund.

10. In less than two months, the Fund lost over 90% of its value. Approximately 95% of those losses were attributable to aggressive options trading. In December 2013, the SMA Client demanded the return of his remaining capital of approximately $17,000, which Acamar returned.

11. As of February 28, 2014, Acamar had total assets under management of approximately $24. In May 2014, Acamar filed a Form ADV stating that the firm was no longer eligible to remain registered with the SEC.

Material Misstatements and Omissions on Acamar's Website and in Presentation Materials

12. Acamar operated a website that advertised its advisory services. Specifically, the website stated that Acamar offered multiple asset allocation models that it used to manage assets for its advisory clients. Acamar's website included a detailed report for two of its model portfolios, the Global Blue Chip portfolio and the Emerging Market portfolio. The reports purported to be a snapshot of the actual portfolio value of one of Acamar's separately managed accounts, with the client name and the account number redacted. The reports contained the Morningstar logo and were generated using Morningstar software. They purported to compare the historical performance of these model portfolios against the relevant benchmark. The content of the reports suggested that the performance figures were based on actual trading, stating, "[t]he performance data quoted represents past performance and does not guarantee future results" and also stated, "[t]he performance reflects the reinvestment of all dividends and income."

13. The reports directed readers to visit the Morningstar website "for information current to the most recent month-end." In fact, the performance data contained in the reports were hypothetical and were not based on actual trading, which was not disclosed anywhere in the report. Moreover, Morningstar's website had no information regarding the hypothetical value of the model portfolio, contrary to the representations in the reports.

14. Acamar's presentation materials that were provided to the SMA Client and other prospective clients also included the past performance of the Global Blue Chip and Emerging Market portfolio models and similarly failed to disclose that the performance figures were hypothetical and not based on actual trading.

Material Misstatements and Omissions in Fund's PPM

15. The PPM for the Global Growth Master Fund, dated April 2013, stated that "the Partnership will not commence operations until the aggregate investor subscriptions to the Feeder Fund and the Master Fund equal at least $5,000,000. Funds will be held in cash until then and not subject to any expenses or fees." Contrary to the PPM, the Fund commenced operations after securing only $193,000 from its sole investor, the SMA Client.

16. The PPM further stated that the Fund's primary investment objective was capital appreciation and sought to achieve this objective "by investing in common stock of foreign and domestic issuers that are likely to have rapid growth in revenues and earnings and potential for above average capital appreciation or are undervalued." The Fund lost 90% of its value within the first two months and, despite disclosing a primarily equities-based trading strategy, 95% of the losses were attributable to options trading. Although the PPM allowed for options trading, nowhere did it indicate that options trading would be the primary trading strategy through which the Fund would seek to achieve its returns.

17. Martin failed to disclose to the SMA Client that he was investing his funds contrary to the disclosures in the PPM.

False Forms ADV and Improper Registration

18. Acamar reported in its initial Form ADV, filed September 26, 2011, that Acamar managed $180 million in client assets. Acamar's Form ADV, dated March 31, 2012, reported $180 million in assets under management, and its Form ADV dated January 31, 2013, reported $190 million in assets under management. In fact, Acamar never had more than $200,000 in assets under management and had no basis for registration with the Commission at any time. Martin signed Acamar's Forms ADV that contained information that he knew to be untrue at the time he signed.

Policies and Procedures

19. Acamar failed to adopt and implement an adequate compliance program. Acamar's written policies and procedures were not reasonably designed to prevent violations of the Advisers Act. Acamar had no written policies and procedures concerning advertising, performance calculation, portfolio management, conducting an annual review, or Form ADV disclosures.

Violations

20. As a result of the conduct described above, Acamar and Martin willfully violated Sections 206(1) and 206(2) of the Advisers Act, which make it unlawful for any investment adviser, directly or indirectly, to (1) "employ any device, scheme, or artifice to defraud any client or prospective client" or (2) "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

21. As a result of the conduct described above, Acamar and Martin willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which make it unlawful for any investment adviser to a pooled investment vehicle to "[m]ake any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle" or "engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle."

22. As a result of the conduct described above, Acamar and Martin 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."

23. As a result of the conduct described above Acamar willfully violated, and Martin willfully aided and abetted and caused Acamar's violation of, Section 203A of the Advisers Act,

which generally prohibits an investment adviser from registering with the Commission unless it has assets under management in excess of $100 million or advises a registered investment company.

24. As a result of the conduct described above, Acamar willfully violated, and Martin willfully aided and abetted and caused Acamar's violations of, Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and its rules.

25. As a result of the conduct described above, Acamar willfully violated, and Martin willfully aided and abetted and caused Acamar's violations of, Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, which prohibit any registered investment adviser from, directly or indirectly, publishing, circulating, or distributing any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.

Civil Penalties

26. Respondents have submitted sworn Statements of Financial Condition dated October 23, 2014, and other evidence and have asserted their inability to pay a civil penalty.

IV.

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

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

A. Respondents Acamar and Martin shall cease and desist from committing or causing any violations and any future violations of Sections 203A, 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rules 206(4)-1(a)(5), 206(4)-7 and 206(4)-8 thereunder.

B. Respondent Martin 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

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.

C. Respondent Acamar is censured.

D. Any reapplication for association by Respondent Martin 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 Martin, 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. Based upon Respondents' sworn representations in their Statements of Financial Condition dated October 23, 2014, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondents.

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 Respondents 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 Respondents was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondents 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.

Brent J. Fields
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. 74532 / March 19, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4051 / March 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16104

In the Matter of MICHAEL LEE MENDENHALL	ORDER VACATING INITIAL DECISION AND REMANDING FOR FURTHER PROCEEDINGS

We instituted this administrative proceeding against respondent Michael Lee Mendenhall in September 2014 based on his conviction for securities fraud and theft in Colorado state court. To promote the orderly resolution of this proceeding, and for the other reasons that follow, we have determined *sua sponte* to vacate the law judge's initial decision and to remand for further proceedings before the law judge.

By way of procedural background, the Division of Enforcement ("Division") filed a motion for summary disposition on December 12, 2014. Mendenhall timely requested a 120-day extension of time to respond to the Division's motion. On January 22, 2015, the law judge granted relief in part and extended the deadline for Mendenhall's response to February 13.[1] On February 18, the law judge issued an initial decision barring Mendenhall from the securities industry. The decision stated that "Mendenhall did not file an opposition" to the Division's motion for summary disposition.[2]

Unbeknownst to the law judge, her January 22 order had not been mailed to Mendenhall at his current address. This oversight was not discovered until Mendenhall wrote to the law judge inquiring as to the status of his extension request. On February 23, the law judge characterized Mendenhall's letter as a "motion to correct a manifest error of fact" in the initial

[1] *Michael Lee Mendenhall*, Admin. Proc. Rulings Release No. 2244 (A.L.J. Jan. 22, 2015).

[2] *Michael Lee Mendenhall*, Initial Decision Release No. 743, 2015 WL 673419 (A.L.J. Feb. 18, 2015).

decision pursuant to Rule of Practice 111(h).[3] She permitted Mendenhall to "file a supplemental pleading concerning the [initial decision] and the Division's motion for summary disposition."[4]

Once an initial decision is issued, our Rules of Practice "largely divest the law judge of authority over the proceeding."[5] As a result, the law judge did not err (and, indeed, properly acted within the bounds of her authority) when she construed Mendenhall's letter as a motion to correct a manifest error of fact. The Commission is not similarly constrained, however. It retains plenary authority over the course of its administrative proceedings and the rulings of its law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief.[6]

Under the unusual circumstances of this case, we believe that Mendenhall should be afforded an opportunity to present facts and legal arguments in response to the Division's motion for summary disposition. We find that the interests of justice would be served, and the disposition of this matter expedited, by vacating the February 18 initial decision and directing that the law judge set a briefing schedule for the Division's motion for summary disposition. In considering that motion, the law judge should employ the standard ordinarily applicable to motions for summary disposition under Rule of Practice 250 and may make such rulings as she deems appropriate.[7] We stress that the standard for a motion to correct a manifest error under Rule of Practice 111(h)—which requires the movant to show that there was a "patent misstatement of fact" in the initial decision—has no relevance when, as here, the initial decision has been vacated and the matter remanded for resolution on an open record.[8]

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3 17 C.F.R. § 201.111(h).

4 *Michael Lee Mendenhall*, Admin. Proc. Rulings Release No. 2344 (A.L.J. Feb. 23, 2015).

5 *Alchemy Ventures, Inc.*, Securities Exchange Act Release No. 70708, 2013 WL 6173809, at *3 (Oct. 17, 2013).

6 *See, e.g.*, 5 U.S.C. § 557(b); Rule of Practice 400(a), 17 C.F.R. § 201.400(a) (providing that the Commission may, "at any time, on its own motion, direct that any matter be submitted to it for review"); Rule of Practice 411(c), *id.* § 201.411(c) (providing that the Commission may, "on its own initiative, order review of any initial decision[]"); Rule of Practice 411(d), *id.* § 201.411(d) (providing that the Commission may, "at any time prior to the issuance of [a final Commission] decision, raise and determine any . . . matters that it deems material").

7 17 C.F.R. § 201.250. We express no view as to the merits of the Division's motion for summary disposition.

8 *Id.* § 201.111(h).

Accordingly, on our own motion, it is ORDERED that the initial decision is vacated and that the matter is remanded for further proceedings as set forth herein. It is further ORDERED that the law judge shall issue an initial decision within 210 days from the date of this order.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
Municipal Advisor and
NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74543 / March 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16451

In the Matter of **MATTHEW O. MADISON,** **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 Matthew O. Madison ("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. Respondent, age 36, is a resident of Coppell, Texas. From March 2008 to October 2008, Respondent was the managing member of Infinity Exploration, LLC, an entity he formed to offer oil-and-gas related investments to prospective investors.

2. On November 18, 2014, a final judgment was entered by consent against Respondent, permanently enjoining him from future violations of Section 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. Matthew O. Madison, Dwight McGhee, and Infinity Exploration, LLC*, Civil Action Number 3:13-CV-02499-L, in the United States District Court for the Northern District of Texas, Dallas Division.

3. The Commission's complaint alleged, among other things, that Respondent prepared fraudulent offering documents in connection with Infinity Exploration, LLC's offer and sale of securities involving oil-and-gas exploration programs. As a result of these offers and sales, Infinity Exploration, LLC raised more than $2 million from at least 40 investors. The complaint also alleged that Respondent acted as an unregistered broker-dealer in offering and selling these securities to investors and prospective investors.

IV.

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

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

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to Municipal
Advisor and NRSRO bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74542 / March 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16450

In the Matter of **DWIGHT D. MCGHEE,** **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 Dwight D. McGhee ("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. Respondent, age 62, is a resident of Irving, Texas. From March 2008 to October 2008, Respondent headed the sales efforts of Infinity Exploration, LLC, an entity offering oil-and-gas related investments to prospective investors.

2. On November 18, 2014, a final judgment was entered by consent against Respondent, permanently enjoining him from future violations of Section 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. Matthew O. Madison, Dwight McGhee, and Infinity Exploration, LLC*, Civil Action Number 3:13-CV-02499-L, in the United States District Court for the Northern District of Texas, Dallas Division.

3. The Commission's complaint alleged, among other things, that Respondent made false and misleading representations to investors and prospective investors about potential production and revenue, well management, the timing of drilling operations, and past successes. The complaint also alleged that Respondent, who played a key management role at Infinity Exploration, LLC, acted as an unregistered broker-dealer in offering and selling these securities to investors and prospective investors. As a result of these offers and sales, Infinity Exploration, LLC raised more than $2 million from at least 40 investors.

IV.

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

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

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74539 / March 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16449

In the Matter of **KEYPOINT 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 Keypoint Capital Management, LLC ("KCM" 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.

III.

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

Summary

1. These proceedings arise out of a violation of Rule 105 of Regulation M of the Exchange Act by KCM, a Dallas-based registered investment adviser. Rule 105 prohibits buying an equity security made available through a secondary or follow-on 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 2013, KCM 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 $11,654.62.

Respondent

3. KeyPoint Capital Management, LLC is a limited liability company incorporated in Texas and based in Dallas, Texas. KCM has been registered with the Commission as an investment adviser since April 17, 2012 and has over $244 million in assets under management.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities in certain public offerings from an underwriter, broker, or dealer participating in the 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 Form 1-A or Form 1-E and ending with pricing. 17 C.F.R § 242.105(a)(1) and (a)(2).

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." 72 Fed. Reg. 45094. Rule 105 is "prophylactic and prohibits the conduct irrespective of the short seller's intent" in effecting the short sale. Id. at 45103.

KCM's Violation of Rule 105 of Regulation M

6. During the period from March 6, 2013 through March 7, 2013, KCM, on behalf of its advisory clients, sold short 24,400 shares of Ramco-Gershenson Properties Trust ("Ramco") at prices ranging between $15.90 and $15.94. After the market close on March 12, 2013, Ramco announced the pricing of a follow-on offering of seven million shares of its common stock at

$15.55 per share. The Rule 105 restricted period relating to this follow-on offering was March 5 through March 11, 2013, the period beginning five business days before the pricing of Ramco's offered securities and ending with the pricing of the offering shares. In March 2013, KCM participated in Ramco's follow-on offering and purchased 34,272 Ramco shares for several of its clients after having sold short 24,400 shares of the same security during the restricted period.

7. The profits consisted of the following:

A. First, the Respondent profited from the difference between the proceeds from their restricted period short sales, and the amounts they paid on an equivalent number of shares received in the offering of the same issuer. These unlawful profits totaled approximately $5,379.58.

B. Second, in those instances where the number of shares they received in the offering exceeded the number of shares they sold short during the restricted period ("overage"), the Respondent improperly obtained an additional benefit in that they obtained the offering shares at a discount to the market price of the issuer's shares. Unlawful profits in the form of market discounts totaled approximately $6,275.04.

C. In total, KCM's violations of Rule 105 resulted in profits of $11,654.62.

Violation

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

KCM'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 KCM's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent KCM 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 30 days of the entry of this Order, pay disgorgement of $11,654.62, which represents profits gained as a result of the conduct described herein, prejudgment interest of $596.00, and a civil money penalty in the amount of $65,000 (for a total of $77,250.62) to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 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;[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 KCM 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 David L. Peavler, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, Suite 1900, Unit 18, Fort Worth, Texas 76102.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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[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.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74552 / March 20, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3643 / March 20, 2015

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of BDO CHINA DAHUA CPA CO., LTD., ERNST & YOUNG HUA MING LLP, KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP), DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACCOUNTANTS LTD., and PRICEWATERHOUSECOOPERS ZHONG TIAN CPAS LIMITED	ORDER GRANTING THE DIVISION OF ENFORCEMENT'S UNOPPOSED MOTION TO WITHDRAW ITS PETITION FOR REVIEW AS TO DAHUA CPA, LTD. AND NOTICE THAT INITIAL DECISION HAS BECOME FINAL AS TO DAHUA CPA, LTD.

These administrative proceedings were instituted pursuant to Rule of Practice 102(e)(1)(iii).[1] The law judge's initial decision denied the privilege of appearing or practicing before the Commission to four of the five respondents for a period of six months and it censured the remaining respondent, Dahua CPA, Ltd. (Dahua).[2] The Division of Enforcement ("Division") sought review of, among other things, "that portion of the Initial Decision" regarding the remedies imposed on Dahua. Dahua did not file a petition for review. We granted the Division's petition for review and also determined, on our own initiative, to review what sanctions, if any, were appropriate.[3]

The Division has filed an unopposed motion to withdraw its petition for review as to Dahua, which is accompanied by a Joint Stipulation of Dismissal of Appeal as to Dahua entered into by the Division and by a representative partner of Dahua. The motion seeks "dismissal of all issues relating specifically to Dahua that have been raised on appeal from the Initial Decision by the Division and/or the Commission ('Dahua-Related Appeal Issues')." The Division states

1 17 C.F.R. § 201.102(e)(1)(iii).

2 *BDO China Dahua CPA Co.*, Initial Decision Release No. 553, 2014 WL 242879, at *84 (Jan. 22, 2014). Dahua was formerly affiliated with BDO International Limited and did business as BDO China Dahua CPA Co., Ltd., the entity that appears in the caption.

3 *BDO China Dahua CPA Co.*, Exchange Act Release No. 72134, 2014 WL 1871077 (May 9, 2014).

that it does *not* seek dismissal of any other aspect of the Division's petition for review, including, in particular, issues relating to remedies imposed on the other respondents.

The Division argues that the Dahua-Related Appeal Issues should be dismissed because subsequent events, including the Commission's February 6, 2015 settlement with the other four respondents,[4] have substantially mitigated the concerns underlying its petition for review as it relates to Dahua. It further states that, because of the Commission's recent settlement with the other respondents, it is not currently the case that the initial decision's absence of a practice bar against Dahua would risk undermining the remedies imposed on the other respondents. The Division also asserts that Dahua, at present, is performing little or no audit work for U.S. issuers, thereby minimizing the risk of future harm to the Commission's processes. Finally, the Division believes that, if future cooperation regarding Dahua's audit work papers becomes necessary, it can seek such cooperation from Dahua and the China Securities Regulatory Commission following the procedures set forth in the settlement order. For all of these reasons, the Division contends that the changed circumstances weigh against imposition of any additional remedy against Dahua at the current time.

The relief sought by the Division appears to be appropriate.

Accordingly, it is ORDERED that the Division's unopposed motion is GRANTED. The Commission has determined to dismiss the Division's petition for review as it relates to Dahua and dismiss its own review of remedies as it relates to Dahua. It is further ORDERED that notice is hereby given that the initial decision of the administrative law judge is reinstated and has become the final decision of the Commission as to Dahua. The order contained in that decision is hereby declared effective as to Dahua. The initial decision censured Dahua pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

It is further ORDERED that the remainder of the Division's petition for review and the Commission's review of sanctions remain stayed in accordance with the Commission's February 6 settlement order.

By the Commission.

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

Brent M. Fields
Secretary

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4 *BDO China Dahua CPA Co.*, Exchange Act Release No. 74217, 2014 WL 7777230 (Feb. 6, 2015).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74547 / March 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16452

In the Matter of **First China Pharmaceutical Group, 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]

1. First China Pharmaceutical Group, Inc. ("FCPG") (CIK No. 1432254) is a defaulted Nevada corporation located in Kunming City, Yunnan Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FCPG 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, 2012. As of March 16, 2015, the common stock of FCPG was quoted on OTC Link operated by OTC Markets Group, Inc. (formerly "Pink Sheets"), had twelve 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.

Brent J. Fields
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. 74549 / March 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16453

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT [1]

1. Longhai Steel Inc. ("LGHS") (CIK No. 1296286) is a revoked Nevada corporation located in Xingtai City, Hebei Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LGHS 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, 2012. As of March 16, 2015, the common stock of LGHS was quoted on OTC Link operated by OTC Markets Group, Inc. (formerly "Pink Sheets"), had eleven 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.

Brent J. Fields
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. 74566 / March 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-14641

In the Matter of	:	
CHARLES L. RIZZO and GINA M. HORNBOGEN,	:	**ORDER DIRECTING DISBURSEMENT OF FAIR FUND**
Respondents.	:	

On September 30, 2013, pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1103, the Commission issued a Notice of Proposed Plan of Distribution and Opportunity for Comment (Exchange Act Rel. No. 70573 (Sept. 30, 2013)). The Notice provided all interested parties thirty (30) days to submit a comment on the Proposed Plan of Distribution ("Proposed Plan"). The Notice advised interested parties that they could obtain a copy of the Proposed Plan from the Commission's public website or by submitting a written request to Nancy Chase Burton, Esq., United States Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5631. All persons who desired to comment on the Proposed Plan could submit their comments, in writing, no later than thirty (30) days from the date of the Notice. Two comments were submitted. On June 18, 2014, the Commission issued a Notice of Amended Proposed Plan of Distribution and Opportunity for Comment and the Amended Plan of

Distribution ("Amended Plan") was simultaneously posted on the Commission's website. The Amended Plan responded to the comments received and included two additional eligible Fair Fund recipients (Exchange Act Rel. No. 72429 (June 18, 2014)). No additional comments were submitted. On July 24, 2014, the Commission issued an Order Approving Amended Plan of Distribution (Exchange Act Rel. No. 72667 (July 24, 2014)).

The Amended Plan provides for the distribution of the Fair Fund through the U.S. Treasury's Bureau of the Fiscal Service when the Fund Administrator submits a payment file with payee information in a Commission-approved format. The Fund Administrator has submitted a payment file with payee information for the disbursement of $189,042.04.

Accordingly, it is ORDERED that the Commission staff shall direct the payment of $189,042.04 from the Fair Fund as provided for in the Amended Plan.

Additionally, it is ORDERED that the Secretary of the Commission is authorized, upon receipt of a payment file from the Fund Administrator, to issue an order directing disbursement if additional funds are received, for an amount not to exceed the remainder of Gina M. Hornbogen's payments, in a second tranche from the Fair Fund for distribution to Eligible Clients.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74569 / March 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16454

In the Matter of JEFFORY D. SHIELDS, 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 Jeffory D. Shields ("Shields" 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 admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 and III.4 below, and 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 about January 2010 through August 2011, Respondent, through his company, Geodynamics, Inc., and several other entities under his control, made use of the mails or means or instrumentalities of interstate commerce to induce or attempt to induce the purchase or sale of securities in four oil and gas investments without being registered with the Commission in accordance with Section 15(b) of the Exchange Act or being associated with a registered broker or dealer. During the period at issue, Shields resided in Larkspur, Colorado.

2. On March 16, 2015, a final judgment was entered by consent against Shields, permanently enjoining him from future violations of Sections 5(a) and (c) and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Shields, et al., Civil Action Number 11-cv-02121-REB-MJW, in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that from about January 2010 through August 2011, when inducing or attempting to induce the purchase or sale of securities in four oil and gas investments, Shields made materially false and misleading statements to them regarding, among other things, the purported uses of investor funds and the expected rates of return. The Complaint further alleged that Shields misappropriated and misused investor proceeds, and otherwise engaged in a variety of conduct which operated as a fraud or deceit on investors. The Complaint further alleged that Shields, in telephonic conference calls, misrepresented operational status and amounts spent on drilling.

4. On June 5, 2014, Shields entered a plea of guilty to three counts of felony securities fraud in violation Colorado law, before the Douglas County District Court of Colorado, in People of the State of Colorado v. Jeffory Shields, Case No. 12-cr-262. On August 15, 2014, a judgment in the criminal case was entered against Shields. He was sentenced to a prison term of six years followed by five years of parole and ordered to make restitution in the amount of $4,613,124.97.

5. The counts of the criminal indictment to which Shields pled guilty alleged, inter alia, that Shields defrauded investors in connection with the offer or sale of securities by unlawfully, feloniously, and knowingly engaging in a course of business which operated as a fraud or deceit.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Shields 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.

Brent J. Fields
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. 74574 / March 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16456

In the Matter of Bama Biotech, Inc., China inSure Holdings, Inc., China Nutrifruit Group, Ltd., and Sino Clean Energy, 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 Bama Biotech, Inc., China inSure Holdings, Inc., China Nutrifruit Group, Ltd., and Sino Clean Energy, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Bama Biotech, Inc. (CIK No. 1501804) is a revoked Nevada corporation located in Guangxi Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Bama Biotech is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2012.

2. China inSure Holdings, Inc. (CIK No. 1497031) 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). China inSure Holdings 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, which reported a net loss of $19,989 for the prior nine months.

3. China Nutrifruit Group, Ltd. (CIK No. 753224) is a revoked Nevada corporation located in Daqing, Heilongjiang, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(b) and 12(g). China Nutrifruit Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2011. As of March 4, 2015, the company's stock (symbol "CNGL") was traded on the over-the-counter markets.

4. Sino Clean Energy, Inc. (CIK No. 1120096) is a defaulted Nevada corporation located in Xi'an, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sino Clean Energy 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 March 4, 2015, the company's stock (symbol "SCEI") was traded on the over-the-counter markets.

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.

Brent J. Fields
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. 74573 / March 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16455

In the Matter of **Austin Acquisitions, Inc., Juniper Growth Corp., Northeast Island Corp., and Thrive World Wide, 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 Austin Acquisitions, Inc., Juniper Growth Corp., Northeast Island Corp., and Thrive World Wide, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Austin Acquisitions, Inc. (CIK No. 1507858) is a revoked Nevada corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Austin Acquisitions is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended Form 10-Q for the period ended June 30, 2012, which reported a net loss of $8,632 for the prior nine months.

2. Juniper Growth Corp. (CIK No. 1381796) is a Cayman Islands corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Juniper Growth 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, which reported a net loss of $4,631 for the prior nine months.

3. Northeast Island Corp. (CIK No. 1486018) is a revoked Nevada corporation located in Libertyville, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Northeast Island 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, 2011, which reported a net loss of $57,469 from the company's January 29, 2010 inception through October 31, 2011.

4. Thrive World Wide, Inc. (CIK No. 1333675) is a revoked Nevada corporation located in Lake Geneva, Wisconsin with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Thrive World Wide is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended Form 10-Q for the period ended June 30, 2012, which reported a net loss of $360,465 for the prior nine months. As of January 15, 2015, the company's stock (symbol "TWWI") was traded on the over-the-counter markets.

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.

Brent J. Fields
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. 74584 / March 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16458

In the Matter of	:	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
Winsonic Digital Media Group, Ltd.,	:	
Respondent.	:	

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 Winsonic Digital Media Group, Ltd. ("Winsonic" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Winsonic (CIK No. 1120411) is a revoked Nevada corporation with its last recorded headquarters located in Las Vegas with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Winsonic is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the quarter ended September 30, 2008, on December 8, 2008. Its last filing of any type with the Commission was a Form 8-K filed on June 27, 2011. As of January 8, 2015, Winsonic's stock (symbol "WDMG") 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).

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, Winsonic is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and has failed to heed delinquency letters sent to it by the Division of

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

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

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

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

If Respondent fails to file the directed Answers, 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 any 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 of that Act delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-74581; File No. S7-05-15

RIN 3235-AL65

Exemption for Certain Exchange Members

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing to amend Rule 15b9-1 ("Rule") under the Securities Exchange Act of 1934 ("Act" or "Exchange Act"), which exempts certain brokers or dealers from membership in a registered national securities association ("Association"). The proposed amendments would replace the current gross income allowance in the Rule with a narrower exemption from Association membership for a broker or dealer that carries no customer accounts and effects transactions on a national securities exchange. The proposed amendments would create an exemption for a dealer that effects transactions off the exchange of which it is a member solely for the purpose of hedging the risks of its floor-based activity, or a broker or dealer that effects transactions off the exchange resulting from orders that are routed by a national securities exchange of which it is a member, to prevent trade-throughs consistent with the provisions of Rule 611 of Regulation NMS.

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

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

Electronic Comments:

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

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-05-15 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-05-15. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: David Michehl, Special Counsel, at (202) 551-5627; Nicholas Shwayri, Special Counsel, at (202) 551-5667; or Charles Sommers, Attorney-Adviser, at (202) 551-5787, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION:

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I. Background

Rule 15b9-1generally provides an exemption for certain broker-dealers from the Exchange Act requirement to become a member of an Association. However, the equities markets have undergone a substantial transformation since the Commission previously considered the Rule. Over time, active, cross-market proprietary trading firms began relying on the Rule 15b9-1 exemption in ways that were not envisioned when the Rule was adopted or amended. The Commission is proposing to amend Rule 15b9-1 to better align the scope of its exemption, in light of today's market activity, with Section 15(b)(8) of the Exchange Act and the Commission's purposes underlying the adoption of Rule 15b9-1.

When the Exchange Act was adopted in 1934, the exchanges were the only self-regulatory organizations ("SROs")[1] and were charged with regulating the activities of their broker-dealer members.[2] Congress soon recognized, however, that the benefit of exchange regulation could be undermined by the absence of a complementary regulatory framework for the off-exchange market[3] and, in 1938, Congress provided for the creation of national securities

1 An SRO is defined, in relevant part, as "any national securities exchange, registered securities association, or registered clearing agency. . . ." 15 U.S.C. 78c(a)(26). See also infra notes 26-28 and accompanying text.

2 See, e.g., 15 U.S.C. 78f(b) (requiring exchanges to be so organized as to enforce compliance by their members and persons associated with their members with the provisions of the Exchange Act).

3 "Off-exchange" trading as used herein means any securities transaction in an exchange-listed security that is not effected, directly or indirectly, on a national securities exchange.

associations.[4] Congress later mandated Association membership for all off-exchange market participants through Section 15(b)(8) of the Exchange Act,[5] which requires a broker-dealer to become a member of an Association unless it effects transactions solely on an exchange of which it is a member. This provision, among others, reflects an overarching principle in the Exchange Act that the SRO best positioned to conduct regulatory oversight should assume those responsibilities[6] and, correspondingly, that off-exchange trading is primarily the responsibility of an Association or Associations.

See 17 CFR 240.600(b)(45) (defining "national securities exchange"). Off-exchange trading includes securities transactions that occur on alternative trading systems and directly with a broker-dealer, acting either as agent or principal, and is also referred to as over-the-counter ("OTC") trading. The term "off-exchange" as used herein does not refer, as it does in some contexts, to transactions in securities, either in equities or other instruments, that are not listed on a national securities exchange.

4 See infra notes 31-33 and accompanying text (describing the early history and background behind the creation of national securities associations).

5 15 U.S.C. 78o(b)(8). Section 15(b)(8) of the Exchange Act was adopted in 1964. See infra notes 36-37 and accompanying text. Notably, however, from 1976-1983, broker-dealers engaged in off-exchange trading could either join an Association or be subject to direct regulation by the Commission under the SEC Only ("SECO") Program. See infra notes 38-48 and accompanying text.

6 As originally adopted in 1934, the regulation of broker-dealer activities on national securities exchanges was excluded from the Commission's authority. See Section 15 as adopted in 1934, Pub. L. No. 73-291, 48 Stat. 881, 895-96 (1934), infra note 27. Rather, regulation of broker-dealer activities on exchanges continued to be conducted by the exchanges themselves, many of which existed prior to the enactment of the Exchange Act. Consequently, this left regulation of the off-exchange market with the Commission, until passage of the Maloney Act in 1938, providing for the creation of voluntary, self-regulating Associations with powers to adopt and enforce rules to regulate the off-exchange market. Pub. L. No. 75-719, 52 Stat. 1070 (1938) (the "Maloney Act"); see also infra note 23 and accompanying text.

In the Exchange Act Amendments of 1975 (Pub. L. No. 94-29, 89 Stat. 97 (1975), the "1975 Amendments"), Congress recognized that, at the time, the allocation of self-regulatory responsibilities among SROs resulted in some cases in duplicative regulation of firms that were members of multiple SROs and varying standards, both in substance and enforcement, among SROs. S. Doc. No. 93-13 at 164-165 (1973). As a result, Congress adopted Section 17(d) of the Act, which provides the Commission with the

Section 15(b)(9) of the Exchange Act,[7] provides the Commission with authority to exempt any broker-dealer from the requirements of Section 15(b)(8), if that exemption is consistent with the public interest and the protection of investors. Pursuant to that authority, the Commission adopted Rule 15b9-1,[8] which was last substantively updated in 1983.[9] That Rule

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authority to allocate regulatory responsibilities among SROs with respect to matters as to which, in the absence of such allocation, such SROs would share authority. 15 U.S.C. 78q(d). In adopting Section 17(d), a Senate Report accompanying the 1975 Amendments expressed the view that "the Commission should play an affirmative role in allocating inspection and enforcement responsibilities among the self-regulatory organizations" and that "for reporting purposes each broker-dealer [should] be assigned to a designated principal self-regulator or government regulator who will be responsible for determining the broker-dealer's operating and financial status." See 1975 Amendments, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94-75, 94th Cong., 1st Session 33 (1975).

As a general matter, SROs and the Commission have used the flexibility provided by Section 17(d) of the Act to allocate regulatory responsibilities in such a manner. 15 U.S.C. 78q(d). See, e.g., Exchange Act Release No. 63750 (January 21, 2011), 76 FR 4948 (January 27, 2011) (order approving 17d-2 plan to allocate regulatory responsibility to FINRA relating to surveillance, investigation, and enforcement of insider trading rules); Exchange Act Release No. 70052 (July 26, 2013), 78 FR 46665 (August 1, 2013) (order approving 17d-2 plan to add Topaz Exchange, LLC to existing plan with all other options exchanges to allocate regulatory responsibility to FINRA relating to, among other things, opening of accounts, supervision, suitability, discretionary accounts, advertising, customer complaints, customer statements, disclosure documents, and certification of personnel); Exchange Act Release No. 73641 (November 19, 2014), 79 FR 70230 (November 25, 2014) (order approving 17d-2 plan to allocate regulatory responsibility to FINRA for the Miami International Securities Exchange, LLC ("MIAX"), with respect to examination and enforcement responsibility relating to compliance by common members with the substantially similar rules of the two SROs and applicable provisions of the federal securities laws). See also infra notes 62-63 and accompanying text (discussing the allocation of regulatory responsibilities among SROs).

7 "The Commission by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (8) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order." 15 U.S.C. 78o(b)(9); Pub. L. No. 98-38, 97 Stat. 205 (1983).

8 17 CFR 240.15b9-1. See also infra notes 38-48 and accompanying text for a discussion on Rule 15b8-1, the predecessor to Rule 15b9-1.

was intended to address the limited activities of exchange-based specialists and floor brokers that were conducted off the exchange of which they were a member and that were ancillary to their floor-based business.[10] Specifically, the Rule exempts a broker-dealer from the requirement to become a member of an Association if it is a member of a national securities exchange, carries no customer accounts, and has annual gross income of no more than $1,000 that is derived from securities transactions effected otherwise than on a national securities exchange of which it is a member (the "de minimis allowance"). Importantly, the Rule permits income derived from transactions for the dealer's own account with or through another registered broker-dealer, to not count toward the $1,000 de minimis allowance (hereinafter, the "exclusion for proprietary trading").[11] As discussed more fully below, the de minimis allowance originally was designed to permit broker-dealers doing business on exchange floors to share in the commissions paid on occasional off-exchange transactions in customer accounts they introduced to other broker-dealers, up to a nominal amount.[12] In addition, when the exclusion for proprietary trading was

9 See SECO Programs; Direct Regulation of Certain Broker-Dealers; Elimination, Exchange Act Release No. 20409 (November 22, 1983), 48 FR 53688 (November 29, 1983) ("SECO Programs Release").

10 See infra note 22 and accompanying text (explaining that the Rule is limited to receipt of a portion of the commissions paid on occasional over-the-counter transactions and certain other activities incidental to their activities as specialists).

11 The exclusion for proprietary trading (conducted with or through another registered broker-dealer) was not part of the original exemption, but was added in 1976. See infra notes 43-44 and accompanying text.

12 See Qualifications and Fees Relating to Brokers or Dealers Who Are Not Members of National Security [sic] Association, Exchange Act Release No. 7697 (September 7, 1965), 30 FR 11673, 11675 (September 11, 1965) ("Qualifications and Fees Release") (describing specialist or floor broker's proprietary off-exchange activity as generally limited to occasional commissions on introduced accounts and other transactions incidental to their activity as specialists or floor brokers). See also infra note 22.

adopted in 1976,[13] the circumstances under which an exchange specialist or floor broker would trade proprietarily off-exchange remained quite limited, such as when a regional exchange specialist would hedge risk on the primary listing market.[14]

Accordingly, those broker-dealers exempt from Association membership pursuant to Rule 15b9-1 when it was first adopted were broker-dealers with a business focused on the floor of an exchange of which they were a member.[15] The Commission crafted Rule 15b9-1 to accommodate limited activities ancillary to that floor-based business, and thereby left it to the exchange of which the specialist or floor broker was a member to continue to regulate the entirety of that broker-dealer's activities. Therefore, the scope of Rule 15b9-1 originally was consistent with the principle underlying Section 15(b)(8) of the Exchange Act, noted above, that the SRO best positioned to conduct regulatory oversight should assume those responsibilities.

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13 In adopting the exclusion for proprietary trading, the Commission indicated that an exchange floor broker, through another broker-dealer, could effect transactions for its own account on an exchange of which it was not a member. The Commission noted that such transactions ultimately would be effected by a member of that exchange. See Extension of Temporary Rules 23a-1(T) and 23a-2(T); Adoption of Amendments to SECO Rules, Securities Exchange Act Release No. 12160 (March 3, 1976), 41 FR 10599, 10600 (March 12, 1976) ("Adoption of Amendments to SECO Rules"). See also infra note 44.

14 In the Special Study of the Securities Markets in 1963, the Commission described how regional exchange specialists reduced their exposure, including by offsetting those positions on other exchanges. The Commission noted that "[s]pecialists on the Boston, Philadelphia-Baltimore-Washington, Pittsburgh, and Montreal stock exchange are in communication with each other by direct wires linking their floors and each may trade on the other exchanges at member rates" and "[s]pecialists who are sole members [of an exchange] also offset [their positions] with over-the-counter houses dealing in listed securities. Many of the offsetting transactions are done on the primary market, the NYSE, with the [specialist] buying or selling on that exchange as his needs dictate." Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 88-95, at 935 (1963) ("Special Study"). The Commission believes that the business of regional exchange specialists was substantially the same when the exclusion for proprietary trading in Rule 15b9-1 was adopted in 1976.

15 See infra note 22.

However, the equities markets have undergone a substantial transformation since the Commission previously considered Rule 15b9-1, evolving from markets with both manual and automated features and trading volumes concentrated on the primary listing exchanges, to a highly electronic, decentralized market with substantial competition among a large number and great variety of trading venues.[16] New types of proprietary trading firms have emerged, including those that engage in so-called high-frequency trading strategies. These firms tend to effect transactions across the full range of exchange and off-exchange markets, including alternative trading systems ("ATSs").[17] They also tend to use complex electronic trading strategies and sophisticated technology to generate a large volume of orders and transactions throughout the national market system.[18]

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16 See Concept Release Concerning Equity Market Structure, Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3594-3596 (January 21, 2010) ("Concept Release") (discussing the evolution from "a market structure with primarily manual trading to a market structure with primarily automated trading").

17 ATSs fall within the statutory definition of national securities exchange, but are exempt from having to register as an exchange if they comply with Regulation ATS. See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70856 (December 22, 1998). Regulation ATS requires ATSs to be registered as broker-dealers with the Commission, which entails becoming a member of an Association and complying with the broker-dealer regulatory regime. 17 CFR 242.301(b)(1). Unlike a registered national securities exchange, an ATS is not required to file proposed rule changes with the Commission. ATSs include both dark pools and electronic communications networks ("ECNs"). ECNs provide their best-priced orders for inclusion in the consolidated quotation data, while dark pools do not. See Concept Release, supra note 16 at 3599. See also infra notes 158 - 161 and accompanying text (describing some of these firms' activity on exchanges). ATSs did not exist when Rule 15b9-1 was last amended in 1983.

18 Many, but not all, such proprietary trading firms are often characterized by: (1) the use of extraordinarily high-speed and sophisticated computer programs for generating, routing and executing orders; (2) the use of co-location services and individual data feeds offered by exchanges and others to minimize network and other types of latencies; (3) the use of very short time-frames for establishing and liquidating positions; (4) the submission of numerous orders that are cancelled shortly after submission; and (5) ending the trading day in as close to a flat position as possible (that is, not carrying significant, unhedged

Over time, active, cross-market proprietary trading firms began relying on the Rule 15b9-1 exemption in ways that were not envisioned when the Rule was adopted or amended.[19] As noted above, the de minimis allowance of Rule 15b9-1, and the subsequent exclusion of income derived from proprietary transactions conducted with or through another registered broker-dealer from such allowance, were designed to permit exchange-based specialists or floor brokers to conduct limited activities off-exchange. However, because the Rule does not explicitly limit this exclusion from the de minimis allowance to dealer activities ancillary to a floor-based business, a broker-dealer, with or without a floor presence, may engage in unlimited proprietary trading in the off-exchange market without becoming a member of an Association. Consequently, many of the most active, cross-market proprietary trading firms have been able to rely on the exemption from Association membership, despite effecting a significant volume of transactions off-exchange.

As a result, an exemption that was developed to address limited off-exchange activity by exchange-based specialists or floor brokers is today being used by many broker-dealers without a floor-based business, and that conduct a substantial percentage of the volume of off-exchange trading in the U.S. securities markets. Specifically, during the fourth quarter of 2014, broker-dealers that are not Association[20] members ("Non-Member Firms") accounted for 45% of orders

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positions over night). See Concept Release, supra note 16, at 3606. See also Staff of the Division of Trading and Markets, Commission, "Equity Market Structure Literature Review, Part II: High Frequency Trading," at 4-5 (March 18, 2014) (available at http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf).

19 These firms are registered with the Commission as broker-dealers but have elected to avail themselves of the Rule 15b9-1 exemption from membership in an Association.

20 Financial Industry Regulatory Authority, Inc. ("FINRA") is currently the sole Association. See infra note 34. In 1939, the Commission approved the National Association of Securities Dealers, Inc. ("NASD") as the first national securities association. See 4 FR 3564 (August 9, 1939). In 2007, the Commission approved

sent directly to ATSs, a significant category of off-exchange trading venue.[21] Preliminarily, the Commission does not believe the public interest finding that originally supported the adoption and amendments of Rule 15b9-1continues to apply today in this context.

Accordingly, the Commission is proposing to amend Rule 15b9-1 to better align the scope of its exemption, in light of today's market activity, with Section 15(b)(8) of the Exchange Act and the Commission's original purpose in adopting Rule 15b9-1, which was to accommodate broker-dealer activities ancillary to a floor-based business while preserving the traditional role of the exchange as the entity best suited to regulate member conduct on the exchange.[22] A broker-

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changes that consolidated the member firm regulatory functions of the NASD, an Association, and NYSE Regulation, Inc., and changed the name of the combined entity to FINRA. See Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007).

21 ATSs received approximately 230 billion orders during 2014 that were sent directly to an ATS (i.e., orders received by a broker-dealer that are then sent to another trading desk of that broker-dealer (so called "desk-reports") are generally excluded from these order totals). Orders from Non-Member Firms accounted for 49% of orders sent directly to ATSs during the first quarter of 2014, 49% of orders sent directly to ATSs during the second quarter of 2014, 48% of orders sent directly to ATSs during the third quarter of 2014, and 45% of orders sent directly to ATSs during the fourth quarter of 2014. In 2013, ATSs received approximately 163 billion orders that were sent directly to an ATS. Orders from Non-Member Firms accounted for 34% of orders sent directly to ATSs during the first quarter of 2013, 38% of orders sent directly to ATSs during the second quarter of 2013, 42% of orders sent directly to ATSs during the third quarter of 2013, and 45% of orders sent directly to ATSs during the fourth quarter of 2013. On a volume-weighted basis (i.e., accounting for variations in total order volume sent to ATSs), Non-Member Firms accounted for 48% of orders sent directly to ATSs in 2014, 40% in 2013, and 32% in 2012. This information is from data obtained from FINRA's Order Audit Trail System ("OATS").

22 In adopting Rule 15b8-1, the Commission stated: "Among the broker-dealers that are not members of a registered national securities association are several specialists and other floor members of national securities exchanges, some of whom introduce accounts to other members. The over-the-counter business of these broker-dealers may be limited to receipt of a portion of the commissions paid on occasional over-the-counter transactions in these introduced accounts, and to certain other transactions incidental to their activities as specialists. In most cases, the income derived from these activities is nominal." See Qualifications and Fees Release, supra note 12, at 11675.

dealer that conducts off-exchange transactions outside the limited scope of Rule 15b9-1, as proposed to be amended, would be required to become a member of an Association. Consequently, such a broker-dealer would be subject, with respect to its off-exchange transactions, to the oversight and rules of an Association, the category of SRO primarily responsible for regulating trading in the off-exchange market in accordance with Section 15(b)(8).[23] Further, as a result of the proposal, a broker-dealer that does not trade off-exchange but that trades indirectly on multiple exchanges would be required in accordance with Section 15(b)(8), to become a member of an Association, or alternatively, a member of each exchange where it effects transactions other than transactions to hedge the risks of its floor-based activities.

A. Regulatory History

The primary purpose of an SRO is to regulate its members.[24] Although the Act provides a limited and targeted exception to Association membership requirements for broker-dealers, its approach to effecting supervision is relatively uniform: broker-dealers must be members of the SROs that regulate the venues upon which they transact. Section 19(g)(1) of the Act, among other things, requires every SRO to examine for and enforce compliance by its members and associated persons with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of

23 See Pub. L. No. 75-719, 52 Stat. 1070 (1938) (The Maloney Act, which established the concept of and framework for Associations, states in its preamble that its purpose was "[t]o provide for the establishment of a mechanism of regulation [Associations] among over-the-counter brokers and dealers operating in interstate and foreign commerce or through the mails, to prevent acts and practices inconsistent with just and equitable principles of trade, and for other purposes"). See also infra notes 26, 28-33 and accompanying text (describing the early history of the Maloney Act).

24 See, e.g., S. Doc. No. 93-13 at 147 (1973) (describing the structure of the self-regulatory system in which SROs "are delegated governmental power in order to enforce, at their own initiative, compliance by members of the industry with legal and ethical standards going beyond the basic requirements laid down in the Act.").

the Act.[25] A primary purpose of an Association as an SRO, among other things, is to regulate the off-exchange market.[26] Under the Exchange Act, as adopted in 1934, the direct regulation of broker-dealer activities on national securities exchanges was to be conducted by the exchanges themselves. As there was no SRO for the off-exchange market, regulation of the off-exchange market was to be the Commission's responsibility.[27] Congress recognized that the benefits of exchange regulation could be undermined in the absence of a complementary regulatory framework for the off-exchange market[28] and provided the Commission the authority to adopt

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25 15 U.S.C. 78q(d); 15 U.S.C. 78s(g).

26 The Maloney Act authorizes an Association to, among other things, establish rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest." 15 U.S.C 78o(b)(6). See also First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 692 (3d Cir. 1979) ("The purpose of [NASD] is to provide self-regulation of the over-the-counter securities market."); Special Study, supra note 14, at 65 (describing the NASD as "the agency with primary self-regulatory responsibility for over-the-counter markets.").

27 As adopted in 1934, Section 15 of the Exchange Act read, in relevant part: "It shall be unlawful, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest and to insure to investors protection comparable to that provided by and under authority of this title in the case of national securities exchanges, (1) for any broker or dealer . . . to make or create, a market, otherwise than on a national securities exchange, for both the purchase and sale of any security . . . or (2) for any broker or dealer to use any facility of any such market. Such rules and regulations may provide for the regulation of all transactions by brokers and dealers on any such market, for the registration with the Commission of dealers and/or brokers making or creating such a market, and for the registration of the securities for which they make or create a market and may make special provision with respect to securities or specified classes thereof listed, or entitled to unlisted trading privileges, upon any exchange on the date of the enactment of this title, which securities are not registered under the provisions of section 12 of this title." Pub. L. No. 73-291, 48 Stat. 881, 895-96 (1934).

28 In considering adopting the Maloney Act, the House noted that: "The committee has been convinced that effective regulation of the exchanges requires as a corollary a measure of

rules and regulations concerning the off-exchange market to achieve investor protections comparable to those on exchanges.[29] After further study,[30] however, in 1938 Congress imposed a comprehensive regulatory framework for the off-exchange market through the Maloney Act.[31] The Maloney Act added Section 15A to the Act,[32] providing for the creation of national securities associations of broker-dealers, with powers to adopt and enforce rules to regulate the off-exchange market.[33] This led to the creation of NASD, the predecessor of FINRA, and the

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control over the over-the-counter markets. The problem is clearly put in the recent report of the Twentieth Century Fund on 'Stock Market Control': 'The benefits that would accrue as the result of raising the standards of security exchanges might be nullified if the over-the-counter markets were left unregulated and uncontrolled. . . . To leave the over-the-counter markets out of a regulatory system would be to destroy the effects of regulating the organized exchanges.'" H.R. Doc No. 1383, 73d Cong. 2d Sess. at 4 (1934) (quoting report on "Stock Market Control" by the Twentieth Century Fund).

29 Id.

30 See Statement of Senator Francis T. Maloney, Hearings before Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess. (1938) (noting that the Maloney Act came after "a long-time effort on the part of the Securities and Exchange Commission in rather close cooperation with members of the investment banking business and over-the-counter dealers and brokers.").

31 Pub. L. No. 75-719, 52 Stat. 1070 (1938).

32 15 U.S.C. 78o-3.

33 Id.; see also S. Rep. No. 75-1455, at 3-4 (1938) ("The committee believes that there are two alternative programs by which this problem [of regulation of the off-exchange market] could be met. The first would involve a pronounced expansion of the organization of the Securities and Exchange Commission; the multiplication of branch offices; a large increase in the expenditure of public funds; an increase in the problem of avoiding the evils of bureaucracy; and a minute, detailed, and rigid regulation of business conduct by law. . . . The second of these alternative programs, which the committee believes distinctly preferable to the first . . . is based upon cooperative regulation, in which the task will be largely performed by representative organizations of investment bankers, dealers, and brokers, with the Government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation."). See also S. Rep. No. 74-1455, at 2-3 (1938) ("It has been deemed advisable to authorize the Commission to subject such activities [i.e., trading in the over-the-counter markets] to regulation similar to that prescribed for transactions on organized exchanges. This power is vitally necessary to forestall the widespread evasion of stock-exchange regulation by

only Association[34] registered to date.[35]

Section 15(b)(8) of the Act, enacted in 1964,[36] further strengthened regulatory oversight of the off-exchange market by prohibiting a broker-dealer from effecting any transaction "otherwise than on a national securities exchange" unless the broker-dealer was either a member of an Association, or met the Commission's standards with respect to training, experience, and other relevant qualifications.[37] In 1965, the Commission adopted Rule 15b8-1 to establish the

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the withdrawal of securities from listing on exchanges, and by transferring trading therein to 'over-the-counter' markets where manipulative evils could continue to flourish, unchecked by any regulatory authority") (quoting S. Rep. No. 73-792, at 6 (1934)). See also supra note 26.

34 See supra note 20. The National Futures Association ("NFA"), as specified in Section 15A(k) of the Act, also is registered as a national securities association, but only for the limited purpose of regulating the activities of NFA members that are registered as brokers or dealers in security futures products under Section 15(b)(11) of the Act.

35 The existing self-regulatory structure in which an Association serves as the regulator of the off-exchange market and exchanges focus their regulatory supervision on their respective markets has not been materially altered from a statutory perspective since its establishment. See Concept Release Concerning Self-Regulation, Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256, 71258 (December 8, 2004).

36 Section 15(b)(8) as enacted provided: "No broker or dealer registered under section 15 of this title shall, during any period when it is not a member of a securities association registered with the Commission under section 15A of this title, effect any transaction in, or induce the purchase or sale of, any security (otherwise than on a national securities exchange) unless such broker or dealer and all natural persons associated with such broker or dealer meet such specified and appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable . . . ." Pub. L. No. 88-467, 78 Stat. 565, 572-73 (1964).

37 In the Special Study, the Commission explained that the controls over entry into the securities business were inadequate, allowing entry by unqualified persons. Special Study, supra note 14, at 1, 23 (1963). Congress' amendments in 1964 responded to these findings.

SECO Program, which provided for the direct regulation by the Commission of broker-dealers that effected transactions off-exchange and that chose not to join an Association.[38]

Rule 15b8-1 provided for an exemption from the SECO Program, and by extension from Association membership, for those broker-dealers that: (1) were members of a national securities exchange; (2) did not carry customer accounts; and (3) had annual gross income derived from off-exchange activity that amounted to no greater than $1,000.[39] This set the basic framework for the Rule 15b9-1 exemption from Association membership that exists today. The Commission recognized that, at that time, exchange-based specialists and other floor brokers, which were comprehensively regulated by the exchange of which they were a member, occasionally introduced accounts to other members and shared in the commission revenues.[40] Rule 15b8-1 permitted these broker-dealers, who were not required to register with the

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38 Under the SECO Program, every associated person engaged directly or indirectly in securities activities for or on behalf of a non-member broker-dealer, and every associated person who supervised others engaged in any securities activities, was required to successfully complete either the general securities examination prescribed by the Commission or an alternative examination deemed satisfactory by the Commission. See Qualifications and Fees Release, supra note 12, at 11676 (defining the term "nonmember broker or dealer" as "any broker or dealer, including a sole proprietor, registered under section 15 of the Act, who is not a member of a national securities association registered with the Commission under section 15A of the Act."). Any broker-dealer could choose to join an Association or be regulated by the Commission directly under the SECO Program.

39 "Under Rule 15b8-1 (17 CFR § 240.15b8-1), any broker-dealer who is a member of a national securities exchange is exempt from the rule if he does not carry customers' accounts and if his annual gross income derived from his over-the-counter business is no more than $1,000. Should a broker-dealer's over-the-counter income exceed these limits for an accounting year, such broker-dealer and all persons associated with him become subject to the requirements of the rule." Id. at 11675.

40 See supra note 22.

Commission as broker-dealers at the time,[41] to receive a portion of the commissions paid on occasional off-exchange transactions on these introduced accounts without becoming subject to the SECO rules and broker-dealer registration, so long as the income derived from those activities was nominal.[42]

In 1976, the Commission amended Rule 15b8-1 to provide that income derived from transactions for the dealer's own account effected with or through another registered broker-dealer would not count towards the $1,000 de minimis allowance.[43] In adopting this amendment to Rule 15b8-1, the Commission noted that an exchange-based floor broker could effect

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41 Until 1975, broker-dealers who traded exclusively on the floor of a national securities exchange were exempt from registration with the Commission. The 1975 Amendments required all broker-dealers, including exchange specialists and floor brokers, to register with the Commission, and extended the Commission's SECO rulemaking authority to any exchange member trading on an exchange other than an exchange of which it was a member. 1975 Amendments, supra note 6, at 121. The 1975 Amendments revised Section 15(b) such that the substance of then existing Section 15(b)(8) was captured in Sections 15(b)(7) - (9). See id. at 131. One purpose of the 1975 Amendments was to assure that the Commission could regulate and recoup the costs of regulating transactions of exchange members conducted on exchanges of which they were not a member. See 1975 Amendments, supra note 6, at 125 (amending Section 15 of the Exchange Act to provide the Commission with authority to "prescribe reasonable fees and charges to defray its costs" of regulation).

42 See Adoption of Amendments to SECO Rules, supra note 13. See also supra note 22 (noting that the over-the-counter business of these broker-dealers may be limited and the income derived from these activities is nominal).

43 "Any nonmember broker or dealer who is a member of a national securities exchange shall be exempt from this rule if (1) he carries no accounts of customers, and (2) his annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange of which he is a member is an amount no greater than $1,000. Provided however, [t]hat gross income derived from transactions otherwise than on such national securities exchange which are effected for his own account with or through another registered broker or dealer shall not be subject to such limitation." See Adoption of Amendments to SECO Rules, supra note 13, at 10601. Thus, broker-dealers registering with the Commission as a result of the 1975 Amendments became subject to the SECO rules in 1976, but could remain exempt from such rules pursuant to Rule 15b8-1 and its exclusion for proprietary trading.

transactions through another broker-dealer for its own account on an exchange of which it was not a member, and indicated that such transactions ultimately would be effected by a member of that exchange.[44] At the time this provision was adopted, the circumstances under which an exchange specialist or floor broker would trade proprietarily off the exchange were quite limited, such as when a regional exchange specialist would hedge risk on the primary listing market.[45]

In 1983, Congress amended the Act to eliminate the direct oversight of broker-dealers by the Commission.[46] Congress maintained the exception from membership in an Association in Section 15(b)(8) of the Act for those broker-dealers that effected transactions in securities only on an exchange of which they were a member. Congress also left unchanged the ability of the Commission to expand upon the statutory exception in Section 15(b)(8) through exemptive

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44 The Commission provided the following example to describe the application of the exclusion for proprietary trading: "a broker who is acting as a floor broker on a particular exchange, and who effects transactions for his own account otherwise than on that exchange through another broker-dealer who acts as a clearing member for the floor broker, would be permitted to effect transactions on exchanges of which neither he nor his clearing broker are members without becoming subject to the SECO rules." Id. In this example, "[t]he clearing broker would, of course, effect transactions on an exchange of which he was not a member through a member of that exchange." Id. at 10602, n. 8.

45 See supra note 14.

46 At that time, direct oversight of broker-dealers by the Commission was conducted through the SECO Program. 15 U.S.C. 78o(b)(8), as amended by Pub. L. No. 98-38, 97 Stat. 205, 206 (1983). See also H.R. Rep. No. 98-106, at 597 (1983) (citing a preference for self-regulation over direct regulation by the Commission. Among other benefits of self-regulation, the report noted that NASD had available a broader and more effective range of disciplinary sanctions to employ against broker-dealers than had the Commission).

Section 15(b)(8) is virtually the same as it was in 1983: "It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 15A of this title or effects transactions in securities solely on a national securities exchange of which it is a member." 15 U.S.C. 78o(b)(8). In 1986, Congress enacted non-substantive amendments modifying a few terms in the statute. Pub. L. No. 99-571, 100 Stat. 3208, 3218 (1986). 15 U.S.C. 78o(b)(8).

authority in Section 15(b)(9) of the Act.[47] When the SECO rules were abolished in 1983, the Commission amended and renumbered Rule 15b8-1.[48] The substance of newly renumbered Rule 15b9-1 remained largely the same as Rule 15b8-1, with modifications that primarily accommodated transactions effected through the new Intermarket Trading System ("ITS") linkage,[49] and eliminated references to, and requirements under, the SECO Program.

Under the Rule as amended in 1983, a broker-dealer was not required to become a member of an Association if: (1) it was a member of a national securities exchange, (2) carried no customer accounts, and (3) had annual gross income no greater than $1,000 that was derived from securities transactions effected otherwise than on a national securities exchange of which the broker-dealer was a member.[50] As under the SECO rules, income derived from transactions effected for a broker-dealer's own account with or through another broker or dealer was not included in the $1,000 de minimis allowance.[51]

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47 See supra note 7.

48 See supra note 9.

49 See infra notes 126-130 and accompanying text.

50 "Any broker or dealer required by Section 15(b)(8) of the Act to become a member of a registered national securities association shall be exempt from such requirement if it: (1) Is a member of a national securities exchange, (2) carries no customer accounts, and (3) has annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange of which it is a member in an amount no greater than $1,000." 17 CFR 240.15b9-1(a); see also SECO Programs Release, supra note 9, at 53690.

51 "The gross income limitation contained in paragraph (a) of this section, shall not apply to income derived from transactions (1) for the dealer's own account with or through another registered broker or dealer or (2) through the Intermarket Trading System." 17 CFR 240.15b9-1(b); SECO Programs Release, supra note 9, at 53690.

Since 1983, Rule 15b9-1 has remained unchanged, except for a technical amendment in 2005 to update cross-references when the Commission adopted Regulation NMS.[52]

B. Regulatory Oversight of Off-Exchange Trading Activity

Section 19(g)(1) of the Act requires every SRO to examine for and enforce compliance by its members and associated persons with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.[53] Without this relief, the statutory obligation of each individual SRO would result in duplicative examinations and oversight of broker-dealers that are members of more than one SRO ("common members"). Section 17(d)(1) of the Act is intended, in part, to eliminate overlapping examinations and regulatory functions.[54] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with the applicable statutes, rules, and regulations, or to perform other specified regulatory functions.[55]

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d-1 and Rule 17d-2 under the Act.[56] Rule 17d-1 authorizes the Commission to name a single SRO as the designated examining authority ("DEA") to examine common members for compliance with the

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52 Regulation NMS, Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37618 (June 29, 2005).

53 15 U.S.C. 78s(g).

54 See 1975 Amendments, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94-75, 94th Cong., 1st Session 32 (1975).

55 15 U.S.C. 78q(d)(1).

56 17 CFR 240.17d-1; 17 CFR 240.17d-2.

financial responsibility requirements imposed by the Act, or by the Commission or SRO rules.[57] To address regulatory duplication in areas other than financial responsibility, including sales practices and trading practices, the Commission adopted Rule 17d-2 under the Act.[58] Rule 17d-2 permits SROs to propose joint plans among two or more SROs for the allocation of regulatory responsibility with respect to their common members.[59] The regulatory responsibility allocated among SROs only extends to matters for which the SROs would share authority, which means that only common rules among SROs can be allocated under Rule 17d-2. Under paragraph (c) of Rule 17d-2, the Commission may declare such a plan effective if, after appropriate notice and opportunity for comment, it finds that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among SROs, or to remove impediments to and foster the development of a national market system and a national clearance and settlement system and in conformity with the factors set forth in Section 17(d) of the Act.[60] Commission approval of a plan filed pursuant to Rule 17d-2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.[61]

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57 See Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

58 See Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

59 "Any two or more self-regulatory organizations may file with the Commission a plan. . . for allocating among the self-regulatory organizations the responsibility to receive regulatory reports from persons who are members or participants of more than one of such self-regulatory organizations to examine such persons for compliance, or to enforce compliance by such persons, with specified provisions of the Securities Exchange Act of 1934, the rules and regulations thereunder, and the rules of such self-regulatory organizations, or to carry out other specified regulatory functions with respect to such persons." 17 CFR 240.17d-2.

60 Id.

61 Id. Exchanges also enter into Regulatory Services Agreements ("RSAs") whereby one SRO contractually agrees to perform regulatory services for another. See, e.g., FINRA News Release, FINRA Signs Regulatory Services Agreement with the Chicago Board

The principle underlying the self-regulatory structure in the Exchange Act is the concept that the SRO best positioned to conduct regulatory oversight should assume responsibility for that oversight.[62] As a general matter, the SROs and the Commission have used the flexibility provided by Section 17 to allocate responsibilities in such a manner.[63] Section 15(b)(8) of the Exchange Act further implements this construct of effective regulatory oversight by requiring Association membership of a broker-dealer unless it effects transactions solely on an exchange of which it is a member. Those exempt from Association membership pursuant to Rule 15b9-1 originally were exchange specialists and other floor members, and the off-exchange activity permitted under Rule 15b9-1 (including its predecessor rule) was intended only to accommodate limited activities ancillary to that floor-based business.

As the sole currently registered Association, FINRA is the SRO primarily responsible for regulating trading in the off-exchange market.[64] FINRA also conducts the vast majority of

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Options Exchange, Incorporated ("CBOE") and C2 Options Exchange, Incorporated ("C2") (December 22, 2014), available at http://www.finra.org/newsroom/newsreleases/2014/p602174. However, RSAs do not relieve the contracting SRO from regulatory responsibility for the performance of any regulatory services allocated pursuant to the RSA and are not filed with the Commission for approval.

62 Section 17(d)(1) of the Act provides that the Commission, in allocating authority among SROs pursuant to Section 17(d)(1), shall "take into consideration the regulatory capabilities and procedures of the self-regulatory organizations, availability of staff, convenience of location, unnecessary regulatory duplication, and such other factors as the Commission may consider germane to the protection of investors, cooperation and coordination among self-regulatory organizations, and the development of a national market system . . ." 15 U.S.C. 78q(d)(1).

63 See supra note 6; infra note 69.

64 See supra note 31.

broker-dealer examinations,[65] mandates broker-dealer disclosures, and writes and enforces rules governing broker-dealer conduct.[66] FINRA regulates trading in non-listed equities, fixed income, and other traded products, and investigates and brings enforcement actions against members for violations of its rules, the rules of the Municipal Securities Rulemaking Board, and the Exchange Act and the rules thereunder.[67] As noted above, the regulatory focus of national securities exchanges, which are also SROs, has been more narrow, with primary responsibility to regulate trading by their members on their respective exchanges,[68] enforce conduct rules (if they have not been relieved of that responsibility by 17d-2 Agreements), and otherwise perform member regulation for their members that are not also members of FINRA. Most exchanges have entered into 17d-2 Agreements with FINRA that allocate regulatory responsibility over common members to FINRA for compliance with common conduct rules.[69]

FINRA has developed a transparency and regulatory regime for the off-exchange market. All off-exchange trades are reported to FINRA,[70] and as a result FINRA has developed a set of

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65 The Commission staff also conducts risk-based examinations of broker-dealers. However, routine broker-dealer examinations are conducted by the SROs, and the Commission staff oversees the examination efforts of the SROs.

66 15 U.S.C. 78o-3.

67 Id.

68 Congress saw the codification of the regulations requiring the registration of off-exchange broker-dealers as "an essential supplement to regulation of the exchanges." H.R. Rep. No. 74-2601, at 4 (1936). See also supra note 28 and accompanying text.

69 See, e.g., Exchange Act Release No. 63430 (December 3, 2010), 75 FR 76758 (December 9, 2010) (order approving Rule 17d-2 plan to allocate regulatory responsibility to FINRA for certain Regulation NMS rules by 13 exchanges). Generally, FINRA is also the DEA for financial responsibility rules for exchange members that also are members of FINRA. See infra note 164 (discussing DEAs).

70 FINRA operates two Trade Reporting Facilities ("TRFs"), one jointly with NASDAQ and another with the NYSE. The TRFs are FINRA facilities for FINRA members to report transactions effected otherwise than on an exchange. See Exchange Act Release

trade reporting rules to support that transparency regime.[71] FINRA also has developed a regulatory audit trail, which provides regulatory data on orders, quotes, routes, cancellations, and executions.[72] FINRA has developed rules and guidance tailored to trading activity[73] and has developed surveillance technology and specialized regulatory personnel to provide surveillance, supervision, and enforcement of activity occurring off-exchange.[74] Furthermore, FINRA has a detailed set of member conduct rules that apply to all activities of a firm, whether on- or off-exchange.[75]

No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (order approving the NASDAQ TRF); Exchange Act Release No. 55325 (February 21, 2007), 72 FR 8820 (February 27, 2007) (notice of filing and immediate effectiveness of a proposed rule change to establish the NYSE TRF). In addition, FINRA operates the Alternative Display Facility ("ADF"), which is a FINRA facility for posting quotes and reporting trades governed by FINRA's trade reporting rules. See Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002) (order approving the ADF); see also Exchange Act Release No. 71467 (February 3, 2014), 79 FR 7485 (February 7, 2014) (order approving a proposed rule change to update the rules governing the ADF).

71 See FINRA Rule 7000 Series – Clearing, Transactions and Order Data Requirements, and Facility Charges.

72 FINRA operates the OATS system, which is an integrated audit trail of order, quote, and trade information for all NMS stocks and OTC equity securities required to be submitted by FINRA members. See e.g., Exchange Act Release No. 54585 (October 10, 2006), 71 FR 61112 (October 17, 2006) (order approving a proposed rule change relating to the expansion of OATS reporting requirements to OTC equity securities). FINRA uses the OATS audit trail system to recreate events in the life cycle of orders and more completely monitor the trading practices of FINRA member firms. See FINRA.org, Order Audit Trail System (OATS), available at http://www.finra.org/industry/oats (last visited March 19, 2015).

73 See e.g., FINRA Rules 5240 (Anti-Intimidation/Coordination), 5250 (Payments for Market-Making), 5210.02 (Publication of Transactions and Quotations – Self-Trades), and 6140 (Other Trading Practices).

74 See FINRA.org, FINRA 2013 Year in Review and Annual Financial Report, available at http://www.finra.org/sites/default/files/Corporate/p534386.pdf (last visited March 19, 2015).

75 See Part V.B.4 discussing the competitive effects of off-exchange market regulation.

As noted, Rule 15b9-1 in its current form allows a broker-dealer to engage in unlimited proprietary trading in the off-exchange market without becoming a member of an Association, so long as its proprietary trading activity is conducted with or through another registered broker-dealer (i.e., not with a customer). In practice, this allows many cross-market proprietary trading firms to avoid Association membership, despite their effecting a significant volume of transactions in the off-exchange market. Non-Member Firms are not subject to oversight by an Association and their off-exchange transactions typically are not overseen by the exchanges of which they may be members. Exchanges traditionally have not assumed the role of regulating the totality of the trading of their member-broker-dealers, and exchanges are currently not well-positioned to assume that role, in light of the statutory scheme and, among other things, their limited access to data[76] and the proper rule set to regulate off-exchange trading. Exchanges generally do not have a detailed set of member conduct rules and non-exchange-specific trading rules, thus allowing such broker-dealers and their personnel to conduct business under a less specific regulatory regime than FINRA members. In this context and consistent with the statutory framework that places responsibility for off-exchange trading with an Association, therefore, the Commission preliminarily believes that an Association is better suited to regulate off-exchange trading.

The Commission estimates that, today, there are approximately 125 broker-dealers exempt from Association membership.[77] This group includes some of the most active cross-

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76 See Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45728-30 (August 1, 2012) (discussing the use and limitations of current SRO audit trails and noting that "[m]ost SROs maintain their own specific audit trails applicable to their members" and "each SRO only has direct access to its own audit trails . . .").

77 The Commission believes that the majority of these firms rely on the Rule 15b9-1 exemption rather than the statutory exception from Association membership under

market proprietary trading firms, which generate a substantial volume of orders and transactions in the off-exchange market. For example, the Commission estimates that orders from Non-Member Firms represented a volume-weighted average of approximately 32% of all orders sent directly to ATSs during 2012.[78] By 2014, these Non-Member Firms represented a volume-weighted average of approximately 48% of orders sent directly to ATSs.[79]

Accordingly, the Commission believes that many of the broker-dealers today that rely on the Rule 15b9-1 exemption are very different from those for which the Rule originally was intended—exchange-based specialists and other floor members that focused their business on a single exchange of which they were a member. The presumption built into Section 15(b)(8) and further extended by Rule 15b9-1, namely that the exchange of which the firm is a member is in the optimal position to provide self-regulatory oversight, does not appear to hold for those firms that avail themselves of the exemption but are engaged in a significant amount of off-exchange trading.[80] For broker-dealers that conduct business only on one exchange, the exchange SRO is well-positioned to oversee the activities of those broker-dealers and write and enforce rules

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Section 15(b)(8) of the Act, 15 U.S.C. 78o(b)(8), because the Rule-based exemption is more permissive than the statute, allowing, for example, unlimited proprietary trading on an exchange of which a broker-dealer is not a member. The estimate of 125 firms is based on publicly available data reviewed by staff during March of 2015. See infra note 148.

78 This estimate is based on data from OATS. See supra note 21.

79 This information is based on data from OATS. In 2013, these Non-Member Firms represented a volume-weighted average of approximately 40% of orders sent directly to ATSs. Id.

80 For example, based on disclosures on Form BD as of March 2015, there were 13 Non-Member Firms that are members of only CBOE, an options exchange, that do not disclose as part of their business activities on Form BD being a "put and call broker or dealer or option writer." Similarly, five Non-Member Firms disclose on Form BD that they are a "broker or dealer making inter-dealer markets in corporate securities over-the-counter" and are not members of FINRA.

tailored to their business model and conduct. For a broker-dealer that trades electronically across a range of exchange and off-exchange venues, however, the individual exchange or exchanges of which the broker-dealer may be a member are not able to as effectively regulate the off-exchange activity of the broker-dealer because such exchange(s) today has neither the resources nor the necessary expertise to oversee such off-exchange activity.[81] The Commission is concerned that the reliance on the Rule 15b9-1 exemption by cross-market proprietary trading firms, given that exchanges focus their regulatory oversight on their respective exchanges, undermines the effectiveness of the regulatory structure of the off-exchange market and the equities markets more broadly.

As noted, FINRA currently is the SRO to which off-exchange trades are reported.[82] However, because it does not have jurisdiction over Non-Member Firms, it is unable to enforce compliance with the federal securities laws and rules, or apply its own rules, to broker-dealers that conduct a significant amount of off-exchange trading activity, including those that engage in so-called high-frequency trading strategies. As a result, FINRA's ability to perform comprehensive market surveillance, especially for violations of Commission rules, as well as its ability to understand and reconstruct activity in the off-exchange market generally, is limited because Non-Member Firms are not consistently identified in trade reports to the TRFs[83] or the

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81 The Commission notes that, while today an exchange may not be able to effectively regulate off-exchange activity, it may be able to acquire the resources and expertise to do so.

82 See supra note 70.

83 Reports to the TRFs can only be made by FINRA members. See FINRA Rules 7210A(k) and 7210B(i) (defining the term "Trade Reporting Participant" or "Participant" as "any member of FINRA in good standing that uses the System").

ADF, and their order activity is not captured by OATS.[84] Accordingly, FINRA is unable to monitor the off-exchange market activity of Non-Member Firms, and detect potentially manipulative or other illegal behavior, as efficiently or effectively as it can with FINRA members.[85] Obtaining additional data, such as through the Consolidated Audit Trail ("CAT"),[86] or the assumption of post-trade surveillance and investigation by the Non-Member Firm's

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84 When a Non-Member Firm routes an order to a FINRA member which then routes the order to an exchange or off-exchange for execution, OATS data would indicate only that the FINRA member received an order from a Non-Member Firm. The identity of the Non-Member Firm is often not captured because such Non-Member Firms are not required to use a unique Market Participant Identifier ("MPID") or other identifier when routing orders to a FINRA member. In some cases, FINRA is able to identify the Non-Member Firm that participated in a transaction if, for example, it has an MPID and provides it to the firm to which it routed an order and that firm reports it to FINRA. FINRA has solicited comment from its members on a proposed FINRA rule change that would require FINRA members to identify Non-Member Firms in off-exchange transactions reported to OATS. See FINRA Regulatory Notice 14-51, Equity Trading Initiatives: OATS and ATS Reporting Requirements (November 2014), available at https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p601681.pdf. This proposal has not yet been filed with the Commission pursuant to Section 19(b)(1) of the Act. 15 U.S.C. 78s(b)(1).

85 Non-Member Firms that engage in off-exchange transactions are not required to submit audit trail data to FINRA. See FINRA Rules 6610 and 6622(a)(i). The Commission believes that this lack of audit trail reporting is problematic because an Association has statutory responsibility for regulatory oversight of the off-exchange market. Although the Commission understands some off-exchange trades between Non-Member Firms are voluntarily reported by clearing firms, clearing firms are not obligated to report such transactions. Lack of comprehensive reporting of off-exchange transactions to FINRA, among other things, undermines FINRA's ability to effectively surveil the off-exchange market. By extension, this also undermines the ability of the Commission and investors to fully benefit from the self-regulatory model envisioned by Congress in the Exchange Act.

86 Rule 613 under the Act requires SROs to jointly submit to the Commission a national market system plan ("NMS Plan") to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail, with respect to NMS securities, that would capture customer and order event information for NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution. See Exchange Act Release No. 67457 (July 19, 2012), 77 FR 45721 (August 1, 2012) ("CAT Release"); 17 CFR 242.613.

member exchange, would neither confer jurisdiction nor provide needed oversight tools to FINRA over Non-Member Firms that participate in the off-exchange market. No exchange currently is positioned to regulate its members' conduct in the off-exchange market, as the exchanges generally have access only to order and trade data for transactions effected on their markets.[87] Moreover, even if exchanges were able to access the necessary trading data (a possibility that would increase with the deployment of CAT),[88] the Commission believes that piecemeal regulation of the off-exchange market by multiple SROs based on the membership status of the participants and a web of regulatory allocations among SROs, through the use of multiple 17d-2 agreements, is significantly less efficient and frustrates the structure established by Congress that an Association regulate the off-exchange market.[89] In addition, an Association's regulatory responsibility for the off-exchange market includes an obligation to monitor those markets for operational and regulatory issues, as well as issues relating to market

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87 While some exchanges have rules requiring the reporting of certain off-exchange transactions by their members, these rules, as they currently exist, would not provide the exchanges with the complete view of the market that the Commission believes is necessary to effectively regulate the off-exchange market. For example, NYSE MKT LLC ("NYSE MKT") Rule 410B - Equities (Reports of Listed Securities Transactions Effected Off the Exchange) only requires reporting of off-exchange transactions in securities listed on NYSE MKT that are not reported to the Consolidated Tape. See Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (order approving, among other things, NYSE MKT Rule 410B); see also, e.g., CBOE Rule 6.49 (Transactions Off the Exchange) (requiring that CBOE members executing transactions in options listed on the exchange other than on CBOE merely keep a record of such transaction for a period of one year).

88 The Commission notes that the CAT NMS plan would not be implemented for several years. In accordance with Rule 613, the SROs would be required to report the required data to the central repository within one year after effectiveness of the NMS plan; broker-dealers, other than small broker-dealers, would be required to report the required data to the central repository within two years after effectiveness of the NMS plan; and small broker-dealers would be required to report the required data within three years after effectiveness of the NMS plan. 17 CFR 242.613.

89 See supra notes 28-33 and accompanying text.

disruptions.[90] The Commission is concerned that the inability of an Association to reliably identify and enforce regulatory compliance by cross-market proprietary trading firms that are Non-Member Firms in the off-exchange market, creates a risk to the fair and orderly operations of the market.

Further, because FINRA is unable to apply the rules it has developed for the off-exchange market to Non-Member Firms, its ability to create a consistent regulatory framework for the off-exchange market is undermined. FINRA has sought to establish a robust regulatory regime for broker-dealers, including broker-dealers conducting business in the off-exchange market, and has developed a detailed set of rules in core areas such as trading practices,[91] business conduct,[92] financial condition and operations,[93] and supervision.[94] Because Non-

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90 15 U.S.C. 78o-3.

91 See FINRA Rule 5000 Series – Securities Offerings and Trading Standards and Practices. For instance, FINRA has rules prohibiting members from coordinating prices and intimidating other members. See FINRA Rule 5240(a), providing, among other things, that "[n]o member or person associated with a member shall: (1) coordinate the prices (including quotations), trades or trade reports of such member with any other member or person associated with a member, or any other person; (2) direct or request another member to alter a price (including a quotation); or (3) engage, directly or indirectly, in any conduct that threatens, harasses, coerces, intimidates or otherwise attempts improperly to influence another member, a person associated with a member, or any other person." The Commission notes that CBOE has stated that it views any collusion, intimidation and harassment by a CBOE member as "inconsistent with the just and equitable principles of trade." See CBOE Regulatory Circular RG97-167 (February 7, 2000) and CBOE Rule 4.1. See also supra note 73 and accompanying text.

92 See FINRA Rule 2000 Series – Duties and Conflicts.

93 See FINRA Rule 4000 Series – Financial and Operational Rules. See e.g., FINRA Rule 4370(a) providing, among other things, that "[e]ach member must create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption. Such procedures must be reasonably designed to enable the member to meet its existing obligations to customers. In addition, such procedures must address the member's existing relationships with other broker-dealers and counter-parties." Although NYSE MKT LLC Equities Rule 4370 is similar to FINRA Rule 4370(a), for example, a number of other exchanges do not have such a rule.

Member Firms are not subject to these or other FINRA rules, they may be subject to a less robust regulatory framework than FINRA members that themselves trade off-exchange. Non-Member Firms also are not subject to the costs associated with FINRA membership.[95]

As is discussed in more detail in the Economic Analysis, firms that become FINRA members would become subject to the fees charged by FINRA to all of its member firms. FINRA charges each member firm certain regulatory fees designed to recover the costs to FINRA of the supervision and regulation of members, including performing examinations,

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94 See FINRA Rule 3000 Series – Supervision and Responsibilities Relating to Associated Persons. This rule series generally requires FINRA member firms to, among other things, establish, maintain, and enforce written procedures to supervise the types of business in which the firm engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. See e.g., FINRA Rules 3110 (Supervision), 3120 (Supervisory Control System), and 3170 (Tape Recording of Registered Persons by Certain Firms). See also FINRA By-Laws Article III – Qualifications of Members and Associated Persons. Any person associated with a member firm who is engaged in the securities business of the firm—including partners, officers, directors, branch managers, department supervisors, and salespersons—must register with FINRA. Other SROs do not have similar standards for associated persons of member broker-dealers.

95 The Commission notes that FINRA may need to consider reassessing the structure of its fees, including its Trading Activity Fee, in order to assure that it is fairly and equitably applied to many of the Non-Member Firms that, as a result of the amendments to Rule 15b9-1, may join FINRA. FINRA uses the TAF to recover the costs to FINRA of the supervision and regulation of members, including performing examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. See FINRA Schedule A to the By-Laws of the Corporation, Section 1(a), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4694 ("FINRA Schedule A"). The TAF is generally assessed on FINRA member firms for all equity sales transactions that are not performed in a broker-dealer's capacity as a registered exchange specialist or market maker. See id. at Section 1(b). As discussed above, many of the broker-dealers that may be required to join FINRA if the proposed amendments are adopted effect transactions in large volumes throughout the national market system, and often in a capacity other than as a registered market-maker. Accordingly, the Commission notes that FINRA may need to consider reevaluating the structure of the TAF to assure that it appropriately takes into account this business model. See also infra notes 174-175 and accompanying text for further discussion of the TAF.

financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.[96] FINRA's regulatory fees include a Trading Activity Fee ("TAF").[97]

The number of trades subject to the TAF in the off-exchange market—and thus the aggregate fees collected by FINRA for that market segment—would not be expected to materially change if the proposed amendments are adopted because, in general, the TAF currently is assessed on the ATSs where Non-Member Firms effect off-exchange transactions, rather than on the Non-Member Firms. However, it is likely that certain on-exchange trades by Non-Member Firms that currently are not covered by the TAF would be captured.[98] As such, the Commission preliminarily believes that FINRA may need to consider reevaluating its fee

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96 FINRA Schedule A, supra note 95, at Section 1.

97 FINRA assesses each member a TAF on the sale of all covered securities. For the purposes of determining the TAF, covered securities include, among other things, all exchange-registered securities wherever executed and all other equity securities traded otherwise than on an exchange. FINRA last adjusted the TAF rate for sales of covered equity securities effective July 2012. FINRA's regulatory fees also include a Gross Income Assessment ("GIA") and a Personnel Assessment.

In addition, Section 3 of Schedule A to the FINRA By-Laws states that each member will be assessed a regulatory transaction fee that is determined periodically in accordance with Section 31 of the Exchange Act. Section 31(c) generally requires each national securities association to pay the Commission a fee based on the aggregate dollar amount of sales of certain securities transacted by or through any member of such association otherwise than on a national securities exchange. 15 U.S.C. 78ee(c). The Commission preliminarily believes that FINRA's Section 3 fees will not change as a result of the proposed amendments to Rule 15b9-1. The fees collected by FINRA under Section 3 are intended to correspond to its obligations to the SEC under Section 31(c) of the Act. However, if the proposal is adopted, as Non-Member Firms become FINRA members, FINRA could seek to reallocate Section 3 fees among FINRA members. Nonetheless, because the Commission generally believes that Section 3 fees are passed through by FINRA members to the parties to covered transactions, we do not expect the burden of Section 3 fees to materially change.

98 As is discussed in more detail in the Economic Analysis, the Commission preliminarily estimates that some firms could be subject to a TAF of up to $3.2 million based on their current sales of covered securities. See Section V.C.2.

structure to ensure that it appropriately reflects the activities of, and regulatory responsibilities towards, these FINRA members, if the proposal is adopted.

In addition, under the proposal a broker-dealer that effects transactions on multiple exchanges, and not on ATSs or elsewhere in the off-exchange market, would need to become a member of an Association if it effects transactions indirectly on exchanges of which it is not a member (i.e., through another broker-dealer that is a member of that exchange) in accordance with Section 15(b)(8), unless one of the specified exceptions in the proposed amendment is available.[99] The Commission believes that this is consistent with the statutory framework and would address an activity potentially not subject to effective regulatory oversight in today's market. Specifically, if such a broker-dealer were a member of one exchange but conducted a significant amount of activity indirectly on other exchanges of which it was not a member, the exchange of which it was a member would not be well-positioned to regulate the member's activity on those other exchanges. As with the off-exchange market, individual exchanges today lack access to data,[100] the proper rule set and the necessary expertise to regulate trading on other exchanges. Under these circumstances—where the broker-dealer would not be conducting "off-exchange" activity but would be effecting transactions on an exchange of which it is not a member, the Commission believes that an Association is best-positioned to oversee this activity.[101] As discussed elsewhere in this release, FINRA currently conducts cross-market

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99 The Commission is not currently aware of any broker-dealer with such a business model.

100 See supra note 76.

101 The Commission also believes that this would be consistent with the statutory framework, which subjected broker-dealers that effect transactions on an exchange of which they are not a member first to Commission, and then to Association, oversight. In amending Rule 15b8-1 in 1976 to add the exclusion for proprietary trading, the Commission also revised the text of Rule 15b8-1 by substituting the phrase "otherwise than on a national securities exchange of which he is a member" to replace the phrase

surveillance and is provided exchange audit trail data pursuant to existing RSAs and 17d-2 agreements.[102] In contrast, exchanges generally do not conduct cross-market surveillance and most have allocated this responsibility to FINRA. Accordingly, the Commission believes that, as a practical matter and consistent with Section 15(b)(8), FINRA is currently in the best position to regulate cross-market activity[103] by broker-dealers that effect transactions on exchanges other

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"otherwise than on a national securities exchange." See Adoption of Amendments to SECO Rules, supra note 13, at 10600. The Commission made this revision "to conform the scope of the SECO rules to the Commission's authority" under Section 15(b)(8) and 15(b)(9) (as revised in 1975) to subject "broker-dealers who effect transactions on exchanges other than those of which they are members to the SECO rules." Id. This change reflected the Commission's understanding that broker-dealers effecting transactions on exchanges of which they were not a member should be subject to the then-existing regulatory framework (i.e., either Association membership or direct Commission regulation under the SECO program) governing off-exchange trading. As noted above, Congress amended the Act in 1983 "to eliminate direct regulation of broker-dealers by the Commission through the SECO Program and to require any broker-dealer engaged in an over-the-counter ('OTC') securities business to join a registered securities association." See SECO Programs Release, supra note 9, at 53688. Consistent with the Commission's rationale in 1976, the Commission believes that broker-dealers that effect transactions on exchanges of which they are not a member should be subject to the current regulatory framework governing off-exchange trading, namely, membership in an Association.

102 See, e.g., News Release, FINRA, BATS Global Markets, FINRA Enter Regulatory Service Agreement (February, 6, 2014), available at https://www.finra.org/Newsroom/NewsReleases/2014/P443474. Such agreements provide detailed data that allow FINRA to comprehensively identify the market-wide activity of broker-dealers, and to surveil behavior for violative activity that might otherwise go undetected if surveillance were only being conducted on an exchange-specific basis.

103 In advance of the 1975 Amendments, Congress contemplated reforms to the regulatory structure of the securities markets in which an Association's role would be expanded, while exchanges would focus their regulatory activities on their respective markets: ". . . the time has come to begin planning a framework which will guide the development of the self-regulatory system in the future. In the revised system, a single nationwide entity [an Association] would be responsible for regulation of the retail end of the securities business, including such matters as financial responsibility and selling practices, while each exchange would concentrate on regulating the use of its own trading facilities . . . the regulatory activities of the NASD (the only organization presently registered as a national securities association) would encompass many of the present regulatory

than those of which the broker-dealer is a member, even if they do not effect transactions in the off-exchange market.[104]

In sum, the Commission is concerned that some of the most active cross-market proprietary trading firms may not be subject to effective regulatory oversight by an exchange or Association with respect to the full range of their market activity. Accordingly, the Commission is proposing to amend Rule 15b9-1, as described below, to appropriately tailor the exemption from Association membership for today's markets.

II. Discussion of Amendments to Rule 15b9-1

A. Prior Comments on Association Membership

In 2010, the Commission issued a Concept Release that, among other things, solicited comment on whether all proprietary trading firms should be required to register as broker-dealers and become members of FINRA to help assure that their operations were subject to full regulatory oversight.[105] The Commission received six comment letters that directly addressed the question as it relates to FINRA membership, including one comment letter from FINRA.[106]

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activities of the NYSE and other exchanges over retail activities of their members. This 'expanded' NASD would have direct responsibility, subject to SEC oversight, for enforcing SEC rules and its own rules . . ." S. Doc. No. 93-13 at 16, 169 (1973).

104 A broker-dealer would not need to become a member of an Association if it conducts no activity in the off-exchange market and it becomes a member of each exchange upon which it effects transactions. Although the Commission is not aware of such broker-dealer business model existing today, if one were to arise, the Commission notes that the exchanges upon which such broker-dealer directly effects transactions could enter into an RSA to ensure effective cross-market supervision of this activity. The Commission acknowledges that in the future another SRO could assume these responsibilities pursuant to 17d-2 Agreements, subject to Commission approval, and RSAs.

105 See Concept Release, supra note 16, at 3612.

106 See letters to Elizabeth M. Murphy, Secretary, Commission, from Kimberly Unger, Executive Director, Security Traders Association of New York, Inc., dated April 30, 2010 ("STANY Letter"); from Liam Connell, Chief Executive Officer, Allston Trading,

The six comment letters offered contrasting views. Three commenters expressed their support for enhanced oversight of proprietary trading firms, including a requirement to become members of FINRA, generally asserting that because proprietary trading firms are not all members of FINRA there is a lack of uniform regulation among registered broker-dealers.[107] Three commenters expressed opposition to the idea of requiring proprietary trading firms to become FINRA members, asserting their belief that such firms are already subject to full regulatory oversight,[108] requiring such firms to join FINRA would be costly and burdensome,[109] and that,

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LLC, and Richard B. Gorelick, Chief Executive Officer, RGM Advisors, LLC, and Adam Nunes, President, HRT Financial LLC, Hudson River Trading, LLC, and Cameron Smith, General Counsel, Quantlab Financial, LLC, dated April 23, 2010 ("Allston Letter"); from Donald R. Wilson, Jr., DRW Trading Group, dated April 21, 2010 ("DRW Letter"); from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, dated April 23, 2010 ("FINRA Letter"); letter to the Commission from Berkowitz, Trager & Trager, LLC, dated April 21, 2010 ("Berkowitz Letter"); and from Stephen M. Barnes, J.D., Salt Lake City, Utah, received October 3, 2011 ("Barnes Letter").

107 See FINRA Letter, supra note 106, at 4-5; Barnes Letter, supra note 106, at 32-33 (suggesting that, to level the regulatory playing field, high-frequency trading firms should be required to register as broker-dealers with the Commission and become members of an SRO such as FINRA or an exchange); and STANY Letter, supra note 106, at 14 (suggesting that the Commission review and consider registration requirements of market participants that are not required to be registered with FINRA and noting that enhanced surveillance and enforcement should improve investor confidence in the markets). See also letter to the Honorable Mary Schapiro, Chairman, Commission, from Kimberly Unger, Executive Director, Security Traders Association of New York, Inc., dated May 10, 2010, at 14 (urging the Commission to work towards a more harmonized regulatory structure, which the commenter believes will put FINRA in a better position to address regulatory gaps through a holistic, cross-market approach to regulation that can detect problematic activity across multiple markets and products).

108 See Allston Letter, supra note 106, at 14-15 (stating that it is inaccurate to say that proprietary trading Non-Member Firms are not subject to full regulatory oversight and noting that such firms are generally members of several exchanges and are consequently subject to multiple regulators).

109 See Berkowitz Letter, supra note 106, at 1 (stating that requiring proprietary trading firms to register as broker-dealers and become members of FINRA would add significant costs and burdens to those firms).

because proprietary trading firms do not have customers, there would be no benefit to requiring such firms to become members of FINRA.[110] The Commission has considered these comments, and, for the reasons set forth throughout this release, is proposing to amend Rule 15b9-1 as described herein.

B. Overview of Amendments

As noted above, Section 15(b)(8)[111] of the Act[112] generally prohibits any registered broker or dealer from effecting transactions in securities unless it (1) is a member of an Association or (2) effects transactions in securities solely on an exchange of which it is a member. Section 15(b)(9)[113] of the Act provides the Commission authority to exempt any broker or dealer from the requirements of Section 15(b)(8). The Commission has, by rule, exercised its exemptive authority. Specifically, Rule 15b9-1[114] generally exempts any broker or dealer from membership in an Association if it: (1) is a member of a national securities exchange; (2) carries no customer accounts; and (3) has annual gross income of no more than $1,000 that is derived from purchases or sales of securities effected otherwise than on an exchange of which it is a member. However, income derived from transactions for the dealer's own account with or

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110 See DRW Letter, supra note 106, at 4 (stating that FINRA's focus is on investor protection and not proprietary trading, and, therefore, there would be no benefit to requiring proprietary trading firms that do not undertake a customer business to become members of FINRA).

111 See supra note 46.

112 15 U.S.C. 78a et seq.

113 See supra note 7.

114 See supra notes 50-51.

through another registered broker or dealer,[115] or through the ITS, is excluded from such de minimis allowance.

The Commission is proposing to eliminate the existing de minimis allowance (including the exclusion for proprietary trading) and replace it with a more targeted exemption from Association membership for a broker-dealer that conducts business on a national securities exchange, to the extent it effects transactions off-exchange for the dealer's own account with or through another registered broker-dealer, that are solely for the purpose of hedging the risks of its floor-based activities, by reducing or otherwise mitigating the risks thereof. The proposed amendments also include an exemption for a broker-dealer to the extent it executes orders that are routed by a national securities exchange of which it is a member, to prevent trade-throughs on such national securities exchange consistent with the provisions of Rule 611 of Regulation NMS.

C. Elimination of the De Minimis Allowance

The Commission proposes to eliminate the de minimis allowance in its entirety. Specifically, the Commission is proposing to delete the following language from Rule 15b9-1(a): "and (3) has annual gross income derived from purchases and sales of securities otherwise on a national securities exchange of which it is a member in an amount no greater than $1000." The Commission also is proposing to delete paragraphs (b) and (c) of the Rule, as they set forth two exceptions to the de minimis allowance.[116] Paragraph (b) provides that income derived from (1) transactions for the dealer's own account with or through another registered broker-dealer, and

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115 See supra note 51.

116 See supra notes 50-51.

(2) transactions through the ITS, do not count toward the $1,000 de minimis allowance, and paragraph (c) defines the ITS.

As discussed above, the $1,000 de minimis allowance originally was intended to permit exchange specialists and other floor members to receive a nominal amount of commissions on occasional off-exchange transactions for accounts referred to other members, without subjecting them to SECO rules and broker-dealer registration and, later, Association membership.[117] Since the de minimis allowance was first adopted in 1965, the securities markets have undergone a significant transformation. At that time, virtually all trading activity was conducted manually on the floors of national securities exchanges.[118] Today, however, electronic cross-market order routing and trading strategies are a significant component of the markets, and exchange floor-based businesses represent only a small fraction of market activity. The $1,000 de minimis allowance has never been adjusted, and the Commission is unaware of any floor members today that refer accounts to other broker-dealers in exchange for a share of the broker's commission revenues. Although the Commission is proposing to eliminate the de minimis allowance, it is soliciting comment on whether the de minimis allowance might continue to be appropriate in today's markets. In particular, the Commission seeks responses to the following questions:

1. Do exchange floor members currently rely on the $1,000 de minimis allowance? If so, how? Please describe the number and types of floor members that rely on the allowance. Please provide the nature and extent of reliance on the allowance. Also, please provide any available data on the amount and frequency of

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117 See supra note 39 and accompanying text.

118 See, e.g., Special Study, supra note 14, at 98 ("Trading by NYSE members on the Exchange but from off the floor accounts for approximately 5 percent of total Exchange purchases and sales . . .").

commissions or referral fees that floor members may continue to receive with respect to off-exchange transactions.

2. If the de minimis allowance is being used by exchange floor members, is it being relied upon for its original purposes (i.e., accommodating occasional commission splitting or referrals by such members)? If not, for what purposes are floor members today relying on the de minimis allowance?
3. If exchange floor members currently rely on the de minimis allowance and the Commission retains that allowance, should the $1,000 limit be changed? Why or why not? What should the limit be?
4. If the de minimis allowance were eliminated, as proposed, would some exchange floor members be required to become members of an Association? If so, how many? Please provide the basis of any estimate. What would be the effect on those firms?
5. Do other broker-dealers that are not floor members rely on the de minimis allowance? If so, for what activities? Specifically, do cross-market proprietary trading firms, as discussed above, rely on the allowance? If so, why? Are there other types of businesses that use the allowance? If so, please describe them. How and why do they rely on the allowance?
6. If the de minimis allowance were eliminated, what would be the effect on these non-floor-based broker-dealer firms? For example, if the allowance were eliminated, would there be effects on the business of firms that would be required to register with an Association, and if so what would they be? Would business incentives change such that firms might adjust their business model or their

trading volume by leaving the off-exchange market, moving transactions on-exchange, or leaving the markets altogether? Would the effects be different on broker-dealers trading equities from those trading options?

D. Floor Member Hedging Exemption

Although the Commission proposes to eliminate the de minimis allowance in its entirety, it also proposes to replace the allowance with an exemption from Association membership for exchange member broker-dealers that operate on the floor of the exchange, to the extent they effect transactions off-exchange solely for the purpose of hedging the risks of their floor-based activities. The Commission proposes the hedging exemption be limited to firms that trade on the floor of a national securities exchange, as the Commission understands that currently, broker-dealers that trade exclusively on a single exchange do so on a physical exchange floor.[119] Accordingly, the Commission is proposing to add the following language to Rule 15b9-1: "and, (c) Effects transactions solely on a national securities exchange of which it is a member, except that . . . (1) A dealer that conducts business on the floor of a national securities exchange may effect transactions, for the dealer's own account with or through another registered broker or dealer, that are solely for the purpose of hedging the risks of its floor-based activities, by reducing or otherwise mitigating the risks thereof. A dealer seeking to rely on this exception shall establish, maintain and enforce written policies and procedures reasonably designed to ensure and demonstrate that such hedging transactions reduce or otherwise mitigate the risks of the financial exposure the dealer incurs as a result of its floor-based activity. Such dealer shall preserve a copy of its policies and procedures in a manner consistent with 17 CFR 240.17a-4

119 Currently, NYSE Arca Options, NYSE Amex Options, NASDAQ OMX Phlx, CBOE, NYSE, and NYSE MKT have physical exchange floors.

until three years after the date the policies and procedures are replaced with updated policies and procedures."

The Commission understands that today there are some broker-dealers that continue to limit their activities to exchange floors, particularly in the options markets.[120] As discussed above, at the time Rule 15b9-1 was adopted, the circumstances under which an exchange specialist or floor broker would trade proprietarily off-exchange were quite limited, such as where a regional exchange specialist would hedge risk on the primary listing market. The Commission believes that those broker-dealers that today continue to limit their trading activities to an exchange floor may seek to hedge the risks of their floor-based activities on other markets, both on national securities exchanges and off-exchange.[121] Therefore, the Commission proposes to retain a more focused exemption from Association membership for the type of activity for which the Commission believes the exclusion for proprietary trading in Rule 15b9-1 was originally designed.[122]

The availability of the proposed hedging exemption would be limited to dealers that conduct business on the floor of a national securities exchange and are members of that exchange. Section 15(b)(8) requires Association membership for all registered broker-dealers

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120 Based on disclosures on Form BD, as of February 2015, the Commission understands that there are approximately 43 Non-Member Firms that are members of one national securities exchange and that disclose being engaged in floor activities on Form BD. The business model of these firms varies widely, and may include market making, other proprietary trading and agency business.

121 For example, a broker-dealer may operate a floor-based business on one or more options exchanges. As a result of this activity, the broker-dealer may need to mitigate the risk of its options positions, resulting from such activity, on other options markets or in the equities markets. The proposed floor member hedging exemption would allow the broker-dealer to enter into transactions on other markets solely for the purpose of hedging this risk.

122 See supra note 39 and accompanying text.

other than those that effect transactions solely on an exchange of which they are a member. Broker-dealers that limit their activities in this manner generally are specialists or floor brokers based on the floor of an individual exchange. In exercising its exemptive authority when it adopted Rule 15b8-1 in 1965, the Commission sought to accommodate off-exchange activities ancillary to that floor-based business. The Commission believes that, today, few broker-dealers limit their activities to a particular exchange. Those broker-dealers that do limit their business to an exchange floor, however, may continue to seek to hedge the risk of their floor-based activities by effecting transactions on another exchange or in the off-exchange market.

The Commission preliminarily believes that a floor-based dealer seeking to rely on the proposed hedging exemption in Rule 15b9-1 should be required to establish, maintain and enforce written policies and procedures reasonably designed to ensure and demonstrate that its off-exchange transactions are solely for the purpose of hedging the risks of its floor-based activities, by reducing or otherwise mitigating the risks thereof. Such hedging should reduce or otherwise mitigate the risks of the financial exposure the dealer incurs as a result of its business on the floor of an exchange of which it is a member. Because such hedging transactions must be solely for the purpose of hedging the risks of the dealer's floor-based activities, the transactions, of course, should not be for the purpose of increasing the aggregate risk of the dealer. The Commission notes that whether a transaction or transactions entered into to reduce or otherwise mitigate risk results in a profit or loss is not dispositive of whether or not such a transaction or transactions meets the terms of the proposed floor member hedging exemption. A floor-based dealer seeking to rely on the proposed hedging exemption would be required to preserve a copy of its policies and procedures in a manner consistent with Rule 17a-4 until three years after the date the policies and procedures are replaced with updated policies and procedures.[123]

The Commission preliminarily believes that requiring written policies and procedures, as described above, would facilitate SRO supervision of broker-dealers relying on the proposed hedging exemption, as it would provide an efficient and effective way for regulators to assess compliance with the proposed exemption. The determination of whether an off-exchange transaction by a floor-based dealer reduces or otherwise mitigates the risk of the financial exposure incurred as a result of the dealer's floor-based business may vary depending on the nature of the business of the floor-based dealer, its financial position, and the particular transactions effected. Consequently, the Commission preliminarily believes that requiring floor-based dealers to develop written policies and procedures will provide sufficient flexibility to accommodate the varying business models of floor-based dealers and appropriate hedging activities.

The Commission notes, however, that such written policies and procedures must be reasonably designed to ensure and demonstrate that the floor-based dealer's off-exchange hedging transactions reduce or otherwise mitigate the risks of the financial exposure it incurs as a result of its floor-based activity. Accordingly, a dealer seeking to rely upon the proposed hedging exemption should maintain documentation that, in the context of an SRO or Commission examination, would enable it to show how the hedging transactions it effects off the exchange reduce or otherwise mitigate the risks of its floor-based business.

The Commission notes that the exchange of which the dealer is a floor member would be responsible for enforcing compliance with the hedging exemption, including reviewing the

123 17 CFR 240.17a-4.

adequacy of the dealer's written policies and procedures and whether the dealer's off-exchange transactions comply with those written policies and procedures, including the requirement that the hedging transactions reduce or otherwise mitigate the risks of financial exposure the dealer incurs as a result of its floor-based activity and that the policies and procedures are reasonably designed to so demonstrate.[124]

Because the proposed hedging exemption is intended to allow a dealer to reduce or otherwise mitigate risk incurred in connection with its floor-based activities, it would be limited to transactions for the dealer's own account. In addition, because the floor-based dealer would not itself be a member of the national securities exchange on which transactions may be effected, or an Association, such transactions would need to be conducted with or through another registered broker-dealer that is a member of such other national securities exchange or a member of an Association (or both).

Finally, a dealer seeking to rely on the proposed hedging exemption would be required to preserve a copy of its policies and procedures in a manner consistent with Rule 17a-4 under the Exchange Act until three years after the date the policies and procedures are replaced with updated policies and procedures. Accordingly, a dealer must keep the policies and procedures relating to its use of the hedging exemption as part of its books and records while they are in effect, and for three years after they are updated.

The Commission requests comment on all aspects of the proposed hedging exemption in Rule 15b9-1. In particular, the Commission seeks responses to the following questions:

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124 See 15 U.S.C. 78f(b)(1) which requires that an exchange is so organized and has the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the exchange.

7. To what extent do exchange floor members that are Non-Member Firms today effect transactions in the off-exchange market to hedge the risk of their floor-based activities? What is the nature and extent of such off-exchange market activities? Do these activities tend to focus on particular products? The Commission specifically seeks data from exchange floor members that demonstrates the extent to which they trade off the exchange floor and how such off-exchange trading relates to their floor-based business, including to hedge the risks thereof, as such data may be particularly helpful in assessing a potential floor member hedging exemption when the Commission considers adoption of the proposed amendments.
8. Is the Commission's proposed description of hedging transactions appropriate? Is it sufficiently defined? If not, how should it be modified or supplemented? Is the phrase "solely for the purpose of hedging the risks of its floor-based activities," as used in the proposed amendments, sufficiently precise that broker-dealers will know what activities are allowed under the proposed floor member hedging exemption from Association membership? If not, what should be changed or what guidance should be provided?
9. Will broker-dealers seeking to rely on the floor member hedging exemption be able to evaluate whether, and demonstrate that, off-exchange transactions are "solely for the purpose of hedging the risks of floor-based activities"? Please provide specific examples. What would be the associated costs?
10. Should there be a hedging exemption at all? Why or why not?

11. Should the Commission narrow or broaden the proposed floor member hedging exemption in any way? If so, how and why?
12. Do exchange floor members that are Non-Member Firms effect transactions in the off-exchange market, or on exchanges of which they are not a member, for purposes other than hedging the risk of their floor-based activities? If so, please describe the nature and extent of such activities. Should there be an exemption for these activities? Why or why not?
13. Are there non-floor-based exchange members that today focus their business activities on a single exchange? If so, what is the nature of their business activity? Should there be an exemption for such activities? Why or why not?
14. The proposed floor member hedging exemption is limited to transactions effected with or through another registered broker-dealer. Are there circumstances where an exchange floor member that is a Non-Member Firm, might need to hedge the risk of its floor-based activities through a transaction with a non-registered broker-dealer counterparty? If so, please describe the nature and extent of such transactions and the particular reason(s) that such transactions should be covered.
15. The proposed floor member hedging exemption is limited to transactions for the dealer's own account. Are there circumstances where an exchange floor member that is a Non-Member Firm might need to hedge the risk of customer activity on the exchange, as agent, in the off-exchange market or on exchanges of which it is not a member? If so, please describe.
16. Is the proposed policies and procedures requirement appropriate for the floor member hedging exemption? What would be the costs of establishing,

maintaining and enforcing the policies and procedures, and the related record-keeping requirements? How are such costs determined? Please provide evidence of the nature, timing, and extent of such costs. Would such costs deter dealers from relying on the floor member hedging exemption? Are there more efficient and effective alternatives to a policies and procedures approach? If so, what are they? Have the transactions executed by floor members pursuant to the current Rule's exclusion for proprietary trading posed issues of regulatory compliance, market surveillance, or enforcement? If so, please describe in detail.

17. Will the proposed requirement to establish, maintain, and enforce written policies and procedures enable floor members to efficiently hedge their floor-based activities while effectively ensuring the floor member hedging exemption is used as intended? Is there another approach that would better achieve these goals?
18. Would the proposed floor member hedging exemption present compliance risks or otherwise raise concerns regarding the protection of investors or the maintenance of fair, orderly, and efficient markets? If so, please describe.
19. Would current exchange surveillance and enforcement mechanisms be effective to monitor trades that would be executed pursuant to the proposed floor member hedging exemption? Please explain.
    a. If not, should the Commission require additional reporting by registered broker-dealers acting as agent for dealers relying on the floor member hedging exemption? For example, should they report to an exchange or an Association (i) the identity of the floor member effecting the hedging transaction; and (ii) the fact that the transaction was a hedging transaction? Is such a requirement

necessary to assure the adequacy of market surveillance and compliance? Or, alternatively, is the registered broker-dealer acting as agent on behalf of the dealer subject to sufficient rules and regulations (including Rule 15c3-5 under the Exchange Act,[125] known as the Commission's "Market Access Rule")? Please explain.

b. Could a Non-Member Firm execute a hedging transaction directly with another Non-Member Firm? If so, how would the transaction be subject to surveillance? How would this activity affect the enforcement of the exemption? Please explain.

c. Would exchanges otherwise have the ability to assess compliance of broker-dealers relying on the Rule?

20. Should the proposed floor member hedging exemption be subject to any quantitative or qualitative limitations, or to special reporting obligations? Please explain.

21. Should the proposed floor member hedging exemption require the floor member to retain records demonstrating how each off-exchange transaction complies with its policies and procedures? Why or why not? What would be the associated costs, and what is the basis for those costs? Would the cost associated with recordkeeping on a transaction by transaction basis be overly burdensome, or unnecessary given the Commission's proposed policies and procedures requirement?

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125 17 CFR 240.15c3-5.

22. Should the Rule contain an anti-evasion provision to prevent floor members from attempting to circumvent the limitations in the floor member hedging exemption? Is there a better method than the proposed policies and procedures approach to ensure that floor members do not misuse the proposed floor member hedging exemption? If so, what is it? Alternatively, are the existing Commission anti-fraud and anti-manipulation rules sufficient to prevent misuse of the proposed floor member hedging exemption?

23. Should floor members have to make a certification in connection with their reliance on the floor member hedging exemption? Why or why not? If a certification should be required, what would be the key elements thereof? How frequently should the certification be made? Who should make it? What qualifications, if any, to such certification might be appropriate (e.g., reasonable basis to believe, best of my knowledge)? Should the certification be made in conjunction with an internal compliance review? If so, what type of internal compliance review should be conducted?

24. Are certifications an appropriate way to promote compliance with the hedging exemption? Do certifications bring more accountability, or do they create compliance costs and therefore a barrier to entry?

25. Is data currently available that could be used by regulators to monitor the use of the proposed floor member hedging exemption? Are there other approaches that would do more to enhance regulatory surveillance, protect investors, or ensure fair, orderly, and efficient markets?

26. Are there other mechanisms the Commission could consider to monitor compliance with the floor member hedging exemption? If so, please explain.

E. Regulation NMS Routing Exemption

The Commission proposes to eliminate a portion of subparagraphs (b)(2) and all of subparagraph (c) from Rule 15b9-1, because both contain outdated references to the "Intermarket Trading System." [126] ITS was a national market system plan ("ITS Plan") operated by the national securities exchanges and NASD that required each participant to provide electronic access to its displayed best bid and offer to other participants and provided an electronic mechanism for routing orders, called commitments to trade, to access those displayed prices.[127] This permitted ITS Plan members at each market to have limited access to the other markets for the purpose of avoiding trade-throughs[128] and locked markets.[129] However, the ITS Plan was eliminated in 2007, when it was superseded by Regulation NMS.[130] Accordingly, the Commission is proposing to eliminate the following language, which creates an additional

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126 The full title of the ITS Plan was "Plan for the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11A(c)(3)(B) of the Exchange Act of 1934." The ITS Plan was initially approved by the Commission in 1978. Exchange Act Release No. 14661 (April 14, 1978), 43 FR 17419 (April 24, 1978). All national securities exchanges that traded exchange-listed stocks and the NASD were participants in the ITS Plan.

127 Id.

128 See 17 CFR 242.600(b)(77) defining a "trade-through" under Regulation NMS.

129 A "locked market" occurs when a trading center displays an order to buy at a price equal to an order to sell, or an order to sell at a price equal to an order to buy, displayed on another trading center.

130 Notice of Filing and Immediate Effectiveness of the Twenty Fourth Amendment to the ITS Plan Relating to the Elimination of the ITS Plan, Exchange Act Release No. 55397 (March 5, 2007), 72 FR 11066 (March 12, 2007). Today, Regulation NMS contains an updated trade-through rule, and contemplates the use of private linkages by trading centers to route orders to avoid trade-throughs. 17 CFR 242.610-611.

exception to the de minimis allowance, from Rule 15b9-1 (b): "or (2) through the Intermarket Trading System." In addition, the Commission is eliminating in its entirety subparagraph (c) of the Rule, which defines the ITS as follows: "(c) For purposes of this section, the term Intermarket Trading System shall mean the intermarket communications linkage operated jointly by certain self-regulatory organizations pursuant to a plan filed with, and approved by, the Commission pursuant to §242.608 of this chapter."

Today, Rule 611 of Regulation NMS requires trading centers to establish, maintain and enforce policies and procedures reasonably designed to prevent trade-throughs in exchange-listed stocks, subject to certain exceptions.[131] In general, Rule 611 protects automated quotes that are the best bid or offer of a national securities exchange or Association.[132] To facilitate compliance with Rule 611 of Regulation NMS, national securities exchanges have developed the capability to route orders through broker-dealers (many of which are affiliated with the exchanges) to other trading centers with protected quotations.

As discussed above, the Commission understands that some broker-dealers today continue to limit their activities to exchange floors, and believes that Rule 15b9-1 should continue to accommodate transactions away from the exchange of which they are a member that are necessary to comply with regulatory requirements. A floor-based member may at times seek to effect a transaction on the exchange at a price that would trade-through a protected quotation on another trading center. In such a case, the exchange would need to route the member's order, through a routing broker-dealer, to that other trading center before it could execute any

131 Exchange Act Rule 611 states, in part, that "a trading center shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations in NMS stocks. . . ." 17 CFR 242.611.

132 Id.

remainder of the floor-based member's order on the exchange. Therefore, a broker-dealer may be required, as a necessary part of its business, to effect transactions otherwise than on the exchange of which it is a member as a consequence of the requirements of Rule 611 of Regulation NMS.

The Commission preliminarily believes that transactions effected solely to comply with Rule 611 regulatory requirements should not require membership in an Association by a broker-dealer that otherwise limits its activities to an exchange of which it is a member. Accordingly, the Commission proposes to add the following language to create a second exemption from the requirement under proposed Rule 15b9-1(c) that a broker-dealer effect transactions solely on an exchange of which it is a member: "(2) a broker or dealer may effect transactions off the exchange resulting from orders that are routed by a national securities exchange of which it is a member, to prevent trade-throughs on that national securities exchange consistent with 17 CFR 242.611." The Commission believes that permitting such routing only by a national securities exchange of which the broker-dealer is a member will provide the exchange with visibility into the routing of transactions by its members to other exchanges, and thus maintain the exchange's ability to effectively oversee the entirety of its member's activity.

The Commission requests comment on all aspects of the proposed Regulation NMS routing exemption in Rule 15b9-1. In particular, the Commission seeks responses to the following questions:

27. Is the proposed routing exemption necessary and appropriate? Why or why not?
28. Is the scope of the proposed routing exemption sufficient to provide for all off-exchange transactions that might be effected by floor members as a necessary

consequence of compliance with Rule 611 of Regulation NMS? If not, how should it be changed?

29. Does the proposed routing exemption allow transactions beyond those necessary to comply with Rule 611 of Regulation NMS? If so, is that appropriate and should it be narrowed or broadened?

30. Are there other off-exchange transactions that a floor member might need to effect in order to comply with regulatory requirements? If so, please describe those transactions and the relevant regulatory requirements.

III. Effective Date and Implementation

The Commission recognizes that firms will require time to comply with Rule 15b9-1 if the amendments are adopted in order to become a member of an Association, or modify the firm's business practices to conform to the requirements of the Rule, as amended. As noted previously, FINRA is currently the only Association. To become a FINRA member, a broker-dealer must complete FINRA's New Member Application and participate in a pre-membership interview.[133] The broker-dealer and its associated persons must comply with FINRA's registration and qualification requirements.[134] The amount of time that it takes to become a FINRA member would depend on a number of factors, including the nature of the broker-dealer's business, the level of complexity or uniqueness of the firm's business plan, the number of associated persons the firm employs, and whether the firm has an affiliate that is already a

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133 See How to Become a Member, FINRA, http://www.finra.org/Industry/Compliance/Registration/MemberApplicationProgram/HowtoBecomeaMember/index.htm (last visited on March 9, 2015).

134 See NASD Rule 1010 – Membership Proceedings, which sets out the substantive standards and procedural guidelines for the FINRA membership application and registration process.

member of FINRA.[135] The Commission understands, based on conversations with FINRA that, on average, the FINRA membership application process generally takes approximately four months.

Alternatively, if the proposed amendments are adopted, a Non-Member Firm not eligible for, or choosing not to rely on, an exemption may become a member of additional exchanges upon which it trades or otherwise modify its business model to conform with the proposed amendments to the Rule. The Non-Member Firm may also need to modify its systems or take other steps to achieve compliance.

The Commission preliminarily believes that 360 days after publication in the Federal Register of any final rules that the Commission may adopt should provide firms enough time to comply with the amended Rule. Therefore, the Commission proposes that the compliance date for the proposed amendments to Rule 15b9-1 would be 360 days after publication of the final rule in the Federal Register. The Commission solicits comment on the adequacy of this proposed implementation timeline. In particular, the Commission seeks responses to the following questions:

31. Does 360 days after publication in the Federal Register provide firms with sufficient time to comply with the revised Rule? Would firms be in a position to comply with the revised Rule earlier than 360 days after publication?
32. How long does the registration process with FINRA, should a firm decide to register, typically take? Please include the estimated time to prepare the application as well as the estimated time for FINRA to process the application.

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135 See Section V.C. discussing the costs of joining FINRA.

33. Do commenters believe that a longer or shorter period is appropriate to determine whether becoming a member of an Association is preferable to changing a firm's business model to remain within the exemptions provided by the Rule, as amended (i.e., ceasing all off-exchange activity and becoming a member of each exchange on which the firm trades, or limiting the firm's off-exchange activity to comply with the floor member hedging exemption and/or NMS routing exemption)?

34. How long does it typically take to complete the application process with a national securities exchange? Please include the estimated time to prepare the application as well as the estimated time for an exchange to process it.

35. To the extent a firm intends to rely on one or more of the proposed exemptions, how long would it take such firm to make the required systems changes to comply? Are there other steps that would need to be taken to achieve compliance? If so, what is the estimated time to accomplish those steps?

IV. General Request for Comments

The Commission seeks comment on all aspects of the proposed amendments to Rule 15b9-1. Commenters should, when possible, provide the Commission with data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the objectives of the proposed amendments.

36. The Commission requests comment generally on whether narrowing or broadening the current exemption is appropriate. In particular, the Commission

seeks comment on whether the fact that Non-Member Firms currently must use an Association member firm to report off-exchange trades gives an Association sufficient information and jurisdiction to effectively regulate the off-exchange market. Are there off-exchange transactions between two Non-Member Firms that occur that are not reported?

37. The Commission requests comment on whether the current exemption should be eliminated entirely. What would be the benefits or drawbacks of doing so?

38. Other than the proposed hedging exemption and Regulation NMS routing exemption, are there any other exemptions that the Commission should consider?

39. Have transactions effected pursuant to the current Rule posed compliance issues in the past? If so, please describe in detail.

40. In addition, the Commission is interested in data indicating how many entities rely either on Rule 15b9-1 in its current form, or exclusively on the statutory exception in Section 15(b)(8) of the Exchange Act. Reliance on Rule 15b9-1 is currently self-effecting (i.e., does not require the reporting of such reliance to the Commission or any other regulatory authority). In lieu of the proposed amendments, should the Commission require broker-dealers relying on Rule 15b9-1 to report such reliance to the Commission or to the exchange of which the broker-dealer is a member? If so, what form should such reporting take and what information should be provided to the Commission or the exchange of which the broker-dealer is a member? If not, why not and what alternative means could be used to collect data about reliance on Rule 15b9-1?

41. If the Commission were instead to eliminate Rule 15b9-1 altogether, how many broker-dealers would: (i) restrict their business to only those national securities exchanges of which they are a member; (ii) become members of other national securities exchanges; and/or (iii) become members of an Association? Would implementation of the proposed amendments have an effect on market liquidity? If so, please estimate that effect. Could broker-dealers that currently rely on the Rule respond to its elimination in other ways to avoid Association membership? If so, please explain.

42. Should the Commission allow Non-Member Firms that conduct off-exchange trading activity to remain exempt from membership in an Association? If so, why? Would membership by Non-Member Firms in multiple exchanges prove an efficient and effective substitute for Association membership? Should the level of off-exchange activity affect the ability of a firm to be exempt from Association membership? Why or why not?

43. Should the Commission require the exchanges to engage in joint plans to ensure that the on-exchange cross-market activity of their members is effectively regulated? How might this improve the oversight of on-exchange trading activity? What problems or inefficiencies would relying on joint plans for the regulation of on-exchange trading activity by exchanges create?

44. Is Association membership an efficient or effective approach for the regulation of firms that trade across multiple exchanges but do not trade off-exchange? Are there more effective alternatives?

45. Under the proposed amendments to the Rule, a Non-Member Firm that conducts no off-exchange trading, but trades on an exchange of which it is not currently a member, would, in accordance with Section 15(b)(8), have to either join an Association or become a member of each exchange upon which it trades. Should the proposed amendments be revised to provide an exemption from Section 15(b)(8) to permit such a Non-Member Firm, with no off-exchange trading, to remain exempt from membership in an Association and continue trading on exchanges of which it is not a member, so long as certain conditions are met, such as the exchange of which it is a member entering into appropriate contractual arrangements such that the exchange is in a position to effectively surveil all of the trading activities of that firm?

46. Should the Commission consider other changes to Rule 15b9-1? If so, why? What specifically should be changed and how?

V. Economic Analysis

As discussed above, the Commission is proposing to amend Rule 15b9-1 to better align the scope of its exemption, in light of today's market activity, with Section 15(b)(8) of the Exchange Act and the Commission's original purpose in adopting Rule 15b9-1. Currently, a broker-dealer can engage in unlimited proprietary trading in the off-exchange market without becoming a member of an Association, so long as its proprietary trading activity is conducted with or through another registered broker-dealer. For a broker-dealer that trades electronically across a range of exchange and off-exchange venues, however, the individual exchanges of which the broker-dealer may be a member are not well-positioned to oversee the off-exchange activity of the broker-dealer, as was previously discussed. The Commission preliminarily believes that this oversight role can best be fulfilled by an Association, which is the SRO intended and authorized by Congress to regulate the trading activity of off-exchange market participants, monitor their financial and operational condition, and enforce their compliance with federal securities laws and Association rules.

The Commission is sensitive to the economic effects of its rule, including the costs and benefits and effects on efficiency, competition, and capital formation. Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking pursuant to the Exchange Act, and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[136] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the effect such rules would have on competition.[137] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[138]

The Commission discusses below a number of economic effects that are likely to result from the proposed amendments. As discussed in detail below, many of the effects are difficult to quantify with any degree of certainty. Although the Commission is providing estimates of direct compliance costs where possible, the Commission also anticipates that broker-dealers affected by the proposed amendments, as well as competitors of those broker-dealers, may modify their business practices regarding the provision of liquidity in both off-exchange markets and on

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136 15 U.S.C. 78c(f).

137 15 U.S.C. 78w(a)(2).

138 <u>Id.</u>

exchanges. Consequently, much of the discussion below is qualitative in nature, but where possible, the Commission has provided quantified estimates.[139]

A. Baseline

1. Regulatory Structure and Activity Levels of Non-Member Firms

The Exchange Act governs the way in which the U.S. securities markets and its broker-dealers operate. Section 3(a)(4)(A) of the Act generally defines a "broker" broadly as "any person engaged in the business of effecting transactions in securities for the account of others."[140] In addition, Section 3(a)(5)(A) of the Act generally defines a "dealer" as: "any person engaged in the business of buying and selling securities for . . . such person's own account through a broker or otherwise."[141] The Commission oversees approximately 4,209 broker-dealers, of which approximately 4,057 are members of FINRA, currently the only Association.[142]

Generally, any firm that interacts directly with a securities exchange must register with the Commission as a broker-dealer to gain direct access to the exchange. Consequently, there is diversity in the size and business activities of broker-dealers.[143] Carrying broker-dealers hold customer funds and securities; some of these are also clearing broker-dealers that handle the clearance and settlement aspects of customer trades, including record-keeping activities and

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139 See Section V.C. for further discussion of the difficulties in estimating market quality effects likely to result from the proposed amendments.

140 15 U.S.C.78c(4)(A).

141 15 U.S.C.78c(5)(A).

142 There were approximately 4,209 broker-dealers registered with the Commission as of March 2015.

143 A firm that wishes to transact business upon an exchange without becoming a broker-dealer can do so by engaging a broker-dealer to provide market access and settlement services. While effecting transactions in the off-exchange market does not require registering as a broker-dealer, it does require obtaining the services of a broker-dealer to handle settlement at a minimum.

preparing trade confirmations.[144] However, during the fourth quarter of 2014, only 284 of the 4,184 registered broker-dealers were classified as carrying or clearing broker-dealers. Thus, the majority of broker-dealers engage in a wide range of other activities, which may or may not include handling customer accounts. These other activities include intermediating between customers and carrying/clearing brokers; dealing in government bonds; private placement of securities; effecting transactions in mutual funds that involve transferring funds directly to the issuer; writing options; acting as an exchange floor broker; and the provision of liquidity to securities markets, which includes, but is not limited to, the activities of registered market makers.

Broker-dealers are diverse in size as well as scope of activity. Most broker-dealers are small, with 67% of broker-dealers employing 10 or fewer registered individuals and only 4% of broker-dealers employing over 151 registered individuals.[145] Although the majority of broker-dealers are small, there are a few very large broker-dealers as well. Further, while there are many registered broker-dealers, a small minority of broker-dealers controls the majority of broker-dealer capital and has the ability to affect the allocation of capital to liquidity provision. As of December 31, 2014, the majority of broker-dealers each had total capital of less than $500,000, while the ten largest broker-dealers in terms of capital accounted for more than 53% of total broker-dealer capital, with each disclosing more than $10 billion in total capital.[146]

As of March 2015, 125 of the approximately 4,209 registered broker-dealers were not members of FINRA, currently the only Association. The Commission believes the majority of

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144 Based on December 2014 FOCUS data.

145 Id.

146 Id.

Non-Member Firms rely on the Rule's exemption from Association membership.[147] Because of the exclusion for proprietary trading, a broker-dealer that does not carry customer accounts is not required to join an Association, even when that broker-dealer has substantial off-exchange trading activity.

Non-Member Firms are diverse in their types and activities. Of the 125 Non-Member Firms, 77 disclose engaging in floor activities on a national securities exchange, as reported on Form BD.[148]

There is significant diversity in the business models of Non-Member Firms. Some Non-Member Firms may limit their trading to a single exchange, while others trade on multiple venues possibly including off-exchange venues like ATSs. Some firms are significant contributors to both off-exchange and exchange volume. Because any off-exchange activity that involves a FINRA member firm ("Member Firm") generates certain audit trail data, FINRA and

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147 See supra note 77. Historically, these floor brokers had only incidental trading on exchanges of which they were not members, and limited off-exchange trading activity. The background and history of Rule 15b9-1 are discussed in Section I.

148 See Form BD data for Non-Member Firms during March of 2015. Of the 125 Non-Member Firms, 77 Non-Member Firms disclose engaging in floor activities on a national securities exchange; 76 firms disclose acting as a put and call broker or dealer or option writer; and 89 firms disclose trading securities for their own account. Other businesses cited by multiple Non-Member Firms include: national securities exchange commission business other than floor activities (6); making inter-dealer markets in corporate securities off-exchange (5); selling corporate debt securities (2); dealing in government securities (4); and other business (18).

Currently, a Non-Member Firm that is a member of a single exchange but is not engaged in floor-broker activity may engage in trading upon other exchanges using access provided by a broker-dealer that is an exchange member of the destination exchange. These single-exchange member Non-Member Firms may also engage in off-exchange trading with or without the intermediation of a Member Firm. Under the proposed amendments, both of these activities would be disallowed except as outlined in the Floor Member Hedging Exemption (see Section II.D.) and the Regulation NMS Routing Exemption (see Section II.E.).

the Commission are able to quantify the aggregate off-exchange activity of Non-Member Firms.[149] During the fourth quarter of 2014, there were 104.5 billion orders reported in the off-exchange market. Of these 104.5 billion orders, 36.9 billion (35.31%) were received from Non-Member Firms.[150] Non-Member Firms submitted 44.99% of all orders within ATSs in the fourth quarter of 2014.

Although the Commission can observe the aggregate off-exchange trading of Non-Member Firms, it is unable to quantify the off-exchange trading of all Non-Member Firms on an individual basis because Member Firms currently are not required to report the identifiers of Non-Member Firms with whom they transact to OATS.[151] However, some Member Firms voluntarily report the exchange-issued identifiers of the Non-Member Firms with which they

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149 Most off-exchange interactions involve a Member Firm at some point in the order audit trail for routing, and therefore produce OATS data, although identification of the firm that submits the order is not required by OATS. Interactions between Non-Member Firms without the involvement of a Member Firm are possible and would not generate audit trail data, but the Commission believes these interactions are infrequent for two reasons. First, all ATSs are operated by Member Firms, so all orders submitted to ATSs are reported to OATS. Second, although two Non-Member Firms could theoretically interact on a Non-Member Firm operated single dealer platform, the Commission is unaware of any single dealer platform that is operated by a Non-Member Firm. Such a platform would be visible in OATS data as a routing and execution destination if it were accessed by Member Firms. Although it is possible that a Non-Member Firm could approach another Non-Member Firm directly to negotiate a transaction outside of an automated venue, the Commission believes large Non-Member Firms transact with each other almost exclusively through ATSs and do not seek each other out as trading partners. Further information about off-exchange trading outside of ATSs is provided by Tuttle, Laura, 2014, Over-the-Counter Trading: Description of Non-ATS OTC Trading in National Market System Stocks, available at http://www.sec.gov/dera/staff-papers/white-papers/otc-trading-white-paper-03-2014.pdf.

150 Data provided by FINRA. This does not include activity submitted by firms not registered as broker-dealers, including data on buy-side activity because the data was screened to include only Non-Member Firms.

151 See supra note 84.

interact.[152] Using this data, the Commission can estimate the ATS activity level of the 14 Non-Member Firms that connected to ATSs directly without the intermediation of another broker-dealer during the fourth quarter of 2014.[153] Based on this data, at least 19.31% of all ATS orders is attributable to the Non-Member Firm that was the most active in ATS orders during the review period.[154] The least active of the 14 identifiable Non-Member Firms has almost no order

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152 Data provided by FINRA. This does not include activity submitted by firms not registered as broker-dealers, including data on buy-side activity. In the fourth quarter of 2014, approximately 46.42% of ATS orders from Non-Member Firms included an exchange-issued identifier that allows identification of the Non-Member Firm submitting an order. The set of ATS clients that are not FINRA members also includes substantial buy-side activity, but this analysis is limited to firms that are also registered broker-dealers: the 125 Non-Member Firms.

Although the analysis here focuses on ATS activity, Non-Member Firms interact with Member Firms outside of ATSs as well, primarily on single-dealer platforms. Across all off-exchange executions, in the fourth quarter of 2014, 3.26% of share volume (10.56% of dollar volume) was attributable to the trading of Non-Member Firms.

153 Although these 14 Non-Member Firms connect to ATSs directly without the assistance of another broker-dealer, the ATSs are operated by Member Firms and these orders are therefore permitted under the current rule.

The Commission believes that these 14 Non-Member Firms represent a subset of the largest Non-Member Firms that actively trade across multiple exchanges and off-exchange and thus may not be representative of the broader set of 125 Non-Member Firms. As such, estimates of these 14 firms' ATS activity levels and the regulatory fees that the activity would generate exceed those expected from typical Non-Member Firms.

154 Non-Member Firms submitted 32.9 billion of the 66.8 billion ATS orders during the fourth quarter of 2014. ATSs reported Non-Member MPIDs for 15.3 billion of these Non-Member Firm orders. The Non-Member Firm most frequently identified as the source of ATS orders submitted 4.9 billion ATS orders (7.30% of all orders and 39.20% of all Non-Member Firm ATS orders for which a Non-Member Firm MPID is reported). With the assumption that this firm also submitted 39.20% of the Non-Member Firm ATS orders to ATSs that do not report Non-Member Firm MPIDs, this firm would account for 19.31% of all ATS orders.

ATSs generally provide the exchange-issued MPIDs of Non-Member Firms submitting orders either for all orders or for none of the orders received directly from Non-Member Firms. For purposes of our analysis, we assume that the proportion of orders submitted by individual Non-Member Firms to ATSs that report identifiers is equal to that proportion for ATSs that do not report Non-Member Firm MPIDs. It is possible that activity. In total, five of the 14 Non-Member Firms are each responsible for 1% or more of all orders sent directly to an ATS for the review period.

The business of providing liquidity off-exchange is competitive. Off-exchange equity trading occurs across many trading venues. In May 2012, 44 ATSs actively traded NMS stocks, comprising 12.12% of NMS share volume.[155] Furthermore, 255 broker-dealers transacted a further 18.75% of NMS share volume off-exchange without the involvement of an ATS.[156] Although many market participants provide liquidity within this market, Non-Member Firms are particularly active within ATSs, as discussed above. Although Non-Member Firms may trade in

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some Non-Member Firms transact only in ATSs that do not report these identifiers to FINRA; if that is true, our estimate of the activity level of the 14 identified Non-Member Firms would be upwardly biased because we would attribute the ATS volume of the unidentified Non-Member Firms to those that have been identified. Furthermore, our estimate that 14 Non-Member Firms connect to ATSs directly would be downward biased. It is also possible that the proportions of orders attributable to individual Non-Member Firms are materially different on ATSs that do not report Non-Member Firm identifiers, although any error introduced by this would likely not be directional. Additionally, some Non-Member Firms may submit orders to Member Firms that are then routed to ATSs or elsewhere off-exchange. Such activity would cause us to underestimate the activity of these 14 Non-Member Firms within ATSs, although such activity would still be counted at the aggregate Non-Member Firm level.

155 Tuttle, Laura, October 2013, Alternative Trading Systems: Description of ATS Trading in National Market System Stocks, available at http://www.sec.gov/marketstructure/research/alternative-trading-systems-march-2014.pdf (revised March 2014).

156 Transaction volume off-exchange outside of ATSs includes internalization, in which a broker-dealer fills orders from its own inventory without interacting directly with an exchange. Tuttle, Laura, March 2014, OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks, available at http://www.sec.gov/dera/staff-papers/white-papers/otc-trading-white-paper-03-2014.pdf.

the Non-ATS segment of the off-exchange market, the Commission preliminarily believes they rarely act as liquidity suppliers outside of ATSs.[157]

While some Non-Member Firms trade actively off-exchange, some of these firms also supply and demand liquidity actively on multiple exchanges.[158] The Commission is able to identify the activity of 13 of the 14 Non-Member Firms identified as connecting directly with ATSs on exchanges operated by BATS, NASDAQ-OMX, and NYSE during May of 2014. The data show that these Non-Member Firms contribute substantially to exchange volume.[159] On these exchanges, during May 2014, these 13 large Non-Member Firms that connect directly to ATSs participate in at least 17.25% of all exchange trading volume. The highest Non-Member Firm participation rate in the data is on BATS-Y, where 27.31% of trade volume involves Non-Member Firms that also connect directly to ATSs. The lowest participation rate is on NYSE, where 5.54% of trading involves Non-Member Firms that connect directly with ATSs. One of the Non-Member Firms that connects directly with ATSs cannot be identified in exchange

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157 OATS data suggests that Non-Member Firms do not supply off-exchange liquidity to Member Firms outside of ATSs and the Commission believes that Non-Member Firms rarely transact with each other outside of ATSs. See supra note 149.

158 See Section V.D.3 for discussion of SRO cross-monitoring capabilities.

159 The estimates include only Non-Member Firms that connect directly to at least one ATS that reports Non-Member Firm MPIDs in OATS. Consequently, some Non-Member Firms are not included in these estimates. Therefore, the estimates underestimate the importance of Non-Member Firms to exchange-based activity in aggregate.

data.[160] The 13 Non-Member Firms that are observed trading on exchanges tend to trade across the majority of exchanges represented in the exchange data sample.[161]

The market for liquidity provision on equity exchanges is also competitive. For example, Nasdaq-listed equities, for which the Commission has relevant data,[162] each had 13 to 80 market makers registered to provide liquidity on Nasdaq as of December 2014. The median Nasdaq-listed equity had 36 registered market makers, and 95% of securities had 20 or more registered market makers. Because Nasdaq is not the only exchange trading its listed equities, these statistics underrepresent the number of firms in the market that provide liquidity in Nasdaq-listed equities. Although the Commission does not have readily available data to count the number of market makers in equities listed on other exchanges, the Commission preliminarily believes that the figures for Nasdaq-listed equities illustrate the magnitude of market makers in equities more generally. Additionally, the Commission notes that while the number of market makers represents the number of firms in the business of providing liquidity, it does not necessarily indicate whether each market maker is an active competitor. However, the Commission believes that many market makers actively compete to provide liquidity. The Commission currently lacks data to quantify the liquidity provision activity attributable to Non-Member Firms.

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160 Data from off-exchange markets and exchanges is matched on a firm-name basis in this analysis. It is possible that one firm that cannot be identified in the exchange data is present under a name that is not readily linked to the firm name cited in the off-exchange data.

161 Data for Nasdaq-OMX is not broken down by exchange, but is instead aggregated at the holding company level. Exchange-level data was provided by BATS and NYSE.

162 Data from Center in Research in Security Prices (CRSP).

2. Current Market Oversight

The surveillance and regulation of each broker-dealer is dependent upon its individual SRO membership status. Each SRO that operates an exchange has responsibility for overseeing trading that occurs on the exchange it operates. Because of this, SROs that operate an exchange possess expertise in supervising members who specialize in trading the products and order types that may be unique or specialized within the exchange. This expertise complements the expertise of an Association in supervising cross-exchange and off-exchange trading activity.[163] Exchanges generally have not monitored trading that their members conduct on other venues.

Approximately 68 Non-Member Firm broker-dealers are members of a single exchange that supervises their activity overall. Exchanges regulate trading by broker-dealers on their exchange and generally may focus examinations on the financial and operational requirements associated with their membership. These requirements share many commonalities across SROs, such as net capital requirements and books and records requirements. Because many broker-dealers are members of multiple SROs with similar requirements, one SRO is appointed as the broker-dealer's DEA.[164]

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163 See Section I.B. discussing the requirement for SROs to examine for and enforce compliance with the Exchange Act, and the rules and regulations thereunder.

164 A DEA is an SRO assigned by the SEC that has certain specific supervisory responsibility for a broker-dealer. The DEA usually performs financial and operations examination activities on behalf of all SROs of which the broker-dealer is a member, although SROs may also allocate other regulatory responsibilities under Rule 17d-2. See supra note 69. These examinations, however, do not generally extend to compliance with trading rules imposed by other SROs; nor do they facilitate surveillance for activity across market centers. DEAs therefore cannot substitute for the surveillance of cross-market and off-exchange trading provided by an Association. See 17 CFR 240.17d-1. FINRA serves as the DEA for the majority of Member Firms; there are exceptions, mostly involving firms that have specialized business models that focus on a particular exchange that is judged to be best situated to supervise the Member Firm's activity. These firms are, however, subject to the same supervision of their trading activity as

All registered broker-dealers are required to join an Association unless they comply with Section 15(b)(8) of the Act or Rule 15b9-1. The vast majority of broker-dealers join an Association and, since there is currently a single Association, with the exception of Non-Member Firms, broker-dealers are subject to relatively uniform regulatory requirements and levels of surveillance and supervision. The supervision by FINRA, which is currently the only Association, is more robust than that of individual exchange SROs because its rule set addresses its need to supervise a market that is fragmented across many trading venues and more opaque than exchange trading.[165] Specifically, FINRA's rule set has provisions related to business conduct, financial condition and operation, and supervision that may differ materially from exchange SRO rule sets.[166]

The existing Association, FINRA, serves crucial functions in the current regulatory structure.[167] FINRA has primary responsibility for overseeing off-exchange trading.[168] Furthermore, FINRA provides cross-market trading supervision of broker-dealers that the exchanges currently are not well-positioned to provide in light of the statutory framework that

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other Member Firms for whom FINRA does act as DEA. Under the proposed amendments, Non-Member Firms that join FINRA may or may not be assigned to FINRA for DEA supervision. A firm with a specialized business model focusing on a single exchange with floor activity may be able to continue trading off-exchange under the proposed floor member hedging exemption without joining FINRA.

165 Comprehensive reporting requirements for all Member Firms that trade off-exchange give FINRA information on market activity levels and market conditions off-exchange. Because most off-exchange venues do not disseminate information on the liquidity available in their systems, comprehensive information from all participants is necessary for FINRA to analyze and surveil the off-exchange market. See infra note 204 for a discussion of the off-exchange trading environment; see also Section I.B. for a discussion of the differing scope of exchange SRO and Association rule sets.

166 See supra notes 91-94 and accompanying text.

167 See Section I.A. for further discussion of the role of Associations in market oversight.

168 See Section I.B. for further discussion of the responsibilities of an Association.

places responsibility for off-exchange trading with an Association. Exchanges generally do not have a detailed set of member conduct rules and non-exchange-specific trading rules and have limited access to data,[169] thus allowing such broker-dealers and their personnel to conduct business under a less specific regulatory regime than FINRA members. On the other hand, FINRA has sought to establish a robust regulatory regime for broker-dealers, including broker-dealers conducting business in the off-exchange market, and developed surveillance technology and specialized regulatory personnel to provide surveillance, supervision, and enforcement of activity occurring off-exchange. Consequently, the current regulatory structure achieves cross-market and off-exchange supervision through the surveillance actions of FINRA and its examination of its members.

Currently, Non-Member Firms transact heavily in the course of normal business activities within venues regulated by SROs of which they are not members. This is very different from when Rule 15b9-1 was first adopted. The Act provides for regulation of exchange trading by the exchanges themselves; it further provides for supervision of off-exchange trading by an Association. Although the Act provides a limited and targeted exception to Association membership requirements for broker-dealers, its approach to effecting supervision is relatively uniform: broker-dealers must be members of the SROs that regulate the venues upon which they transact. For each trading venue, whether an exchange or the off-exchange market as a whole, the responsible SRO (an exchange SRO or FINRA) is obligated and empowered to fulfill its regulatory responsibilities through its authority to adopt rules, surveil the markets, examine its members' activities and bring enforcement actions when necessary. To the extent that the current regulatory structure undermines this functional approach, the ability of SROs to fulfill

169 See supra note 76.

their responsibilities to protect investors and promote fair and orderly markets may be compromised.

Comprehensive supervision of cross-market and off-exchange activity requires data on off-exchange activity, but this data for Non-Member Firms is often not readily available to regulators.[170] FINRA's rules require that nearly all Member Firms report order audit trail data daily.[171] This data records the origination, receipt, execution, routing, modification or cancellation of every order a Member Firm handles, with limited exceptions for certain activities including market-making. Additionally, FINRA currently has RSAs with most exchanges[172] that provide FINRA with detailed data that often allow FINRA to comprehensively identify the market-wide activity of broker-dealers, and to surveil behavior for violative activity that might otherwise go undetected on an exchange-specific surveillance basis. However, a significant amount of activity remains missing from FINRA's existing audit trail data (OATS) because it does not include the orders that otherwise would be reported by Non-Member Firms if they were members, and does not identify executions as those of a broker-dealer. Non-Member Firm activity that involves a Member Firm (such as an ATS order or an order routed through a Member Firm) does appear in OATS, although the identity of the Non-Member Firm sending the

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170 If the Commission approves the NMS Plan submitted by the SROs to create, implement, and maintain a CAT, the CAT would be able to provide the SROs and the Commission with such data on Non-Member Firms. See Exchange Act Release No. 67457 (July 19, 2012), 77 FR 45721 (August 1, 2012).

171 See generally FINRA Rule 7400 Series – Order Audit Trail System.

172 FINRA has RSAs with all exchanges operated by Intercontinental Exchange, Nasdaq-OMX, and BATS. Together, these exchanges accounted for 99.6% of exchange-based share volume in Tape A, B, and C securities during October 2014, based on data available on the BATS website. See http://www.batstrading.com/market_data/market_volume_history/ (last visited March 9, 2015).

order is not required to be reported.[173] Furthermore, some off-exchange activity that does not involve a Member Firm (and thus creates no OATS data record) may be entirely unsurveiled by FINRA and possibly not subject to rules that were intended to universally govern off-exchange activity. In particular, an off-exchange trade between two Non-Member Firms is not subject to FINRA's audit trail and trade reporting rules.

Because Non-Member Firms are not required to join an Association, they are not required to pay the costs of Association membership, which could be significant, especially for Non-Member Firms with substantial trading activity. FINRA members currently pay a TAF for all equity sales transactions that are not performed in the firm's capacity as a registered specialist or market maker upon an exchange. The Commission estimates that the annual TAF associated with ATS trading for some Non-Member Firms would be as high as $3.2 million per year.[174] Additionally, a substantial portion of Non-Member Firms' exchange-based activity may be subject to TAF as well.[175] These estimates of TAF have substantial uncertainty. As discussed previously, the Commission believes that FINRA may need to consider revising its fee structure

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173 FINRA has proposed amendments to its rules pertaining to identification of Non-Member Firms in OATS data. See supra note 84.

174 TAF incurred for off-exchange activity for Non-Member firms would be unavoidable as the fee is currently structured. FINRA assesses it directly on FINRA members. TAF is discussed further in Section V.C.2.b.

175 Schedule A of the FINRA By-Laws outlines which transactions are subject to the TAF. Generally, equity sales both on and off-exchange are subject to the TAF unless the member is acting in the capacity of a specialist or market maker on the exchange where the transaction was effected.

to reflect the business model of these firms and this may significantly affect their potential FINRA fee burden.[176]

Furthermore, FINRA currently cannot assess Non-Member Firms Section 3 fees for off-exchange trading. The Section 3 fee is the second of two primary FINRA fees (the other being TAF) that are assessed upon each off-exchange sale by or through a FINRA member. Under Section 31 of the Act,[177] SROs must pay transaction fees based on the volume of their covered sales. These fees are designed to offset the costs of regulation incurred by the government—including the Commission—for supervising and regulating the securities markets and securities professionals. FINRA obtains money to pay its Section 31 fees from its membership, in accordance with Section 3 of Schedule A to the FINRA By-Laws. FINRA assesses these Section 3 fees on the sell side of each off-exchange trade, when possible. When the sell side of an off-exchange transaction is a Non-Member Firm and the seller engages the services of a clearing broker that is a Member Firm, FINRA can assess the Section 3 fee against the Member Firm clearing broker.[178] When the seller is a Non-Member Firm that self-clears, FINRA has no authority to assess the Section 3 fee against the seller. In such case, FINRA will seek to assess the fee against the buyer, if the buyer includes a Member Firm counterparty or a Member Firm acting as clearing broker for a Non-Member Firm buy side counterparty. Given that any firm that carries customer accounts is required to be a member of an Association, firms that represent the trading of the investing public may bear the fees that would be otherwise assigned to Non-

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176 See supra note 95. Under the current TAF schedule, Member Firms may realize some cost savings because they would no longer be assessed TAF when they buy shares from a Non-Member Firm off-exchange. This is discussed further in Section V.B.3.

177 15 U.S.C. 78ee.

178 The seller's clearing broker may pass that fee on to the Non-Member Firm.

Member Firms trading proprietarily in the off-exchange market. These costs may be passed on to the investing public in whole or in part. Regardless of who ultimately bears the Section 3 fees, these Non-Member Firms may face lower off-exchange trading costs than Member Firms due to the allocation of these fees.

B. Broad Economic Considerations, Including Effects on Efficiency, Competition and Capital Formation

As discussed above, the Commission is proposing amendments to Rule 15b9-1 to address the off-exchange trading activity that may not currently be subject to effective regulatory oversight that has developed with the advent of cross-market proprietary trading. In addition to the specific, individual benefits and costs discussed below, the Commission expects the proposed amendments to have several broad economic effects, including effects on efficiency, competition, and capital formation. These effects are described in this section.

1. Effects on Regulatory Supervision

Non-Member Firms are significant contributors to off-exchange order and trade activity, yet are not under the jurisdiction of an Association that supervises off-exchange trading activity. The Commission preliminarily believes the current exemption of Non-Member Firms from Association membership undermines the effectiveness of regulatory supervision. For example, reliance by Non-Member Firms on the Rule 15b9-1 exemption leaves FINRA charged with responsibility for the off-exchange market without jurisdiction over broker-dealers that conduct a substantial amount of off-exchange trading activity. It also undermines the ability of an Association to apply a consistent set of conduct, supervisory, and other rules to off-exchange market participants, and to effectively surveil the trading activity of broker-dealers with a significant presence in the off-exchange market.[179]

As discussed further below, the Commission believes the proposed amendments will have a beneficial effect on the efficiency of regulation of the equity markets.[180] In particular, some broker-dealers are currently overseen by individual exchanges, which are not well-positioned to oversee the off-exchange and cross-market activity of the broker-dealer. Under the proposal, these broker-dealers would be supervised by an Association that has this expertise. This improvement in regulatory oversight of the off-exchange market should achieve more uniform and effective regulatory supervision of off-exchange and cross-exchange trading practices by broker-dealers.

The Commission is aware that some of the 125 Non-Member Firms trade primarily on a single exchange in a floor-based capacity. For these firms, especially those with specialized business models that operate primarily on one exchange, their current exchange (not an Association) may be best equipped to provide efficient supervision. The Commission believes that many of these firms will not need to join an Association to comply with the proposed amendments.

2. Firm Response and Effect on Market Activity

Although Non-Member Firms could seek to comply with the proposed amendments in multiple ways, each route could involve changes to firms' business models. Some Non-Member Firms limit their trading to exchanges of which they are members, and the Commission believes they do not trade off-exchange other than to hedge positions gained through floor broker activity.

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179 See supra notes 91-94 and accompanying text.

180 See Section V.C.1.

These firms will remain exempt from the requirement to become a member of an Association, if they comply with the Rule as proposed to be amended.[181] Other firms will no longer be exempt, and will need to take action to comply with the amended rule. Under the revised Rule, a Non-Member Firm that trades off-exchange, or upon exchanges of which it is not a member, can comply in four ways. The first option would be to join an Association. This option does not require the Non-Member Firm to restrict its current trading practices beyond those necessary to comply with the rules of FINRA. The second option would be to join all exchanges upon which the Non-Member Firm wishes to trade, and to cease any off-exchange trading, other than off-exchange trading consistent with the floor-broker hedging exemption. Third, a Non-Member Firm could comply by trading solely upon those exchanges of which it is already a member, consistent with the statutory exception in Section 15(b)(8).[182] Finally, a Non-Member Firm could cease trading equity securities.

The changes Non-Member Firms make to their business model in order to comply with the amendments may affect competition in the market for off-exchange liquidity provision. In particular, Non-Member Firms may be less willing to compete to provide liquidity off-exchange, decreasing off-exchange liquidity. For example, Non-Member Firms may choose to cease their off-exchange activity rather than join an Association – although it seems likely that firms that trade heavily in the off-exchange market may find it less costly to join an Association.[183] In

181 Changes to the exclusion for proprietary trading are discussed in Section II.C. Changes to the proposed floor member hedging exemption are discussed in Section II.D.

182 15 U.S.C. 78o(b)(8).

183 Firms that do not connect directly may trade on ATSs through a Member Firm at much lower activity levels. For firms with very limited off-exchange activity, ceasing off-exchange activity is likely to be less costly than joining an Association. The costs of joining FINRA are discussed in detail in Section V.C.2; for firms with very limited off-exchange activity, it is unlikely that the profits generated from this activity would offset

addition, Non-Member Firms that choose to join an Association may reduce their off-exchange trading because joining an Association would increase variable costs to trade in the off-exchange market, as these trades will incur TAF and possibly additional Section 3 fees.[184] An increase in cost would reduce the profitability of off-exchange trading and thus potentially reduce off-exchange trading.

The removal of this liquidity could either improve or degrade execution quality on ATSs.[185] To the extent that institutional investors transacting in ATSs are seeking institutional investor counterparties that are not proprietary trading firms for their transactions, the removal of Non-Member Firm liquidity may be seen by some institutional investors as improving liquidity quality within ATSs.[186] It is also possible that reducing the activity of Non-Member Firms

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FINRA membership costs. However, for firms that generate profits from off-exchange activities that exceed FINRA membership costs, it may be less costly for these firms to join FINRA than to cease their off-exchange activity. Firms with very low ATS activity are unlikely to directly connect to an ATS, instead accessing ATSs through a Member Firm.

The Commission is unaware of any Non-Member Firms operating single dealer platforms upon which such firms could provide liquidity to orders routed by Member Firms outside of an ATS.

184 As previously noted, FINRA may need to consider reevaluating the structure of the TAF to assure that it appropriately takes into account the business model of certain Non-Member Firms that may join FINRA as a result of the proposed amendments. See supra note 95. The Commission's analysis of TAF is based on current TAF structure as outlined in the FINRA By-Laws, Schedule A. TAF and Section 3 fees are discussed further in Section V.C.2.b. Firms will also face additional fixed costs both to establish and maintain Association membership; those costs are discussed in Section V.C.2.

185 Non-Member Firms are likely to also reduce their off-exchange trading outside of ATSs, such as on single-dealer platforms. However, Non-Member Firms can only take (not make) liquidity on these platforms. It is possible that additional off-exchange liquidity may be available outside of ATSs as a result of the proposed amendments to Rule 15b9-1 due to a reduction in Non-Member Firm trading on single dealer platforms.

186 Industry white papers sometimes discuss the concept of natural counterparties for institutional trades. These papers may explicitly or implicitly identify proprietary automated trading firms as sources of information leakage in dark pools. See e.g., Mittal,

within ATSs may result in more ATS liquidity, if Non-Member Firms are acting as net takers of liquidity within these systems.[187] Regardless, liquidity levels in ATSs may change. In addition, these firms may reduce their off-exchange trading outside of ATSs such as on single-dealer platforms. It is possible that this will result in a transfer of volume from off-exchange venues to exchanges, but it is also possible that overall market trading volume will diminish if decreased volume from off-exchange trading does not migrate to exchanges.

Changes in business models for Non-Member Firms may affect market quality on exchanges as well. In addition to trading extensively in the off-exchange market, many Non-Member Firms are among the most active participants on exchanges. Business model changes by these firms may lead to less exchange liquidity for several reasons. First, Non-Member Firms that choose not to join an Association would no longer be able to rely on the rule and trade

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Hitesh, Are You Playing in a Toxic Dark Pool? A Guide to Preventing Information Leakage, 2008 ITG white paper, available at http://www.itg.com/news_events/papers/ITGResearch_Toxic_Dark_Pool_070208.pdf, and Dark Pools and Toxicity Assessment, 2014, EY White Paper, available at http://www.ey.com/Publication/vwLUAssets/Dark_pools_and_toxicity_assessment/$FILE/Dark%20pools%20and%20toxicity%20assessment_FINAL_LR.pdf. Other industry participants describe a more benign role for automated trading firms as liquidity providers in ATSs. See High-Speed Traders Go Dark, 2012, Markets Media Commentary, available at http://marketsmedia.com/high-speed-traders-go-dark/.

187 There is some evidence that proprietary electronic trading firms are net takers of liquidity in equity markets, although the evidence is not conclusive. Using NASDAQ data from 2008-2010, Carrion estimates that these firms supply liquidity to 41.2% of trading dollar volume and take liquidity in 42.2% of trading dollar volume. See Carrion, Al, 2013, "Very fast money: High-frequency trading on the NASDAQ," Journal of Financial Markets 16, 680-711. Al Carrion currently serves as an Economic Fellow within the Division of Economic and Risk Analysis. Another study finds that electronic trading firms act as net liquidity suppliers during periods of extreme price movements. See Brogaard, Moyaert, Riordan, Shkilko and Sokolov, 2015, "High Frequency Trading and Extreme Price Movements," working paper.

indirectly on exchanges of which they are not members.[188] Second, Non-Member Firms that do not join an Association would no longer be able to access off-exchange liquidity to unwind positions acquired on exchanges, except as outlined in the floor member hedging exemption. This may reduce their willingness to provide liquidity upon exchanges.[189] Third, Non-Member Firms that choose to join an Association may be subject to additional variable costs (primarily regulatory fees) on their exchange-based trading as well as on their off-exchange trading.[190] These firms may respond by trading less actively on exchanges. Finally, Non-Member Firms may choose to cease trading equity securities rather than join an Association or change their business models. Reduced liquidity upon exchanges can result in higher spreads and increased volatility. Increased spreads on exchanges can lead to increased costs for off-exchange investors as well as investors transacting on exchanges, because most off-exchange transactions (including many retail executions) are derivatively priced with reference to prevailing exchange prices.

The Commission preliminarily believes that the proposed amendments are not likely to have an economically meaningful effect on direct capital formation (the assignment of financial resources to meet the funding requirements of a profitable capital project, in this case, the provision of liquidity to financial markets). However, the Commission believes that the changes

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188 Currently, a Non-Member Firm can indirectly access an exchange of which it is not a member through a firm that is an exchange member. In light of the proposed elimination of the exclusion for proprietary trading, this activity would not be consistent with the proposed amendments, unless the floor member hedging exemption or Regulation NMS routing exemption applies.

189 These firms could unwind positions on other exchanges, but the cost to do so may be higher than if all liquidity, including off-exchange liquidity, were available.

190 It is possible Non-Member Firms that choose to join an Association may avoid some additional costs by registering as market makers on additional venues, mitigating these charges. Furthermore, they may see a reduction in fees that were formerly paid to their DEA if FINRA assumes that role.

in allocation of regulatory fees and more efficient supervision within the off-exchange market may result in improved efficiency of capital allocation by the financial industry. Currently, Non-Member Firms face lower regulatory costs and a lower degree of regulatory scrutiny of their off-exchange trading activity than Member Firms. While the Commission believes that this imposes certain costs on other market intermediaries and the investors they represent, there is another externality as well: over-commitment of liquidity both to exchanges and the off-exchange market.[191] This over-commitment is likely to have some positive effects on capital markets, such as lower quoted spreads on exchanges. In addition to lowering immediate execution costs on exchanges, lower exchange quoted spreads are likely to reduce transaction costs off-exchange as well, because off-exchange trades are typically priced with reference to quoted exchange prices. Adoption of the proposed amendments may reduce the capital commitment of Non-Member Firms to equity market liquidity provision. It is possible that in response current Member Firms may choose to commit additional capital to liquidity provision when the trading environment has more uniform regulatory requirements. These reallocations of capital may improve or degrade levels of liquidity, spreads and volatility measures on exchanges and within the off-exchange market.

The magnitude of these competitive effects is impossible for the Commission to determine at this time for a number of reasons. First, these effects involve strategic decisions by Non-Member Firms that the Commission cannot predict, and a competitive response that the Commission lacks information to anticipate. Second, even if the Commission could predict the likely changes in capital commitment by market participants, the Commission lacks information on how capital commitment by financial firms maps into market quality measures such as

191 There is likely to be a corresponding underinvestment of capital somewhere else.

spreads, levels of liquidity, and execution costs.[192] Due to the complexity of the economic relationship between capital commitment and market quality measures, and inadequate information on individual firm's strategies, cost structures and likely competitive responses, the Commission cannot estimate the likely magnitude of these effects.

3. Competition to Provide Liquidity Is Distorted by Regulatory Costs Borne by Only a Subset of Competitors, Member Firms

Currently, Member Firms bear a number of costs not borne by Non-Member Firms including a number of regulatory fees and indirect costs that are assessed or imposed upon Member Firms. These costs include direct costs such as trading fees that are either assigned only to Member Firms, such as TAF, or in the case of Section 3 fees, Member Firms may be assigned costs that potentially could be assigned to Non-Member Firms selling securities off-exchange. There are indirect costs of disparate regulatory regimes as well. For example, Member Firms bear costs of interacting with regulators to accommodate supervision, and must comply with the rules of an Association as well as rules adopted by the Commission. This inequality in regulatory requirements may distort competitive forces in the market and these potential distortions may be mitigated by the proposed amendments to Rule 15b9-1, to the extent that Non-Member Firms join an Association and subject themselves to comparable fees and regulatory costs imposed on all other Member Firms.

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192 The Commission has considered whether it is possible to model this response using current data to estimate these effects. Even if CAT data were available today, the Commission believes it would not have sufficient information for this estimation because information on the daily and perhaps intra-day change in committed capital levels is not available. Although the Commission has quarterly data on the net capital of broker-dealers, broker-dealers do not commit all of this capital to liquidity provision in equity markets. Furthermore, on a daily or more frequent basis, a liquidity provider may choose to fully or partially withdraw from the market for any reason.

The existing differential regulatory burden of Member Firms and Non-Member Firms may have consequences with respect to market quality both for exchange-based and off-exchange trading. For example, because Non-Member Firms, ceteris paribus, currently face lower variable costs of trading compared to Member Firms, Non-Member Firms may be able to provide liquidity at a lower cost than Member Firms. Because a low-cost competitor may be able to quote at a price superior to that of his competitors, investors may incur lower transaction costs than if Non-Member Firms faced the same costs as Member Firms. It may also reduce direct execution costs (such as quoted and effective spreads) for both exchange and off-exchange trades, the latter of which are normally derivatively priced with reference to prevailing exchange quotes. The differential regulatory burden, however, may also reduce depth at best prices because a Member Firm may not be able to trade profitably at a price established by a Non-Member Firm that faces lower regulatory costs. Lower liquidity at best exchange prices implies greater price effect of trades, which may increase trading costs, particularly for large orders. For example, if the best price on an exchange is associated with 100 shares of depth, a 200 share order will exhaust depth at the best price and the second 100 share lot will execute at an inferior price.[193] If depth at best price tends to be larger, it is less likely that an order will exceed the depth available at the best price. The change in best price associated with an execution that exhausts the depth available at the best price is the price effect of the trade upon the exchange. Because the Commission does not have access to consolidated audit trail data, the Commission lacks data to quantify the percent of inside depth provided by Non-Member Firms and the frequency with which only Non-Member Firms are quoting the best price on an exchange.

193 This assumes no hidden depth at the best price. If non-displayed depth is present at the best price, the remaining 100 shares will be filled at the best price if at least 100 shares of hidden depth exists at the best price.

However, the high participation rate of Non-Member Firms in exchange trading suggests they provide a significant fraction of exchange liquidity.[194]

4. Competitive Effects on Off-Exchange Market Regulation

Currently, FINRA is the only Association. It is possible, however, for new Associations to enter the regulatory oversight market and compete with FINRA. The proposed amendments to Rule 15b9-1 may create incentives for a new Association (or Associations) to form. The large Non-Member Firms have commonalities in business models, for example, they typically do not carry customer accounts. They may consider joining an Association concurrently. Because these firms collectively conduct a significant portion of off-exchange volume, the creation of an Association tailored to these firms may be economically viable.

To be registered as an Association, in addition to requirements that parallel the requirements to be a national securities exchange, an Association must "[b]y reason of the number and geographical distribution of its members and the scope of their transactions" be able to carry out the purposes of Section 15A.[195] Additionally, for example, the Association must permit any registered broker-dealer that meets the Association's qualification standards to become a member,[196] and it must have rules regarding the form and content of quotations relating to securities sold otherwise than on a national securities exchange that are designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to

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194 Participation rates of Non-Member Firms in exchange trading are discussed more fully in Section V.A.1.

195 See 15 U.S.C. 78o-3.

196 See 15 U.S.C. 78o-3(b)(3). Section 15A of the Exchange Act specifically states that an Association shall not be registered as a national securities association unless the Commission determines, among other things, that "(3)…the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof."

promote orderly procedures for collecting, distributing and publishing quotations.[197] The Association must also be so organized and have the capacity to enforce compliance by its members and persons associated with its members with, among other things, its own rules and the Exchange Act and the rules and regulations thereunder.[198]

The ability to form an Association is characterized by barriers to entry. A new Association would likely incur significant fixed costs to create the infrastructure needed to perform the surveillance and oversight requirements imposed on Associations by statute and regulation. It may also incur substantial costs, including personnel, training, travel, and other costs to provide for an effective surveillance and supervision of the off-exchange market. Indeed, as previously discussed, the only existing Association, FINRA, has resources and demonstrated expertise that enable it to surveil and supervise the off-exchange market. Duplication of that infrastructure could be costly for a new Association.

The proposed amendments may alter barriers to entry and thus affect the potential for competition among regulators of off-exchange markets. Currently the primary barrier to entry is the high fixed-cost involved in forming and operating an Association. If adopted, the amendments would bring nearly all off-exchange trading under the jurisdiction of an Association, including the trading of firms that currently are not members of an Association (Non-Member Firms). If these firms join the only existing Association, FINRA, an Association newly formed after this point may have increased difficulty attracting the members needed to support the high fixed-costs associated with forming an Association because every broker-dealer that participates in the off-exchange market would already be a FINRA member. This increased

197 See 15 U.S.C. 78o-3(b)(11).

198 See 15 U.S.C. 78o-3(b)(2).

difficulty results because many firms may be reluctant to change Associations, either because of the costs to change compliance infrastructures or uncertainty in the regulatory environment of the new Association. Thus, if the proposal results in more firms becoming members of the existing Association, a new Association could face increased difficulties attracting members in the future.

The proposed amendments do, however, temporarily lower the barriers to entry for a competing Association. If these amendments are adopted, a number of firms with similar business models and substantial off-exchange volume could contemplate Association membership concurrently. This may provide the incentive to create and tailor a new Association to specific business models of these firms. If a competing Association limited the scope of its members or operations, it might not have to duplicate all of the surveillance and supervision functions required to be provided by an Association that does not have those limits. This may lower the costs of forming an Association and alter the barriers to entry.[199]

The existence of multiple Associations might provide benefits to the market as a whole. If a new Association could provide high quality services to members with a lower fee structure, all Associations would have incentives to reduce fees to attract members. This could result in cost savings to broker-dealers. Second, a new Association could innovate to develop different surveillance and supervision methods that could be more efficient than FINRA's methods.

Competition among Associations could also entail substantial costs. If a new Association were to form, the necessary regulatory infrastructure including Information Technology ("IT") systems and personnel would need to be duplicated in the new Association. If the market for

199 Some limitations on Association membership or operations would require exemptive relief for the Association to register with the Commission.

Associations is characterized by economies of scale, aggregate costs for the same level of regulation would be higher in a market with two Associations than in a market with a single Association. These additional costs would ultimately be borne by Associations' broker-dealer members. Second, Associations might compete on the basis of providing "light touch" regulation, in essence surveiling less and providing less supervision. As a result, the quality of market supervision might decrease, although the Commission does itself oversee self-regulatory organizations, such as Associations, and accordingly, would not permit a "race to the bottom."[200]

C. Consideration of Costs and Benefits

This section discusses costs and benefits of the proposed amendments. While the Commission has attempted, where possible, to provide estimated quantifiable ranges, both costs and benefits are difficult to quantify for this proposal for a number of reasons. First, market participants are heterogeneous in their type, existing exchange memberships, and activity level in the off-exchange market. Consequently, compliance costs will vary across firms in a number of dimensions. Second, estimating costs is complicated by the fact that Non-Member Firms can comply with the proposal in a number of ways, and presumably each will choose to seek compliance in the manner that minimizes the sum of its direct costs (related to joining and maintaining memberships in additional SROs) and indirect costs (which include forgone opportunities to trade profitably and costs associated with revising business strategies). Furthermore, some firms are likely to remain exempt upon adoption of the proposed amendments, but the Commission lacks data to identify those firms with certainty.[201] At the

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200 See Section 19(g) and Section 19(h) of the Exchange Act.

201 Non-Member Firms that provide liquidity on multiple exchanges and trade heavily off-exchange are unlikely to be small in terms of net capital, and are not low trading volume firms by definition. However, as discussed in Section V.A.1, many Non-Member Firms

other end of the spectrum, the minority of Non-Member Firms that are large and contribute significantly to both exchange and off-exchange trading are unlikely to remain exempt.[202] For the 14 large firms that connect directly to ATSs, the Commission believes that all will lose their exempt status, but cannot predict how those firms will seek to comply with the proposed amendments. The Commission is unable to more precisely quantify the number of Non-Member Firms that will lose their exemption from Association membership upon adoption of the proposed amendments because it is unable to estimate the level of off-exchange trading for the majority of the 125 Non-Member Firms. OATS reporting rules do not require Member Firms to disclose the identities of broker-dealers that submit orders to a Member Firm, making it infeasible to more precisely estimate non-ATS off-exchange trading for Non-Member Firms.

Quantifying costs is further complicated because Non-Member Firms do not report order audit trail data. It is difficult to measure the trading of individual firms, although their activity as a group is observable within audit trail data. Consequently, the Commission can measure the approximate overall contribution of Non-Member Firms to off-exchange volume, but cannot fully partition that volume across Non-Member Firms.

Some firms with substantial off-exchange trading activity may choose to change their business models rather than join an Association. If such firms ceased off-exchange activity, they would remain outside the supervision of an Association, and their decision to change business models may affect market quality both on and off-exchange. The Commission does not have

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are small in terms of net capital and may be members of a single exchange. Such firms are more likely to have a floor-brokerage business model, or have limited exposure to off-exchange markets. Such firms would either be exempt from the rule by virtue of having no off-exchange trading or no trading on exchanges of which they are not members, or be able to rely on the floor member hedging exemption to continue their limited off-exchange trading related to floor brokerage activities.

202 The diversity of Non-Member Firms is discussed in Section V.A.1.

ready access to statistics on the liquidity provision of Non-Member Firms on and off exchanges. As such, the Commission cannot quantify the potential changes in transaction costs, even under broad assumptions about how Non-Member Firms will change their business models. This is discussed further in Section V.B.2.

The overall benefits of the proposed amendments relate to more comprehensive and uniform surveillance of off-exchange activity by the regulator best positioned to oversee such activity. The benefits the Commission anticipates from the amendments are largely qualitative and by their nature difficult to measure.

1. Benefits

As discussed above,[203] some of the firms using the existing Rule 15b9-1 exemption are significant participants in overall off-exchange market volume. Thus, a substantial share of off-exchange volume is conducted outside of the regulatory jurisdiction of an Association that has primary responsibility for overseeing off-exchange activity. Association membership would supplement the oversight of the exchanges, which typically do not examine the off-exchange activity of their members. This would further assist the Commission in obtaining a more complete picture of the activity that occurs on ATSs and elsewhere in the off-exchange market by entities that are not currently members of an Association. Investors and intermediaries benefit when a specialized expert regulates and oversees the off-exchange market.[204] Investors

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203 See Section I.

204 The off-exchange market is diverse and less transparent than exchanges. An exchange typically has a single matching engine for a given security and a limited number of order types that interact to create transactions while disseminating quote information publicly. The off-exchange market encompasses over 40 ATS matching engines while more than half of off-exchange volume occurs outside of ATSs with transactions reported by more than 200 market participants. Only a few of these ATS venues disseminate quote information. Surveillance and oversight of the off-exchange market requires proprietary

participating in the off-exchange market currently do not fully realize the benefits of such expertise and regulatory oversight.

As discussed above,[205] the Commission preliminarily believes the inclusion of more Non-Member Firms in an Association would improve such Association's ability to supervise cross-exchange trading activity. This would enhance regulators' ability and—through the information FINRA shares with the Commission—the Commission's ability to effectively oversee regulation of trading on multiple markets and of financial products.

The Commission also preliminarily believes that the proposed amendments to Rule 15b9-1 would improve supervision of Non-Member Firms. FINRA, currently the only Association, has substantial experience and expertise from overseeing a large number of broker-dealers. This makes FINRA's potential regulation of Non-Member Firms with off-exchange or cross-market trading activity particularly efficient.

The Commission preliminarily believes that this proposal provides significant benefits even in the event that the Commission approves the CAT NMS Plan.[206] The CAT eventually may address the regulatory audit trail data deficiencies discussed previously,[207] but the CAT will not address FINRA's lack of jurisdiction over Non-Member Firms participating in the off-

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data from thousands of market participants, and regulatory personnel with knowledge of the institutional detail of the workings of dozens of trading venues. At present, only FINRA possesses those resources. Further detail on off-exchange market trading is provided by Tuttle, Laura, 2014, Over-the-Counter Trading: Description of Non-ATS OTC Trading in National Market System Stocks, available at http://www.sec.gov/dera/staff-papers/white-papers/otc-trading-white-paper-03-2014.pdf.

205 See supra Section I.B.

206 See CAT Release, supra note 86.

207 See supra note 170.

exchange markets, which FINRA is charged with overseeing, and the need for that enhanced oversight.

While current members of an Association would not be directly affected by this rule, they would benefit by having a more level playing field in terms of their regulatory requirements relative to Non-Member Firms. Currently, competition in liquidity provision in equity markets is distorted by inequalities in regulatory requirements.[208] With more uniform regulatory requirements and oversight, firms may compete more equitably to supply liquidity both on exchanges and off-exchange.

2. Costs

The proposed amendments, by narrowing the existing exemption, would result in broker-dealers that no longer qualify for the exemption having to comply with Section 15(b)(8) by either limiting their trading to exchanges of which they are members or joining an Association. Under the proposed amendments, therefore, Non-Member Firms that choose to continue any off-exchange activity will be faced with choices that would involve corresponding costs. For example, Non-Member Firms may incur costs related to membership in an Association or costs necessitated by additional exchange memberships. Additionally, some Non-Member Firms may incur the costs of losing the benefits of trading in the off-exchange market if they decide not to join an Association.

Most of the costs incurred in joining an Association and maintaining membership therein are dependent on firm characteristics and activity level. Furthermore, the Commission believes that some Non-Member Firms may comply by ceasing their off-exchange trading activity, avoiding many of these costs but forgoing the opportunity to trade profitably in some venues.

208 See Section V.B.3.

With certain assumptions, the Commission has attempted to estimate direct compliance costs that a Non-Member Firm is likely to face to comply with the proposed amendments. The estimate applies to the 14 Non-Member Firms that connect directly to ATSs; smaller firms that choose to join an Association should face lower costs because they have less revenue and trading volume that would be subject to GIA, TAF and Section 3 fees. The 14 Non-Member Firms that connect directly to ATSs, assuming that trading volumes and gross income levels remain unchanged, would face implementation costs of approximately $3.3 million per firm, with ongoing annual costs ranging from about $2.3 million to $23 million depending on the firms' off-exchange trading volume.[209] Cost estimates (one time and annual) are broken down in the following tables and are discussed in detail below:

Table 1: Median or Average Firm Implementation Costs

Cost	**Median or Average**[210]
Application to join FINRA	$7,500

209 The largest contributor to the estimate of implementation and ongoing costs is the cost of OATS reporting. Estimates for OATS reporting costs are taken from the CAT NMS Plan and relate to implementing CAT reporting, which is expected to be more complex and have more stringent requirements related to technology, such as more stringent clock synchronization, than OATS reporting requires. Consequently, the Commission believes these likely are overestimates of actual costs firms will face to implement OATS reporting. See infra note 221 for further information on CAT NMS Plan cost estimates. Each of the 14 firms is assumed to have implementation costs of $3,160,000 to initiate OATS reporting, $82,500 in legal consulting costs, and an application fee ranging from $7,500 to $12,500 depending on the number of registered persons. The Commission derived these estimates from the CAT NMS Plan. See infra note 221 and accompanying text for qualifiers on these estimates.

210 Medians are used where possible. For OATS-related costs, median values are zero, so averages are used. This data is discussed further in note 219, infra. Cost estimates are reported as ranges for legal consulting and compliance work; for these estimates, the midpoint is used.

Implement OATS reporting	$3,160,000
Legal consulting	$82,500
Total	$3,250,000

Table 2: Median or Average Firm Ongoing Annual Costs[211]

Cost	**Median or Average**
OATS reporting	$2,280,300
Gross Income Assessment	$113,000
Trading Activity Fee	$40,000
Personnel Assessment	$0
Section 3 fee	$212,000
Compliance work	$60,000
Total	$2,705,300

If all 14 of those Non-Member Firms that connect directly to ATSs were to join FINRA, the aggregate cost of the proposal for these firms would be $42.5 million in implementation costs and ongoing aggregate annual costs of $85.2 million, with the majority of the costs related to implementing OATS reporting.[212] While the Commission is unable to aggregate the costs of the proposal for the remaining 111 firms, the Commission believes that the aggregate costs for the

211 TAF is underestimated because it accounts for only ATS volume. See infra note 231 and accompanying text. This TAF cost also represents a transfer from current Non-Member Firms to current Member Firms. The Section 3 fee estimate assumes that the firms currently pay no Section 3 fees. It is likely that firms that clear through a Member Firm are currently assessed these fees indirectly.

212 See supra note 209 and infra note 221 related to OATS reporting costs derived from the CAT NMS Plan. The total cost calculation assumes range midpoint costs for FINRA application, legal consulting, and compliance work, as well as maximum costs for implementation of OATS reporting. GIA, TAF, and Section 3 fees are calculated using firm share and dollar volume activity estimates from FINRA data discussed further in Section V.A.1.

subset of 14 represent the majority of the aggregate costs, even assuming that all 125 firms will join FINRA.[213]

a. Costs of Joining an Association[214]

Based on discussions with FINRA, currently the only Association, and industry participants, the Commission preliminarily believes that the direct compliance costs on Non-Member Firms of joining FINRA are composed of the FINRA membership application fees, costs associated with adapting IT infrastructure for regulatory data reporting requirements, and any legal or consulting costs necessary for effectively completing the application to be a member of FINRA (e.g., ensuring compliance with FINRA rules including drafting policies and procedures as may be required).

The fees associated with a FINRA membership application can vary. As an initial matter, the application fee to join FINRA is tier-based according to the number of registered persons associated with the applicant. This one-time application fee ranges from $7,500 to $55,000.[215]

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213 The data provided to the Commission by FINRA describes the aggregate ATS activity level of all 125 Non-Member firms. Further firm-level data for the 14 firms that directly connect to ATSs can be inferred using exchange MPIDs that are reported by some ATSs. Because these 14 direct-connecting firms account for the majority of Non-Member Firm ATS activity, the Commission believes that the 111 remaining firms have much lower ATS (and presumably other off-exchange) activity levels. Since transacted volume is the primary driver of the variation in costs across firms that join FINRA, the Commission believes that the remaining 111 firms will face far lower costs if they choose to join FINRA.

214 The Commission recognizes that Non-Member Firms would incur compliance costs on an initial and ongoing basis to comply with the proposed amendments. See Section V.C.2.a. The Commission does not aggregate these costs across all Non-Member Firms because the Commission does not have necessary information about the majority of the Non-Member Firms and expects that costs would vary widely across firms. Where possible, however, the Commission has provided estimates based on a subset of large firms on which the Commission has sufficient information. The Commission expects that smaller firms likely will face lower costs.

215 See FINRA By-Laws, Schedule A, Section 4.

The initial membership fee for FINRA is $7,500 for firms with ten or fewer representatives registered with FINRA and $12,500 for firms with eleven to one hundred representatives registered with FINRA.[216] Based on its knowledge of the size and business models of Non-Member Firms, the Commission preliminarily believes that most Non-Member Firms would not incur FINRA application fees exceeding $12,500.[217]

Because most FINRA members have OATS reporting obligations, Non-Member Firms that choose to join FINRA will incur costs related to initiating and maintaining data reporting.[218] Costs to initiate and maintain OATS reporting[219] will vary widely among firms, depending on many factors including current IT infrastructure, complexity, and affiliation with a firm that already reports OATS data. While we are unable to quantify these costs precisely, one point of reference for the possible costs associated with OATS reporting obligations is the CAT NMS Plan, that provides estimates of these costs for reporting CAT data. There are limitations, however, to those estimates in this context in that CAT is an order audit system that will be significantly more complex and larger in scope than OATS.[220] Because the projected scope of

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216 Id.

217 Based on current FOCUS data, the Commission believes no Non-Member Firm has more than 100 registered representatives.

218 See FINRA Rule 7400 Series – Order Audit Trail System.

219 Pursuant to Rule 613 under the Exchange Act, the SROs have submitted a plan to eliminate existing rules and systems that will be rendered duplicative by the CAT. 17 CFR 242.613(a)(1)(ix). To the extent that OATS is rendered duplicative by CAT, the CAT NMS Plan proposes its elimination, and the Commission approves the CAT NMS Plan, the OATS system may eventually be eliminated. If this occurs, the costs of OATS reporting to Non-Member Firms may cease, but may be supplanted by other costs related to order and transaction reporting requirements under the CAT NMS Plan.

220 The CAT NMS Plan proposal discusses OATS reporting requirement. These requirements include having revenue of less than two million dollars. The Commission believes that large Non-Member Firms would not qualify for OATS reporting exemptions, were the Commission to approve the CAT NMS Plan as submitted on

CAT exceeds substantially the scope of OATS reporting, and implementation of CAT reporting is expected to include technical requirements such as more stringent clock synchronization requirements than OATS, the Commission believes these estimates provide (at best) an upper-bound for OATS reporting costs. Furthermore, Non-Member Firms that are members of NASDAQ or NYSE are already required to produce OATS data and report it to FINRA upon request. Consequently, implementation costs likely overstate the costs these firms would face in initiating OATS reporting because the Non-Member Firms may have already established some of the necessary infrastructure. In addition, the Commission recognizes that the CAT NMS Plan estimates are based on voluntary survey responses by a small number of broker-dealers. Finally, the CAT NMS Plan has not yet been published for comment. Nevertheless, the Commission believes that those estimates give a sense of the potential magnitude of initiating OATS reporting.

The CAT NMS Plan details cost estimates for two types of broker-dealers. The first type already reports OATS data; the second type does not. The Commission focuses on costs for large firms that do not currently report OATS data. In these estimates, the average large firm estimated CAT implementation costs are approximately $3,160,000; average implementation costs for a small firm are estimated at approximately $131,200. The average large firm estimated annual CAT reporting costs are $3,160,000 annually; average small firm reporting costs are $121,200.[221] As discussed previously, these are, at best, upper-bounds on OATS

February 27, 2015. See CAT NMS Plan, available at http://catnmsplan.com/web/groups/catnms/@catnms/documents/appsupportdocs/p602500.pdf.

221 Costs estimates are the sum of hardware/software costs, full time employee costs, and third party/outsourcing costs for firms that do not currently report to OATS. Within these firms, median implementation and annual ongoing costs were estimated at zero. The

reporting costs because of differences in complexity and technical requirements for OATS and CAT reporting.

In addition to the application fees and data reporting costs, the Commission has taken into account the cost of legal and other advising necessary for effectively completing the application to be a member of FINRA. Some firms may choose to perform this legal work internally while others may use outside counsel for the initial membership application. In making this choice, Non-Member Firms will likely take into account factors, such as the size and resources of the firm, the complexity of the firm's business model, and whether the firm previously used outside counsel to register with any exchanges. Based on conversations with industry participants that assist with FINRA membership, for Non-Member Firms that choose to employ outside counsel to assist with their FINRA membership application, the cost of such counseling ranges from approximately $40,000 to $125,000. Factors affecting the specific costs of a particular firm include the number of associated persons, the level of complexity or uniqueness of the firm's business plan, and whether the firm has previously completed exchange membership applications with similar requirements.

b. Costs of Maintaining an Association Membership

With respect to ongoing costs, the Commission preliminarily believes that the three components of such costs are any ongoing fees associated with FINRA membership, costs of

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CAT NMS plan discusses interpretation of the zero medians, saying "It is the participants' understanding that this is likely due to current operational practices among broker-dealers that do not differentiate between technology and headcount costs that support business functionality and regulatory reporting." Consequently, the Commission believes these estimates do not reflect the opportunity costs associated with assigning employees to regulatory reporting tasks instead of other tasks they could be performing. See the amended CAT NMS Plan, available at http://catnmsplan.com/web/groups/catnms/@catnms/documents/appsupportdocs/p602500.pdf.

legal work relating to FINRA membership, and costs associated with additional compliance activities.

The ongoing membership related fees associated with FINRA membership include the annual gross income assessment; the annual personnel assessment; and the TAF and Section 3 fees, among others. The more significant fees are discussed below.[222]

The annual Gross Income Assessment generally requires members to pay a percentage of the Member Firm's total annual revenue based on a graduated scale.[223] The magnitude of the annual Gross Income Assessment is based on the total annual revenue, excluding commodities income, reported by the Member Firm on its FOCUS Form Part II or IIA.[224] Based on FOCUS Form data from Non-Member Firms in 2014, the Commission has determined that the average annual total revenue of Non-Member Firms, excluding commodities income, is approximately

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222 There are additional fees associated with maintaining an Association membership. There is an annual Personnel Assessment fee ranging from \$130 to \$150 per employee that applies to principals or representatives in the FINRA member's organization. See FINRA By-Laws, Schedule A, Section 1(e). Based on 2014 FOCUS reports, the number of registered representatives of Non-Member Firms that connect directly to ATSs ranges from 0-91, with an average of 18 and a median of 0. The Commission estimates that the average Non-Member Firm would incur a Personnel Assessment fee of no more than \$2,520, and the median Non-Member Firm would incur a Personnel Assessment fee of \$0. The Commission further estimates that the maximum Personnel Assessment fee that one of these Non-Member Firms would incur would be \$11,830. There are also additional continuing education and testing requirements which will impose costs upon firms joining an Association. Additionally, there are de minimis fees (branch registration fee and system processing fee, among others). See FINRA By-Laws, Schedule A.

223 Id. For example, FINRA imposes a Gross Income Assessment as follows: (1) \$1,200 on a Member Firm's annual gross revenue up to \$1 million; (2) a charge of 0.1215% on a Member Firm's annual gross revenue between \$1 million and \$25 million; (3) a charge of 0.2599% on a Member Firm's annual gross revenue between \$25 million and \$50 million; and so on as provided in Schedule A. When a firm's annual gross revenue exceeds \$25 million, the maximum of current year's revenue and average of the last three years' revenue is used as the basis for the income assessment. Id.

224 See FINRA By-Laws, Schedule A, Section 2. See also FOCUS Report Form X-17A-5, Part II and IIA.

$93 million, with a median of $86 million.[225] For the 14 large firms that connect directly to ATSs, FINRA's graduated Gross Income Assessment scale results in an average Gross Income Assessment for these Non-Member Firms of $91,784 and a median Gross Income Assessment of $113,824.[226]

The magnitude of the TAF depends on the transaction volume of a FINRA member that is covered by TAF as described in the FINRA Bylaws.[227] The Commission notes that FINRA may need to consider reevaluating the structure of the TAF to assure that it appropriately takes into account the business models of Non-Member Firms that may join FINRA as a result of the proposed amendments.[228] Although the Commission lacks the data to comprehensively estimate TAF that Non-Member Firms are likely to incur, data on ATS trading during the fourth quarter of 2014 provided by FINRA allows the Commission to estimate the fees associated with ATS activity for Non-Member Firms that connect directly to an ATS.[229] The Commission has identified 14 Non-Member Firms that traded on ATSs directly without the intermediation of a

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225 Based on 2012-2014 FOCUS data.

226 ($1,200 for the first $1 million of revenue) + (0.1215% × annual revenue greater than $1 million up to $25 million) + (0.2599% x annual revenue greater than $25 million up to $50 million) + (0.0518% of annual revenue greater than $50 million up top $100 million) + (0.0365% of annual revenue greater than $100 million to $5 billion). As discussed previously, Non-Member Firms vary in size. GIA for large firms used in these calculations (the 14 that connect directly to ATSs), is anticipated to be far larger than for the 111 remaining Non-Member Firms. See FINRA By-Laws, Schedule A, Section 1(c).

227 See FINRA By-Laws, Schedule A, Section 1(b).

228 See supra notes 95 and 184.

229 Some Non-Member Firms may trade on ATSs indirectly using the services of a Member Firm. The Commission cannot identify the magnitude of these firms' trading on an individual basis because Non-Member Firms are not required to be identified in Member Firms' OATS data. The Commission thus cannot estimate the TAF that these firms would incur as FINRA members.

Member Firm during the fourth quarter of 2014.[230] The Commission estimates that trading activity fees incurred by these 14 large Non-Member Firms due to their ATS activity would range from $0 to approximately $3.2 million annually, with a median incurred TAF of around $40,000.[231] The Commission believes that TAF for Non-Member Firms not among the 14 identified will be far lower because the median Non-Member Firm has far lower trading volume than the typical firm of the 14 identified in the data.

Some off-exchange trading that Non-Member Firms engage in currently may no longer be profitable when TAF is incurred. Consequently, Non-Member Firms may reduce their trading both on exchanges and off-exchange after joining an Association.

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230 These 14 firms do not represent typical Non-Member Firms: they represent the largest of the Non-Member Firms in terms of trading volume. Consequently, the median TAF discussed here far exceeds what the majority of Non-Member Firms would pay if they were to join FINRA.

231 Estimated TAF does not include any TAF related to firm's exchange-based trading activity, or off-exchange activity that occurs outside of an ATS. If a firm's activity on an exchange is related to normal market making operations, the activity does not incur TAF. The Commission is unable to estimate the proportion of these firms' exchange trading that would incur TAF because the Commission does not have information on what proportion of Non-Member Firm exchange activity would qualify for exemption from TAF fees under FINRA By-Laws. Because other elements of the TAF are not included in this calculation, it underestimates the actual TAF that firms would incur if they joined FINRA. The magnitude of the underestimation may be significant, but firms that join FINRA may be able to reduce their TAF cost by registering as Market Makers upon additional exchanges. (TAF is not assessed for certain trades related to registered market-making. See FINRA By Laws, Schedule A, Section (1)(b)(2)(F).) Estimates of TAF are based on the percentage of ATS orders received by Member Firms that operate an ATS and report the exchange-issued MPIDs of Non-Member Firms that place orders within that system. The calculation assumes that these proportions are representative of the trading of Non-Member Firms on all ATSs, and that the orders placed by these firms are equally likely to be executed within ATSs. It also assumes that half of all executed volume is sell volume, which incurs a TAF. The estimated TAF is equal to estimated sell volume x $0.000119. The $0 minimum is associated with a firm that has almost no ATS volume.

In addition to TAF, Non-Member Firms that choose to join FINRA may incur additional Section 3 fees. Using data on ATS trading during the fourth quarter of 2014 provided by FINRA, the Commission estimates that Section 3 fees incurred by the 14 large Non-Member Firms due to their off-exchange trading would range from $0 to approximately $16.9 million dollars annually, with a median incurred Section 3 fee[232] of $212,000.[233] As discussed in Section V.A.2 above, some of these fees may already be paid by Non-Member Firms that engage the services of a Member Firm clearing broker. However, FINRA lacks the authority to assess Section 3 fees against Non-Member Firms that self-clear, in which case FINRA may assess the fee to the Member Firm counterparty to the transaction. While these fees will represent a cost to Non-Member Firms, the cost will be largely offset to the industry as a whole by a reduction of Section 3 fees incurred by Member Firms (or clearing brokers acting on behalf of a Member Firm) when they buy from a self-clearing, Non-Member Firm.

Ongoing compliance costs would depend on the business circumstances of each firm and the types of issues that could arise. As in the case of the initial membership, some Non-Member Firms may choose to conduct ongoing compliance activities other than regulatory data reporting work (such as core accounting functions, updating policies and procedures, and updating forms

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232 These estimates do not include fees related to off-exchange trading outside of an ATS; the Commission is unable to estimate the magnitude of such fees that Non-Member Firms would incur if they were to continue trading off-exchange upon adoption of these amendments because in the absence of a consolidated audit trail, the Commission lacks data on Non-Member Firm off-exchange activity outside of ATSs.

233 Section 3 fees are estimated using Non-Member Firm off-exchange dollar volume reported by FINRA. Half of volume is assumed to be sell volume that would be subject to Section 3 fees. Aggregate estimated sell volume is estimated across firms by assuming that all non-member orders are equally likely to generate executions. For example, assume firm ABC submitted 10% of all off-exchange orders submitted by Non-Member Firms. Section 3 Fee obligation is calculated as: Non-Member Firm Dollar Volume x ½ x 10% x $18.40/$1,000,000.

filed with regulators) in-house while others may seek to outsource this work. The Commission estimates, based on discussions with industry participants, that the ongoing compliance cost for firms that outsource this work will range from $24,000 to $96,000 per year.[234] In the case of some Non-Member Firms, i.e., those that are affiliates of FINRA members, this cost is likely to be lower as they may be able to leverage compliance work already being performed.

In addition to the cost estimates discussed above, the Commission recognizes that both Non-Member Firms and SROs will incur other direct and indirect costs because of the increased regulatory requirements of the proposed amendments. Specifically, there will be compliance costs associated with regulation by FINRA.[235] Generally, the SROs that supervise Non-Member Firms are unable to provide the level of supervision of cross-market and off-exchange activity that FINRA provides to its Member Firms. Consequently, firms that join an Association will face costs associated with greater regulatory scrutiny, including the costs of comprehensive examinations of activity that was previously subject to less regulatory review. To the extent that this activity is permissible under Association rules, additional costs will be limited to those activities that are required to accommodate normal supervision and examination by an Association. To the extent that their activity does not already do so, firms will face additional costs related to bringing activity into compliance with Association rules. For the reasons

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234 For firms that choose to do this work in-house, the Commission preliminarily believes that the costs of ongoing compliance may be less than $96,000. This figure assumes Non-Member Firms may have experience in ongoing compliance work with SROs through their exchange membership(s) and, therefore, only captures the incremental cost of compliance with Association rules.

235 However, Non-Member Firms that choose to join an Association may have FINRA assigned as their DEA. Such an assignment could eliminate separate DEA fees that the Non-Member Firms may pay to their current DEA.

discussed above, the Commission is not able to estimate these costs, although the Commission believes they will vary among Non-Member Firms.

c. Costs of Joining Additional Exchanges under the Rule as Proposed to be Amended

Non-Member Firms must be members of all exchanges upon which they transact business if they decide not to join an Association. With limited exceptions for some excluded activity previously discussed, some Non-Member Firms may choose to join additional exchanges to be excluded from the requirement to become a member of an Association. Alternatively, these firms may cease trading on exchanges of which they are not members.

Based on discussions with FINRA and industry participants, the Commission understands that completing a membership application with an additional exchange is generally less complicated and time consuming than completing a membership application with FINRA. Consequently, the Commission preliminarily believes that the compliance burden on Non-Member Firms for joining an additional exchange is likely to be significantly less than that of joining FINRA as those Non-Member Firms that choose to join an additional exchange are likely able to perform this work internally, given that they are already members of at least one exchange, and that such work should take less time than the time required to complete an application with FINRA.

In addition to the legal burden, Non-Member Firms joining additional exchanges as a result of the proposed amendments would incur membership and related fees. To the extent that Non-Member Firms choose to become members of additional exchanges, the fees associated with such memberships would vary depending on the type of access sought and the exchanges of which Non-Member Firms choose to become members.

The Commission also believes that the exchange membership fees that would apply to Non-Member Firms joining such exchanges would be those fees that apply to either introducing broker-dealers or proprietary trading firms. This assumption is consistent with the fact that any broker-dealers carrying customer accounts could not qualify for the current exemption of Rule 15b9-1. Thus, any exchange membership fees that apply to firms that provide clearing services or conduct a public business would not apply to Non-Member Firms.

Furthermore, because all Non-Member Firms are members of at least one exchange,[236] they would have already completed a Form U4, to register associated persons.[237] Although FINRA's rules regarding registration of associated persons tend to be more specific than exchange SRO rules regarding associated persons, the Commission believes Non-Member Firms will not need to register additional associated persons because the exchange SRO rules are already comprehensive in this regard. The Commission understands that all exchanges can access the Form U4 filings within the CRD which is maintained by FINRA.

In order to obtain estimates of the cost of joining additional exchanges, the Commission reviewed the membership related fee structures of all eighteen national securities exchanges. In assuming that the potential burden of joining additional exchanges would likely be less than that of joining FINRA, the Commission assumes that the costs imposed on Non-Member Firms by the proposed amendments would be membership fees, not costs relating to trading, such as

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236 For a broker-dealer to possibly be exempt from the requirement to be an Association member currently or under the proposed amendments, the broker-dealer must be a member of at least one exchange.

237 Form U4 is the Uniform Application for Securities Industry Registration or Transfer. Representatives of broker-dealers, investment advisers, or issuers of securities use Form U4 to become registered in the appropriate jurisdictions and/or with SROs. The Commission understands that all SROs currently use Form U4. See, e.g., BATS Rule 2.5.01(c), ISE Rule 304(b), Phlx Rule 600(b).

trading permit fees and connectivity. The Commission recognizes that membership in an exchange, alone, may not guarantee the ability to trade because many exchanges charge fees for trading rights, ports, various degrees of connectivity, and floor access and equipment, should those be desired. The Commission believes that the fees associated with trading on an exchange are not the result of the proposed amendments because, under the proposed amendments, a Non-Member Firm could continue to trade through another broker-dealer on an exchange as long as that Non-Member Firm is a member of every exchange on which it trades or is a member of FINRA. In other words, the proposed amendments themselves do not impose the cost of connectivity and related fees, but only the costs associated with membership on exchanges on which Non-Member Firms will trade. To the extent, therefore, that Non-Member Firms continue to trade through other broker-dealers in a manner consistent with how they currently operate, the proposed amendments impose only the costs associated with membership.

The Commission also recognizes that connectivity fees to additional exchanges can range from the very low—approximately $500 a month for a workstation at NASDAQ—to upwards of $100,000 monthly, depending on factors such as latency, distance, bandwidth, and co-location, among others. Again, however, these costs are not a result of the proposed amendments because the proposed amendments do not impose any connectivity requirements. They simply impose membership requirements to facilitate regulatory supervision.

To arrive at preliminary estimates of the cost of joining additional exchanges, the Commission aggregated any fees associated with a firm's initial application to an exchange ("initial fee") and separately aggregated the fees associated with any monthly or annual membership costs to obtain a separate annual cost ("annual fee"). Based on these aggregations, the Commission obtained a preliminary range for both the initial fee and the annual fee across exchanges. The initial fee is as low as $0 for some exchanges. Most exchanges have an initial fee that is greater than $0 and no more than $5,000.[238]

Regarding monthly or annual membership fees, most exchanges' ongoing monthly or annual membership fees generally range from $1,500 to $7,200.[239] Again, these ongoing

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238 The BATS Exchanges do not assess any initial fees. See BATS BYX Exchange Fee Schedule, available at http://www.batstrading.com/support/fee_schedule/byx/ (last visited February 18, 2015) (omitting any mention of an initial membership fee); BATS BZX Exchange Fee Schedule, available at http://www.batstrading.com/support/fee_schedule/bzx/ (last visited February 18, 2015) (same); BATS EDGA Exchange Fee Schedule, available at http://www.batstrading.com/support/fee_schedule/edga/ (last visited February 18, 2015) (same); BATS EDGX Exchange Fee Schedule, available at http://www.batstrading.com/support/fee_schedule/edgx/ (last visited February 18, 2015) (same).

Other exchanges do have initial application fees. See, e.g., ISE Fee Schedule at 19, available at http://www.ise.com/assets/documents/OptionsExchange/legal/fee/ISE_fee_schedule.pdf (last visited February 18, 2015) (assessing a one-time application fee of $3,500 for an "Electronic Access Member"); application for NYSE and NYSE MKT Equity Membership for Non-FINRA Members at 2, available at http://usequities.nyx.com/sites/usequities.nyx.com/files/nyse__mkt_equity_membership_application_for_non-finra_members.pdf (last visited February 18, 2015) (discussing the Non-Public Firm Application Fee of $2,500); NASDAQ Price List, available at http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2 (last visited February 18, 2015) (discussing the NASDAQ Application Fee of $2,000); CBOE Fee Schedule at 10, available at http://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf (last visited February 18, 2015) (typically assessing a trading permit holder organization application fee on all of its members of $5,000). If a firm is organized as a sole proprietorship, the application fee for CBOE is only $3,000. Id. See also CBOE TPH Organization Application Timeline and Needs List, available at https://www.cboe.org/publish/TPHForms/TPHOrganizationApplicationTimelineandNeeds.pdf (last visited February 18, 2015).

239 See, e.g., BATS BYX Exchange Fee Schedule, available at http://www.batstrading.com/support/fee_schedule/byx/ (last visited February 18, 2015) (noting an annual membership fee of $2,500); BATS EDGA Exchange Fee Schedule, http://www.batstrading.com/support/fee_schedule/edga/ (last visited February 18, 2015) (same); CHX Fee Schedule at 3, available at http://www.chx.com/_literature_119763/CHX_Fee_Schedule (last visited February 18, 2015) (assessing an annual membership fee of $7,200); MIAX Fee Schedule at 9, available at

exchange membership costs are generally lower than the annual costs estimated for being a member of FINRA.

d. Policies and Procedures Related to the Hedging Exemption

Non-Member Firms that choose not to join an Association but wish to continue to trade off-exchange (or on exchanges of which they are not members) must do so in a manner that conforms to the hedging exemption. To do so, the proposal would require Non-Member Firms to establish, maintain and enforce policies and procedures as discussed above. The Commission estimates that firms will incur a burden of 16 hours in initially preparing these policies and procedures.[240] Furthermore, the burden of maintaining and enforcing such policies and procedures, including a review of such policies at least annually, would be approximately 96 hours.[241] The Commission estimates an initial implementation cost of approximately $5,000 and an annual ongoing cost of approximately $18,000 for Non-Member Firms that wish to utilize the hedging exemption and perform this work internally; for firms that outsource this work, costs are

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http://www.miaxoptions.com/sites/default/files/MIAX_Options_Fee_Schedule_02012015.pdf (last visited February 18, 2015) (assessing a monthly trading permit fee for an "Electronic Exchange Member" of $1,500).

240 This figure is based on the following: (Compliance Manager at 10 hours) + (Compliance Attorney at 5 hours) + (Director of Compliance at 1 hour) = 16 burden hours per dealer. See infra note 271. As is discussed in more detail in the Paperwork Reduction Act discussion, the Commission based this estimate on the estimated burdens imposed by other rules applicable to broker-dealers, such as Regulation SHO. However, the Commission preliminarily believes that the policies and procedures under the proposed floor member hedging exemption will be substantially less burdensome than those required by the Amendments to Regulation SHO because those policies and procedures require certain technology and real-time monitoring components. In contrast, the policies and procedures under the proposed amendments to Rule 15b9-1 do not involve a real-time monitoring or technology component. See infra note 273.

241 See Section VI.D.

likely to be higher.[242] For firms that choose to join FINRA, the hedging exemption is not relevant. They will not incur these costs.

e. Indirect Costs

In addition to possibly incurring costs related to joining exchanges, Non-Member Firms that choose not to join an Association will lose the benefits of trading in the off-exchange market, unless they meet the exemption for hedging. As mentioned above, Non-Member Firms are significant participants in ATS activity. Much of this trading is attributed to 14 Non-Member Firms, and the activity level across those firms varies widely. Assuming that order volume is proportional to trade volume, the Commission estimates that the smallest of the 14 firms executed 11 shares on ATSs during the fourth quarter of 2014.[243] The largest firm executed 13.3 billion shares. The median firm in the group of 14 large Non-Member Firms is estimated to have executed 167.6 million shares. Although these share volumes are large, the Commission does not have adequate data on these firms to estimate the proportion of their trading activity and revenues that occurs on exchanges versus off-exchange. The Commission cannot judge the

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242 For firms that perform this work internally, the initial cost estimate assumes 4 hours of work performed by a Compliance Manager at an hourly rate of $283 and 12 hours performed by Compliance Attorneys at an hourly rate of $334. The annual cost estimate assumes 48 hours of work by Compliance Clerks at an hourly rate of $64, 32 hours by Compliance Attorneys, and 16 hours by Compliance Managers. Hourly salary figure is from SIFMA's Management & Professional Earnings in the Securities Industry 2013, 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.

243 The composition of the list of Non-Member Firms that are identified in ATS trading data changes across time periods. It is possible that the number of Non-Member Firms trading directly on ATSs is higher than estimated here. Additional Non-Member Firms may access ATSs through Member Firms, which would also exclude them from this analysis.

To address data limitation, the Commission assumes that ATS orders from each of the 14 Non-Member Firms observable in the data are equally likely to be executed.

likelihood of these firms choosing to cease off-exchange activity rather than joining an Association.

Finally, those firms that choose not to join an Association would be limited in their ability to route their own transactions in a manner so as to comply with the requirements of Regulation NMS.[244] Their transactions would have to be routed through a broker-dealer of an exchange of which they are a member, or routed by a broker-dealer only to those exchanges of which they are members. The routing of orders of Non-Member Firms that do not join an Association will be determined by the routing broker-dealer of the exchanges of which they are members. This loss in choice could lead to higher costs for routing and costs associated with increased latency because the exchange's routing broker-dealer may have a telecommunications infrastructure that is inferior to that of the broker-dealer that previously provided connectivity to that exchange to the Non-Member Firm.[245]

D. Alternatives

1. Elimination of the Floor Member Hedging Exemption

Although the proposed amendments would eliminate the exclusion for proprietary trading activity for broker-dealers wishing to continue availing themselves of the exemption from Association membership under Rule 15b9-1, it would maintain a limited exception for hedging of floor-based activity.[246] Currently, Non-Member Firms are able to hedge their floor-based

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[244] The exemption related to routing to comply with Regulation NMS is discussed in Section II.E.

[245] Firms in the business of providing connectivity to exchanges are likely to compete on the basis of their technology. The Commission assumes that some firms that do not join FINRA will have some orders (those governed under the Regulation NMS provisions to prevent trade-throughs) routed using technology inferior to the technology of their firm of choice.

[246] The floor member hedging exemption is discussed more fully in Section II.D.

activity through the exclusion for proprietary trading in Rule 15b9-1. The Commission does not have data to estimate the number of Non-Member Firms that use the proprietary trading exemption in this manner, or the dollar-value of trading that they hedge through the exemption.

One alternative considered by the Commission was the elimination of the hedging exemption entirely. Elimination of the floor member hedging exemption would require any firm that wished to hedge through off-exchange transactions to join an Association or become a member of each exchange on which it trades and cease off-exchange trading. This would improve the Association's ability to monitor cross-market hedging activity that was conducted off-exchange. The Commission recognizes, however, that there may be challenges for the Commission, firms, and exchanges in proving compliance with the exemption. For example, some broker-dealers may label activity as hedging activity that is not covered by the exemption. A firm could establish a limited floor-based business and then inadvertently or deliberately claim the hedging exemption covers significant trading off-exchange (and trading on exchange of which the firm is not a member) that did not reduce or otherwise mitigate the risk of its floor-based activity. Further, firms that wish to avail themselves of the hedging exemption will incur costs to establish, maintain and enforce written policies and procedures related to its use.[247] Without the hedging exemption, firms would not incur these costs, but would incur other costs. In particular, without a hedging exemption, floor brokers on some exchanges might find that hedging positions obtained through their normal activity limited to the floor of a single exchange is less cost-effective. For example, a floor broker on an options exchange is currently exempt from FINRA membership if he trades off-exchange under the exclusion for proprietary trading. After entering an options position, the floor broker can enter an offsetting equity position by

247 See Section V.C.2.d.

trading on an exchange of which he is not a member (through a member broker-dealer) or in the off-exchange market. Under the proposed amendments without the hedging exemption, the floor broker would not be able to make such a hedging transaction without joining at least one additional SRO (FINRA or another exchange where he could transact in equities). If participants have less opportunity to hedge their positions, they may be less willing to provide liquidity in their capacity as floor brokers. Therefore, the Commission is proposing a narrow hedging exemption that covers only the activity it intends to exclude.

2. Improve Off-Exchange Supervision through Action of Other SROs with or without CAT

The Commission also considered whether an alternative approach to achieving the objectives of the proposed amendments would be to address the limitations in regulatory oversight of off-exchange activity of Non-Member Firms through exchanges that act as their DEAs or all exchanges of which they are members. The Commission preliminarily believes either of these alternatives would frustrate the regulatory structure established by Congress and would be inefficient. As discussed in detail above, exchanges traditionally have not assumed the role of regulating the totality of the trading of their member-broker-dealers, and exchanges are currently not well-positioned to assume that role, in light of the statutory framework and, among other things, their limited access to data and the lack of a proper rule set to regulate off-exchange trading.[248] Exchanges generally do not have as detailed a set of member conduct rules and do not have non-exchange-specific trading rules, thus allowing such broker-dealers and their personnel to conduct business under a less specific regulatory regime than FINRA members.[249]

[248] See supra notes 82-95 and accompanying text.

[249] See supra note 75 and accompanying text.

As discussed above, in this context and consistent with the statutory framework, the Commission preliminarily believes that an Association is better suited to regulate off-exchange trading.[250]

With respect to having Non-Member Firms' DEAs assume the regulatory oversight responsibilities, the Commission could require the Non-Member Firm's DEA to oversee the off-exchange activity of the firm. This alternative may offer some benefit in terms of providing efficient supervision. Non-Member Firms' DEAs may have specialized knowledge of Non-Member Firms' businesses and operations that would facilitate efficient supervision of their off-exchange activity.[251] Similarly, requiring all SROs to supervise the off-exchange activity of their members might bring certain benefits. First, there might be innovation in surveillance methodology because exchange SROs could need new surveillance systems and procedures tailored to current market structure and practice. Second, this could foster competition among SROs to provide regulatory services, which could lower costs to members.

However, with respect to DEAs, the supervision of trading activity is outside the scope of typical DEA oversight responsibilities[252] and the Commission believes most exchanges contract with FINRA to perform these examinations. Consequently, if exchange SROs were expected to supervise the off-exchange activities of firms assigned to them for DEA examinations, the exchanges would need to acquire the resources to provide this supervision.

Requiring all SROs to supervise their members' off-exchange trading would also entail substantial costs and create inefficiencies. As discussed previously, exchange SROs have not

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250 See supra notes 82-95 and accompanying text.

251 See Allston Letter, supra note 106.

252 See supra note 164.

generally supervised their members' activity outside of the markets they operate.[253] As discussed above, FINRA has invested in the technological infrastructure, cooperative agreements with other SROs, and specialized regulatory personnel to provide surveillance and supervision of activity in off-exchange markets.[254] If each of the exchanges were required to supervise the off-exchange activities of some or all of their members, the exchanges each would need to invest in similar regulatory infrastructure. This investment would be costly to the exchanges; presumably these costs would be passed on to exchange members and ultimately the investing public through higher trading costs. In addition, assigning regulatory responsibility to an exchange SRO, which may in turn contract with FINRA to provide those services, would be costly and inefficient. Further, notwithstanding the potential benefits to innovation, the duplication in regulatory oversight would also be duplication in regulatory resources as multiple SROs would surveil the off-exchange trading of some firms. This approach also could be inconsistent with the allocation of regulatory responsibilities contemplated by Section 17(d) of the Exchange Act.[255]

Furthermore, FINRA has adopted rules that govern off-exchange trading, recognizing the complexity and opacity of the off-exchange marketplace. If exchanges were required to supervise the off-exchange activity of their members, exchanges would need to adopt rules that were tailored to the institutional detail of the off-exchange market. This could result in off-exchange trading rules that varied depending on the exchange membership status of individual participants, resulting in inconsistent rules governing the same off-exchange trading activity.

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[253] See supra note 68-69 and accompanying text.

[254] Id.

[255] 15 U.S.C. 78q(d).

Finally, the Commission has also considered whether the possibility that the exchanges could obtain additional data through the CAT, or through a FINRA rule change if implemented,[256] affects the Commission's preliminary belief that an Association is better suited to regulate off-exchange trading. Although there may thereby be additional data, these changes would not address the underlying statutory scheme and resource issues that make FINRA well-positioned to regulate off-exchange trading.

3. Exchange Membership Alternative

The proposed amendments would, in accordance with Section 15(b)(8), preclude any firm that is not a member of an Association from trading on exchanges of which it is not a member.[257] Further, under the proposed amendments, if a firm becomes a member of an Association, it would not have to become a member of each exchange upon which it trades.[258] The Commission has also considered requiring broker-dealers to become a member of every exchange on which they trade and to become a member of an Association in order to trade off-exchange ("Exchange Membership Alternative"). In other words, under this alternative, becoming a member of an Association would not alone allow firms to trade on exchanges of which they are not members (as would be permitted under the proposed amendments).

In considering the Exchange Membership Alternative, the Commission weighed whether the same issue of off-exchange activity not being subject to effective regulatory oversight that exists when a Non-Member Firm trades off-exchange is present when a Member or Non-

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256 See supra note 84.

257 The proposed amendments provide limited exemptions for hedging of floor-based activity and order routing to satisfy certain provisions of Regulation NMS.

258 In order to trade on exchanges of which it is not a member, the firm would have to trade with or through another broker-dealer that is a member of that exchange.

Member Firm trades on an exchange of which it is not a member (through a member of that exchange). The Commission preliminarily believes that the proposed amendments adequately address the issue of establishing effective oversight of off-exchange activity and that the more onerous Exchange Membership Alternative would not provide any additional regulatory benefit beyond the proposed amendments for several reasons. First, while exchanges lack the data, surveillance technology and specialized regulatory personnel to surveil their members' trading off-exchange, FINRA has these resources to surveil the activity of Member Firms both on exchanges and off-exchange. Accordingly, requiring Member Firms to also become members of each exchange on which they effect transactions, including indirectly, would be unnecessarily duplicative because FINRA can already surveil the activity of a Member Firm trading on an exchange of which it is not a member. In addition, while exchanges do not have a specialized rule set to govern their members' activity in the off-exchange market, FINRA's rules are consistent with requiring Member Firms to adhere to the trading rules of exchanges on which they transact. If a Member Firm were to violate an exchange rule on an exchange of which it is not a member, FINRA would have the jurisdiction needed to address the resulting violation. Therefore, requiring that the Member Firm also become a member of that exchange would not prevent FINRA from exercising jurisdiction over the matter.

The Commission notes that the Exchange Membership Alternative might require firms to become members of more SROs than required under the proposed amendments, which would impose additional costs. In particular, some Non-Member Firms that would become Member Firms under the Proposal would also need to become members of additional exchanges or cease trading on these exchanges. In addition, some current Member Firms would also need to become members of additional exchanges

4. Retaining the De Minimis Allowance

The Commission considered retaining the $1,000 de minimis allowance for trading other than on an exchange of which the Non-Member Firm is a member. The Commission also considered retaining the $1,000 de minimis allowance, but removing the exception for proprietary trading conducted with or through another registered broker-dealer. As discussed above,[259] the Commission believes that the magnitude of the de minimis allowance is no longer economically meaningful. Furthermore, the Commission believes that the commission sharing arrangements discussed previously[260] are rarely if ever used. However, the Commission believes that floor members on some exchanges may rely upon the exception for proprietary trading conducted with or through another registered broker-dealer to hedge risks associated with floor-based activities. Consequently, the proposed amendments include a hedging exemption for floor-based activity but no longer include a de minimis dollar amount associated with transactions that do not fall under the limited hedging exemption.

5. The Commission Assumes Regulatory Oversight Role for Non-Member Firms

The Commission considered assuming the role of providing direct primary regulatory oversight for Non-Member Firms. We do not believe, however, that this is a reasonably available alternative because of the judgments reflected in Congress's determinations over time about where to locate that oversight function and our own understanding of the entity best suited to that role. As discussed in detail above, the Exchange Act, as originally adopted in 1934, left regulation of the off-exchange market to the Commission.[261] In 1938, Congress provided for the

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259 See Section II.C.

260 Id.

261 See supra note 27 and accompanying text

creation of Associations,[262] and from 1965 until 1983, broker-dealers engaged in off-exchange trading could become members of NASD or opt to be regulated directly by the Commission under the SECO program.[263] In 1983, the Commission recommended that Congress eliminate the SECO program because, among other things, only a limited number of broker-dealers chose to be regulated under the SECO program[264] and maintaining the program disproportionately affected the Commission's resources. Congress then amended the Act to eliminate the SECO program,[265] which had the effect of making the regulation of off-exchange trading under the Exchange Act the responsibility of an Association.[266] Consistent with this, in this rulemaking the Commission is proposing to modify the Rule 15b9-1 exemption so that; with limited exceptions, the off-exchange transactions of broker-dealers will be subject to the oversight and rules of an Association, the SRO primarily responsible for regulating trading in the off-exchange market. As discussed throughout, we believe an Association is best positioned to regulate that trading. Based on the foregoing, including the Congress's determination to eliminate the SECO

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262 See supra notes 31-33 and accompanying text.

263 As previously noted, broker-dealers that traded exclusively on the floor of an exchange were exempt from broker-dealer registration with the Commission until the 1975 Amendments, which extended the Commission's SECO rulemaking authority to any exchange member trading on an exchange other than an exchange of which it was a member. See supra note 41 and accompanying text. Broker-dealers registering with the Commission as a result of the 1975 Amendments became subject to the SECO rules in 1976, but could remain exempt from such rules pursuant to Rule 15b8-1. See supra note 43 and accompanying text.

264 Because many broker-dealers chose to become members of NASD rather than participating in the SECO Program, only 12 percent of all active Commission-registered broker-dealers effecting transactions off-exchange were SECO broker-dealers by May 1982. House Comm. on Energy and Commerce, "Authorization of Appropriations for the Securities and Exchange Commission," H.R. Rep. No. 98-106, at 597 (1983).

265 Pub. L. No. 98-38, 97 Stat. 205 (1983).

266 See supra note 31 and accompanying text.

Program,[267] the Commission does not view assumption of direct responsibility for off-exchange broker-dealer oversight by the Commission as a reasonably available alternative.

E. Request for Comment on Economic Analysis

The Commission has identified above economic effects associated with the proposal and requests comment on all aspects of its preliminary economic analysis. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such economic effects. In particular, the Commission seeks comment on the following:

47. Do commenters agree with the Commission's analysis of the potential economic effects of the proposed amendments? Why or why not?
48. Do commenters agree with the Commission's assessment of the baseline for the economic effects?
49. Is the supervision and surveillance of Non-Member Firms with substantial cross-market or off-exchange trading sufficient under current rules? Why or why not?
50. How would further changes to the scope of existing Regulatory Services Agreements between SROs affect regulators' ability to effectively surveil cross-market and off-exchange trading?
51. Do commenters believe that there are additional categories of benefits or costs that could be quantified or otherwise monetized? If so, please identify these categories and, if possible, provide specific estimates or data.

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267 The report accompanying the amendments made to the Act in 1983 cited a preference for self-regulation over direct regulation by the Commission. See supra note 46 and accompanying text.

52. Are there any additional benefits that may arise from the proposed amendments? Or are there benefits described above that would not likely result from the proposed amendments? If so, please explain these benefits or lack of benefits in detail.

53. Are there any additional costs that may arise from the proposed amendments? Are there methods by which the Commission could reduce the costs imposed by the proposed amendments enabling effective regulatory oversight of Non-Member Firms? Please explain. Are there any other potential consequences of the proposed amendments? Or are there costs described above that would not likely result from the proposed amendments? If so, please explain these costs or lack of costs in detail.

54. Does the release appropriately describe the potential effects of the proposed amendments on the promotion of efficiency, competition, and capital formation? Why or why not? If possible, commenters should provide analysis and empirical data to support their views on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments.

55. Are there alternative mechanisms for achieving the Commission's goal of improving regulatory oversight while promoting competition and capital formation?

56. To the extent that there are reasonable alternatives to the proposed amendments, what are the potential costs and benefits of those reasonable alternatives relative to the proposed amendments? What are the potential effects on the promotion of efficiency, competition, and capital formation of those reasonable alternatives?

57. Would the cost of FINRA or exchange membership cause some Non-Member Firms to alter their activities in any way? If so, how would Non-Member Firms alter their business? How would these changes affect competition and market efficiency? How would these changes affect market quality?

58. Would the proposed amendments cause Non-Member Firms to exit the marketplace? If so, how many Non-Member Firms would elect to restrict their operations rather that become members of FINRA or one or more exchanges? How would these changes affect competition and market efficiency? How would these changes affect market quality? What would be the effect on liquidity of Non-Members Firms exiting the marketplace?

59. Are there costs related to FINRA membership for Non-Member Firms that the Commission has not considered? What are these costs? Please be specific.

60. For Non-Member Firms, how much will the cost of FINRA membership vary? Will the cost of FINRA membership cause some firms to change the scope of their business? If so, in what manner?

61. Do commenters agree with the assumptions underlying the Commission's estimates of the range for membership costs for exchanges?

62. Do commenters agree with the Commission's preliminarily belief that the TAF collected by FINRA would not be expected to materially change if the proposed amendments were adopted? What would the effect of the proposed amendments be on the TAF assessed to current FINRA members? What would the effect of the proposed amendments be on the TAF assessed to Non-Member Firms that choose to become FINRA members?

63. Has the Commission properly accounted for the compliance cost burden required to achieve the access to exchanges necessary to comply with the proposed amendments? Would any costs beyond basic membership be the direct result of the proposed amendments?

64. If Non-Member Firms were to elect to join additional exchanges rather than becoming members of FINRA, how many exchanges would they expect to join?

65. Is the Commission correct in assuming that the cost of membership is the relevant compliance cost burden and that connectivity or trading related costs are optional for most to all of the exchanges? Are there any exchanges on which connectivity or trading rights costs are mandatory even if a broker-dealer trades through another member broker-dealer that is paying the connectivity or trading rights costs?

66. Are the Commission's assumptions on the manner in which Section 3 fees are allocated in off-exchange transactions with Non-Member Firms correct? Are there mechanisms in place already that result in these fees being passed on to Non-Member Firms that transact in ATSs, or elsewhere in the off-exchange market?

67. Would a Non-Member Firm elect to become a member of one or more exchanges rather than become a member of FINRA? If so, please discuss in detail why a Non-Member Firm would make such an election. Which exchanges, in particular, are Non-Member Firms likely to join, if they join additional exchanges, as a result of the proposed amendments? How would these changes affect competition and market efficiency? How would these changes affect market quality?

68. Has the Commission articulated all reasonable alternatives for the proposed rule? If not, please provide additional alternatives and how their costs and benefits would compare to the proposed rule. For the alternatives described above, has the Commission accurately described the costs and benefits? If not, please provide more accurate costs and benefits, including any data or statistics that support those costs and benefits.

69. One alternative discussed is to effect improved off-exchange supervision through the action of exchanges. Is this alternative practical? What resources would exchanges have to acquire to provide efficient and effective supervision of their members' off-exchange trading activity?

70. What effects could the proposed amendments have on FINRA's oversight of the off-exchange market? How could FINRA's revenues and cost of regulation be affected? What changes should FINRA consider implementing should the Commission approve the proposed amendments to Rule 15b9-1? Please be specific.

71. Would the proposed amendments create a barrier to entry for new prospective Associations? Would there be benefits to competition among Associations?

VI. Paperwork Reduction Act

Certain provisions of these proposed amendments to Rule 15b9-1 contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[268] As discussed in Part II.D, the proposed amendments to Rule 15b9-1 would require dealers relying on the floor member hedging exemption under Rule 15b9-1 to establish,

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[268] 44 U.S.C. 3501 et seq.

maintain, and enforce certain written policies and procedures. Compliance with these collections of information requirements would be mandatory for firms relying on the rule. The Commission is submitting these collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title of new collection of information is "Rule 15b9-1 Floor Member Hedging Exemption." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number.

A. Summary of Collection of Information

The proposed amendments to Rule 15b9-1 would include a collection of information within the meaning of the PRA for broker-dealers relying on the floor member hedging exemption under the proposed Rule. The floor member hedging exemption under the proposed amendments to Rule 15b9-1 would permit a qualifying dealer[269] that conducts business on the floor of a national securities exchange to effect transactions for its own account with or through another registered broker or dealer that are solely for the purpose of hedging the risks of its floor-based activities, by reducing or otherwise mitigating the risks thereof. Broker-dealers relying on the floor member hedging exemption must establish, maintain, and enforce written policies and procedures reasonably designed to ensure and demonstrate that such hedging transactions reduce or otherwise mitigate the risks of the financial exposure the dealer incurs as a result of its floor-based activity. In addition, such dealers would be required to preserve a copy of their policies

269 A broker-dealer would have to meet the threshold requirements of proposed Rule 15b9-1. Specifically, such broker-dealer would have to: (1) be a member of a national securities exchange; (2) carry no customer accounts; and (3) effect transactions in securities solely on a national securities exchange of which it is a member, except for transactions complying with the floor member hedging exemption or the Regulation NMS routing exemption.

and procedures in a manner consistent with Rule 17a-4 until three years after the date the policies and procedures are replaced with updated policies and procedures.

B. Proposed Use of Information

The policies and procedures required under Rule 15b9-1 would be used by the Commission and SROs to understand how dealers relying on the floor member hedging exemption evaluate whether their off-exchange transactions are conducted solely for the purpose of hedging risks incurred from the dealer's floor-based business and that such dealers are complying with the requirements of Rule 15b9-1. These policies and procedures will be used generally by the Commission as part of its ongoing efforts to monitor and enforce compliance with the federal securities laws, including Section 15(b)(8) and Rule 15b9-1 thereunder. In addition, SROs may use the information to monitor and enforce compliance by their members with applicable SRO rules and the federal securities laws.

C. Respondents

The Commission estimates that up to 100 dealers may rely on the floor member hedging exemption contained in Rule 15b9-1. The Commission notes that, based on publicly available information reviewed in the first quarter of 2015, there are currently 125 broker-dealers registered with the Commission that are not members of an Association. Of those 125 broker-dealers, 77 broker-dealers currently disclose being an exchange member engaged in floor activities on Form BD.[270] The Commission believes that while not all of these dealers will

[270] Of the approximately 4,209 total registered broker-dealers as of March 2015, 182 broker-dealers in total disclose being an exchange member engaged in floor activities on Form BD (<u>note</u>: the 182 broker-dealers includes the 77 broker-dealers engaged in floor activities that are not members of an Association). The Commission preliminarily believes that broker-dealers engaged in floor activities that are currently members of an Association are unlikely to withdraw from Association membership and begin relying on the floor member hedging exemption because such broker-dealers have already elected to

choose to avail themselves of the floor member hedging exemption contained in Rule 15b9-1 because the exemption restricts off-exchange transactions solely to those that hedge risks incurred as a result of their floor-based activity, some firms not included in this number may decide to avail themselves of the floor member hedging exemption. The Commission preliminarily believes, however, that more of these firms are likely to want the ability to engage in off-exchange transactions other than those that hedge the risk of their floor-based activity, and may, accordingly, choose to join an Association as a result of the proposed amendments to Rule 15b9-1.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission estimates that the one-time, initial burden for a dealer to establish written policies and procedures as required under Rule 15b9-1 would be approximately 16 hours.[271] This figure is based on the estimated number of hours to develop a set of written policies and procedures, including review and approval by appropriate legal personnel. The Commission notes that the policies and procedures required by the proposed Rule are limited to hedging transactions that reduce or otherwise mitigate the risks of the financial exposure the dealer incurs as a result of its floor-based activity. In addition, the Commission estimates the annual burden of maintaining and enforcing such policies and procedures, including a review of such policies at least annually, would be approximately 96 hours for each dealer.[272] This figure

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join an Association and reliance on the floor member hedging exemption would limit their permissible off-exchange activity solely to hedging risks incurred as a result of their floor-based business.

271 This figure is based on the following: (Compliance Manager at 10 hours) + (Compliance Attorney at 5 hours) + (Director of Compliance at 1 hour) = 16 burden hours per dealer.

272 This figure is based on the following: (Compliance Manager at 60 hours) + (Compliance Attorney at 24 hours) + (Director of Compliance at 12 hours) = 96 burden hours per dealer.

includes an estimate of hours related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining relevant systems and internal controls, performing necessary testing and monitoring of off-exchange hedging transactions as they relate to the broker-dealer's floor-based activities and maintaining copies of the policies and procedures for the period of time required by the proposed rule.

The Commission estimates that the initial burden associated with Rule 15b9-1 would be 112 hours per dealer, which corresponds to an initial aggregate burden of 11,200 hours.[273] The Commission estimates that the ongoing annualized burden associated with Rule 15b9-1 would be

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[273] This figure is based on the following: ((16 burden hours per dealer) + (96 burden hours per dealer)) x (100 dealers) = 11,200 burden hours during the first year. In estimating these burden hours, the Commission examined the estimated burdens imposed by other rules applicable to broker-dealers. For example, amendments to Regulation SHO adopted in 2010 required broker-dealers to establish, maintain, and enforce written policies and procedures relating to Rule 201(c) and Rule 201(d)(6) to ensure short-sale orders are, among other things, properly marked, are submitted at the proper price, or are properly off-set (in the case of Rule 201(d)(6). See Exchange Act Release No. 61595 (February 26, 2010) 75 FR 11232, 11286 (March 10, 2010) ("Amendments to Regulation SHO"). The policies and procedures relating to Rule 201(c) and Rule 201(d)(6) required under the Amendments to Regulation SHO estimated an average initial one-time burden of 160 burden hours per broker-dealer and ongoing compliance cost of 60 hours annually to ensure the policies and procedures are up-to-date and remain in compliance as well as an additional 336 hours annual to monitor, surveil, and enforce trading in compliance with Rule 201. Id. The Commission preliminarily believes that the policies and procedures under the proposed floor member hedging exemption will be substantially less burdensome than those required by the Amendments to Regulation SHO because those policies and procedures require certain technology and real-time monitoring components. For example, under the Amendments to Regulation SHO described above, broker-dealers' policies and procedures must be reasonably designed to enable a broker-dealer to monitor, on a real-time basis, the national best bid so as to determine the price at which a broker-dealer may submit a short sale order to a trading center in compliance with Rule 201(c), and off-setting transactions under the riskless principal provision under Rule 201(d)(6) must be allocated to a riskless principal or customer account within 60 seconds of execution. Id. at 11284. In contrast, the policies and procedures under the proposed amendments to Rule 15b9-1 do not involve a real-time monitoring or technology component.

96 hours per dealer, which corresponds to an ongoing annualized aggregate burden of 9,600 hours.[274]

E. Collection of Information is Mandatory

All of the collection of information discussed above would be mandatory.

F. Confidentiality of Responses to Collection of Information

To the extent that the Commission receives confidential information pursuant to the collection of information, such information will be kept confidential, subject to the provisions of applicable law.[275]

G. Retention Period for Recordkeeping Requirements

Dealers seeking to take advantage of the proposed hedging exemption would be required to preserve a copy of their policies and procedures in a manner consistent with Rule 17a-4[276]

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274 This figure is based on the following: (96 burden hours per dealer) x (100 dealers) = 9,600 ongoing, annualized aggregate burden hours. In estimating these burden hours, the Commission also examined the estimated initial and ongoing burden hours imposed on registered security-based swap dealers under Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information. See Exchange Act Release No. 74244 (February 11, 2015) 80 FR 14564, 14683 (March 19, 2015) ("Regulation SBSR"). Regulation SBSR requires registered security-based swap dealers to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations. Id. The estimated initial and ongoing compliance burden on registered security-based swap dealers under Regulation SBSR were 216 burden hours and 120 burden hours respectively. Id. The Commission preliminarily believes that the initial and ongoing burden hours under the proposed floor member hedging exemption will be substantially less than for registered security-based swap dealers under Regulation SBSR, because the policies and procedures under Regulation SBSR require programing certain systems for transaction reporting and performing testing of such systems. Id. In contrast, the proposed floor member hedging exemption would not necessarily require programming or testing of certain systems and is a much more discrete set of policies and procedures as compared to the more comprehensive policies and procedures required by Regulation SBSR, which cover, among other things, the full scope of reporting security-based swap transactions by registered security-based swap dealers and others.

275 See, e.g., 5 U.S.C. 552 et seq.; 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

until three years after the date the policies and procedures are replaced with updated policies and procedures.

H. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment to:

72. Evaluate whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information shall have practical utility;
73. Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
74. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
75. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Brent J. Fields, Secretary, Securities and

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[276] 17 CFR 240.17a-4. Registered brokers and dealers are already subject to existing recordkeeping and retention requirements under Rule 17a-4. However, proposed Rule 15b9-1 contains a requirement that a dealer relying on the floor member hedging exemption preserve a copy of its policies and procedures in a manner consistent with Rule 17a-4 until three years after the date the policies and procedures are replaced with updated policies and procedures. The burdens associated with this recordkeeping obligation have been accounted for in the burden estimates discussed above for Rule 15b9-1.

Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File Number [ ]. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number [ ] and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE., Washington, DC 20549-2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Consideration of Impact on Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[277] the Commission requests comment on the potential effect of the proposed amendments to Rule 15b9-1 on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VIII. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980[278] ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the impact of the proposed rule amendments on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[279] For

277 5 U.S.C. 603.

278 5 U.S.C. 603(a).

279 5 U.S.C. 605(b).

purposes of Commission rulemaking in connection with the RFA,[280] a small entity includes a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[281] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[282] With regard to exchanges, a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 under Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[283]

The Commission examined recent FOCUS data for the 125 Non-Member Firms and concluded that at most 11 of the affected entities have net capital of $500,000 or less, and some of those might not be small entities because they might be affiliates of larger organizations.

Although the Commission lacks the data to quantify these firms' off-exchange activity, it does have FOCUS information on the firms' disclosed activities. Based on this disclosure, the Commission believes that many of these firms may be able to trade off-exchange under the

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280 Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act, 17 CFR 240.0-10. See Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS-305).

281 17 CFR 240.17a-5(d).

282 See 17 CFR 240.0-10(c).

283 See 17 CFR 240.0-10(e).

proposed floor member hedging exemption for a number of reasons. First, a number of firms disclose floor-based activity that may allow them to trade off-exchange under the floor member hedging exemption: five report writing options and six disclose floor activity.[284] Second, one discloses only trading in government debt securities, so is unlikely to be affected by the proposed amendments. Finally, only two of the eleven firms disclose proprietary trading activity. These firms would be affected only by the elimination of the de minimis allowance, unless the firms can rely on the floor member hedging exemption for such activity.[285] Therefore, the Commission certifies that the proposed amendments to Rule 15b9-1 would not, if adopted, have a significant economic impact on a substantial number of small entities.

76. We encourage written comments regarding this certification. We solicit comment as to whether the proposed amendments could have impacts on small entities that have not been considered. We request that commenters describe the nature of any impacts on small entities and provide empirical data to support the extent of such effect.

Such comments will be placed in the same public file as comments on the proposed amendments to Rule 15b9-1. Persons wishing to submit written comments should refer to the instructions for submitting comments in the front of this release.

IX. Statutory Authority – Text of the Proposed Amendments

Pursuant to the Exchange Act, 15 U.S.C. 78a et seq., and particularly Sections 3, 15(b)(9), 15A, 17, 19, 23, and 36 thereof, the Commission is proposing amendments to Title 17, Chapter II of the Code of Federal Regulations as follows.

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284 Firms often disclose multiple activities, so the number of disclosed activities in this discussion exceeds the number of firms.

285 Hedging activity is proprietary trading activity.

List of Subjects in 17 CFR Part 240

Brokers, Dealers, Registration, Securities.

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

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

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

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78o-10, 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, 7201, et seq.; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

2. Section 240.15b9-1 is revised to read as follows:

§240.15b9-1 Exemption for certain exchange members.

Any broker or dealer required by section 15(b)(8) of the Act (15 U.S.C. 78o(b)(8)) to become a member of a registered national securities association shall be exempt from such requirement if it:

(a) Is a member of a national securities exchange;

(b) Carries no customer accounts; and

(c) Effects transactions in securities solely on a national securities exchange of which it is a member, except that with respect to this paragraph (c):

(1) A dealer that conducts business on the floor of a national securities exchange may effect transactions off the exchange, for the dealer's own account with or through another registered broker or dealer, that are solely for the purpose of hedging the risks of its floor-based activities, by reducing or otherwise mitigating the risks thereof. A dealer seeking to rely on this exception shall establish, maintain and enforce written policies and procedures reasonably designed to ensure and demonstrate that such hedging transactions reduce or otherwise mitigate the risks of the financial exposure the dealer incurs as a result of its floor-based activity. Such dealer shall preserve a copy of its policies and procedures in a manner consistent with 17 CFR 240.17a-4 until three years after the date the policies and procedures are replaced with updated policies and procedures; and

(2) A broker or dealer may effect transactions off the exchange resulting from orders that are routed by a national securities exchange of which it is a member, to prevent trade-throughs on that national securities exchange consistent with 17 CFR 242.611.

* * * * *

By the Commission.

Brent J. Fields
Secretary

Dated: March 25, 2015

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 230, 232, 239, 240, 249 and 260

[Release Nos. 33-9741; 34-74578; 39-2501; File No. S7-11-13]

RIN 3235-AL39

Amendments to Regulation A

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: We are adopting amendments to Regulation A and other rules and forms to implement Section 401 of the Jumpstart Our Business Startups Act. Section 401 of the JOBS Act added Section 3(b)(2) to the Securities Act of 1933, which directs the Commission to adopt rules exempting from the registration requirements of the Securities Act offerings of up to $50 million of securities annually. The final rules include issuer eligibility requirements, content and filing requirements for offering statements, and ongoing reporting requirements for issuers in Regulation A offerings.

DATES: The final rules and form amendments are effective on [insert day 60 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Zachary O. Fallon, Special Counsel; Office of Small Business Policy, Division of Corporation Finance, at (202) 551-3460; or Shehzad K. Niazi, Special Counsel; Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are amending Rules 251 through 263[1] of

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1 17 CFR 230.251 through 230.263.

Regulation A under the Securities Act of 1933 (the "Securities Act").[2]

We are revising Form 1-A,[3] rescinding Form 2-A,[4] and adopting four new forms, Form 1-K (annual report), Form 1-SA (semiannual report), Form 1-U (current report), and Form 1-Z (exit report).

Further, we are revising Rule 4a-1[5] under the Trust Indenture Act of 1939 (the "Trust Indenture Act")[6] to increase the dollar ceiling of the exemption from the requirement to issue securities pursuant to an indenture. We are also amending Rule 12g5-1[7] of the Securities Exchange Act of 1934 (the "Exchange Act")[8] to permit issuers to rely on a conditional exemption from mandatory registration of a class of securities under Section 12(g) of the Exchange Act, Rule 15c2-11[9] of the Exchange Act to permit an issuer's ongoing reports filed under Regulation A to satisfy a broker-dealer's obligations to review and maintain certain information about an issuer's quoted securities, and Rule 30-1[10] of the Commission's organizational rules and provisions for delegated authority to permit the Division of Corporation Finance to issue notices of qualification and deny Form 1-Z filings. In addition, we are adopting a technical amendment to Exchange Act Rule 15c2-11 to update the outdated reference to "Schedule H of the By-Laws of the National Association of Securities Dealers, Inc.," which is now

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

3 17 CFR 239.90.

4 17 CFR 239.91.

5 17 CFR 260.4a-1.

6 15 U.S.C. 77aaa *et seq.*

7 17 CFR 240.12g5-1.

8 15 U.S.C. 78a *et seq.*

9 17 CFR 240.15c2-11.

10 17 CFR 200.30-1.

known as the "Financial Industry Regulatory Authority, Inc." and to reflect the correct rule reference.

As a result of the revisions to Regulation A, we are adopting conforming and technical amendments to Securities Act Rules 157(a),[11] 505(b)(2)(iii),[12] and Form 8-A. Additionally, we are revising Item 101(a)[13] of Regulation S-T[14] to reflect the mandatory electronic filing of all issuer initial filing and ongoing reporting requirements under Regulation A. We are also revising Item 101(c)(6)[15] of Regulation S-T to remove the reference to paper filings in a Regulation A offering, and removing and reserving Item 101(b)(8)[16] of Regulation S-T dealing with the optional electronic filing of Form F-X by Canadian issuers.

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11 17 CFR 230.157(a).

12 17 CFR 230.505(b)(2)(iii).

13 17 CFR 232.101(a).

14 17 CFR 232.10 *et seq.*

15 17 CFR 232.101(c)(6).

16 17 CFR 232.101(b)(8).

Table of Contents

I. INTRODUCTION

On December 18, 2013, we proposed rule and form amendments[17] to implement Section 401 of the Jumpstart Our Business Startups Act (the "JOBS Act").[18] Section 401 of the JOBS Act amended Section 3(b) of the Securities Act by designating existing Section 3(b) as Section 3(b)(1), and creating new Sections 3(b)(2)-(5). Section 3(b)(2) directs the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to $50 million of securities within a 12-month period. Sections 3(b)(2)-(5) specify mandatory terms and conditions for such exempt offerings and also authorize the Commission to adopt other terms, conditions, or requirements as necessary in the public interest and for the protection of investors.[19] In addition, Section 3(b)(5) directs the Commission to review the $50 million offering limit specified in Section 3(b)(2) not later than two years after the enactment of the JOBS Act and every two years thereafter, and authorizes the Commission to increase the annual offering limit if it determines that it would be appropriate to do so. Accordingly, we are revising Regulation A under the Securities Act to require issuers conducting offerings in reliance on Section 3(b)(2) to comply with terms and conditions established by the Commission's rules, and, where applicable, to make ongoing disclosure.

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17 *See* Rel. No. 33-9497 [79 FR 3925] (Dec. 18, 2013) (the "Proposing Release"), *available at*: http://www.sec.gov/rules/proposed/2013/33-9497.pdf.

18 Pub. L. No. 112-106, 126 Stat. 306.

19 We are adopting a number of terms and conditions for Regulation A offerings pursuant to our discretionary authority under Sections 3(b)(2)-(5). Where we have done so, as discussed in detail in Section II. below, it is because we find such terms and conditions to be necessary in the public interest and for the protection of investors.

II. FINAL RULES AND AMENDMENTS TO REGULATION A

A. Overview

We are adopting final rules to implement the JOBS Act mandate by expanding Regulation A into two tiers: Tier 1, for securities offerings of up to $20 million; and Tier 2, for offerings of up to $50 million.[20] The final rules for offerings under Tier 1 and Tier 2 build on current Regulation A and preserve, with some modifications, existing provisions regarding issuer eligibility, offering circular contents, testing the waters, and "bad actor" disqualification. As proposed, and with the modifications described below, the final rules modernize the Regulation A filing process for all offerings, align practice in certain areas with prevailing practice for registered offerings, create additional flexibility for issuers in the offering process, and establish an ongoing reporting regime for Regulation A issuers. Under the final rules, Tier 2 issuers are required to include audited financial statements in their offering documents and to file annual, semiannual, and current reports with the Commission. With the exception of securities that will be listed on a national securities exchange upon qualification, purchasers in Tier 2 offerings must either be accredited investors, as that term is defined in Rule 501(a) of Regulation D, or be subject to certain limitations on their investment. The differences between Tier 1 and Tier 2 offerings are described more fully below.

In developing the final rules, we considered the statutory language of JOBS Act Section 401, the JOBS Act legislative history, recent recommendations of the Commission's Government-Business Forum on Small Business Capital Formation,[21] the

20 An issuer of $20 million or less of securities could elect to proceed under either Tier 1 or Tier 2.

21 Recommendations of the Commission's Government-Business Forum on Small Business Capital Formation are *available at*: http://www.sec.gov/info/smallbus/sbforum.shtml.

Advisory Committee on Small and Emerging Companies,[22] the Equity Capital Formation Task Force,[23] comment letters received on Title IV of the JOBS Act before the Commission's proposed rules were issued in December of 2013,[24] and comment letters received to date on the Commission's proposed rules to implement Section 401 of the JOBS Act.[25]

The key provisions of the final rules and amendments to Regulation A follow:

Scope of the exemption – the final rules:

- Establish two tiers of offerings:
  - Tier 1: annual offering limit of $20 million, including no more than $6 million on behalf of selling securityholders that are affiliates of the issuer.
  - Tier 2: annual offering limit of $50 million, including no more than $15 million on behalf of selling securityholders that are affiliates of the issuer.
- Limit sales by selling securityholders in an issuer's initial Regulation A offering and any subsequently qualified Regulation A offering within the first 12-month period following the date of qualification of the initial Regulation A offering to no more than 30% of the aggregate offering price.

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22 Recommendations of the Advisory Committee on Small and Emerging Companies are *available at*: http://www.sec.gov/info/smallbus/acsec.shtml.

23 Equity Capital Task Force, *From the On-Ramp to the Freeway: Refueling Job Creation and Growth by Reconnecting Investors with Small-Cap Companies*, presentation to the U.S. Dep't. of Treasury (November 11, 2013), *available at*: http://www.equitycapitalformationtaskforce.com/.

24 To facilitate public input on JOBS Act rulemaking before the issuance of rule proposals, the Commission invited members of the public to make their views known on various JOBS Act initiatives in advance of any rulemaking by submitting comment letters to the Commission's website at http://www.sec.gov/spotlight/jobsactcomments.shtml. Comment letters received to date on Title IV of the JOBS Act are *available at*: http://www.sec.gov/comments/jobs-title-iv/jobs-title-iv.shtml.

25 The comment letters received to date in response to the Proposing Release are *available at*: http://www.sec.gov/comments/s7-11-13/s71113.shtml.

- Preserve the existing issuer eligibility requirements of Regulation A, and also exclude issuers that are, or have been, subject to any order of the Commission pursuant to Section 12(j) of the Exchange Act entered within five years before the filing of the offering statement and issuers that are required to, but that have not, filed with the Commission the ongoing reports required by the final rules during the two years immediately preceding the filing of an offering statement.
- Limit the amount of securities that an investor who is not an accredited investor under Rule 501(a) of Regulation D can purchase in a Tier 2 offering to no more than: (a) 10% of the greater of annual income or net worth (for natural persons); or (b) 10% of the greater of annual revenue or net assets at fiscal year end (for non-natural persons). This limit will not apply to purchases of securities that will be listed on a national securities exchange upon qualification.
- Exclude asset-backed securities, as defined in Regulation AB, from the list of eligible securities.
- Update the safe harbor from integration and provide guidance on the potential integration of offerings conducted concurrently with, or close in time after, a Regulation A offering.

Solicitation materials:

- Permit issuers to "test the waters" with, or solicit interest in a potential offering from, the general public either before or after the filing of the offering statement, so long as any solicitation materials used after publicly filing the offering statement are preceded or accompanied by a preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained.

Qualification, communications, and offering process:

- Require issuers and intermediaries in the prequalification period to deliver a preliminary offering circular to prospective purchasers at least 48 hours in advance of sale unless the issuer is subject to, and current in, Tier 2 ongoing reporting obligations. Where the issuer is subject to, and current in, a Tier 2 ongoing reporting obligation, issuers and intermediaries will only be required to comply with the general delivery requirements for offers.
- Modernize the qualification, communications, and offering processes in Regulation A to reflect analogous provisions of the Securities Act registration process:[26]
  - Permit issuers and intermediaries to satisfy their delivery requirements as to the final offering circular under an "access equals delivery" model when sales are made on the basis of offers conducted during the prequalification period and the final offering circular is filed and available on the Commission's Electronic Data Gathering, Analysis and Retrieval system (EDGAR);
  - Require issuers and intermediaries, not later than two business days after completion of a sale, to provide purchasers with a copy of the final offering circular or a notice with the uniform resource locator (URL) where the final offering circular may be obtained on EDGAR and contact information sufficient to notify a purchaser where a request for a final offering circular can be sent and received in response; and

[26] *See, e.g.*, Securities Offering Reform, Rel. No. 33-8591 (July 19, 2005) [70 FR 44722].

- Permit issuers to file offering circular updates and supplements after qualification of the offering statement in lieu of post-qualification amendments in certain circumstances, including to provide the types of information that may be excluded from a prospectus under Rule 430A.

- Permit continuous or delayed offerings, but require issuers in continuous or delayed Tier 2 offerings to be current in their annual and semiannual reporting obligations in order to do so.

- Permit issuers to qualify additional securities in reliance on Regulation A by filing a post-qualification amendment to a qualified offering statement.

Offering statement:

- Require issuers to file offering statements with the Commission electronically on EDGAR.

- Permit the non-public submission of offering statements and amendments for review by Commission staff before filing such documents with the Commission, so long as all such documents are publicly filed not later than 21 calendar days before qualification.

- Eliminate the Model A (Question-and-Answer) disclosure format under Part II of Form 1-A.

- Update and clarify Model B (Narrative) disclosure format under Part II of Form 1-A (renamed, "Offering Circular"), while continuing to permit Part I of Form S-1 narrative disclosure as an alternative.

- Permit real estate investment trusts (REITs) and similarly eligible companies to provide the narrative disclosure required by Part I of Form S-11 in Part II of

Form 1-A.

- Require that offering statements be qualified by the Commission before sales may be made pursuant to Regulation A.
- Require Tier 1 and Tier 2 issuers to file balance sheets and related financial statements for the two previous fiscal year ends (or for such shorter time that they have been in existence).
- Require Tier 2 issuers to include financial statements in their offering circulars that are audited in accordance with either the auditing standards of the American Institute of Certified Public Accountants (AICPA) (referred to as U.S. Generally Accepted Auditing Standards or GAAS) or the standards of the Public Company Accounting Oversight Board (PCAOB).
- Require Tier 1 and Tier 2 issuers to include financial statements in Form 1-A that are dated not more than nine months before the date of non-public submission, filing, or qualification, with the most recent annual or interim balance sheet not older than nine months. If interim financial statements are required, they must cover a period of at least six months.

Ongoing reporting:

- Require Tier 1 issuers to provide information about sales in such offerings and to update certain issuer information by electronically filing a Form 1-Z exit report with the Commission not later than 30 calendar days after termination or completion of an offering.
- Require Tier 2 issuers to file electronically with the Commission on EDGAR annual and semiannual reports, as well as current event reports.

- Require Tier 2 issuers to file electronically a special financial report to cover financial periods between the most recent period included in a qualified offering statement and the issuer's first required periodic report.
- Permit the ongoing reports filed by an issuer conducting a Tier 2 offering to satisfy a broker-dealer's obligations under Exchange Act Rule 15c2-11.
- Provide that Tier 2 issuers' reporting obligations under Regulation A would suspend when they are subject to the ongoing reporting requirements of Section 13 of the Exchange Act, and may also be suspended under Regulation A at any time by filing a Form 1-Z exit report after completing reporting for the fiscal year in which an offering statement was qualified, so long as the securities of each class to which the offering statement relates are held of record by fewer than 300 persons, or fewer than 1,200 persons for banks or bank holding companies, and offers or sales made in reliance on a qualified Tier 2 Regulation A offering statement are not ongoing. In certain circumstances, Tier 2 Regulation A reporting obligations may terminate when issuers are no longer subject to the ongoing reporting requirements of Section 13 of the Exchange Act.
- Require Tier 2 issuers to include in their first annual report after termination or completion of a qualified Regulation A offering, or in their Form 1-Z exit report, information about sales in the terminated or completed offering and to update certain issuer information.
- Eliminate the requirement that issuers file a Form 2-A with the Commission to report sales and the termination of sales made under Regulation A every six months after qualification and within 30 calendar days after the termination,

completion, or final sale of securities in the offering.

Exchange Act registration:

- Conditionally exempt securities issued in a Tier 2 offering from the mandatory registration requirements of Section 12(g) of the Exchange Act, for so long as the issuer engages the services of a transfer agent that is registered with the Commission under Section 17A of the Exchange Act, remains subject to a Tier 2 reporting obligation, is current in its annual and semiannual reporting at fiscal year end, and had a public float of less than $75 million as of the last business day of its most recently completed semiannual period, or, in the absence of a public float, had annual revenues of less than $50 million as of its most recently completed fiscal year.
- Permit Tier 2 issuers to use a Form 8-A short form registration statement concurrently with the qualification of a Regulation A offering statement that includes Part I of Form S-1 or Form S-11 narrative disclosure in Form 1-A in order to register a class of securities under Sections 12(g) or 12(b) of the Exchange Act.

"Bad actor" disqualification provisions:

- Substantially conform the "bad actor" disqualification provisions of Rule 262 to Rule 506(d) and add a disclosure requirement similar to Rule 506(e).

Application of state securities laws:

- Provide for the preemption of state securities law registration and qualification requirements for securities offered or sold to "qualified purchasers," in light of the total package of investor protections included in the final rules. A qualified purchaser will be defined to be any person to whom securities are offered or sold in a Tier 2 offering.

The Commission is required by Section 3(b)(5) of the Securities Act to review the Tier 2 offering limitation every two years. In addition to revisiting the Tier 2 offering limitation, the staff will also undertake to review the Tier 1 offering limitation at the same time. The staff also will undertake to study and submit a report to the Commission no later than 5 years following the adoption of the amendments to Regulation A, on the impact of both the Tier 1 and Tier 2 offerings on capital formation and investor protection. The report will include, but not be limited to, a review of: (1) the amount of capital raised under the amendments; (2) the number of issuances and amount raised by both Tier 1 and Tier 2 offerings; (3) the number of placement agents and brokers facilitating the Regulation A offerings; (4) the number of Federal, State, or any other actions taken against issuers, placement agents, or brokers with respect to both Tier 1 and Tier 2 offerings; and (5) whether any additional investor protections are necessary for either Tier 1 or Tier 2. Based on the information contained in the report, the Commission may propose to either decrease or increase the offering limit for Tier 1, as appropriate.

B. Scope of Exemption

1. Eligible Issuers

a. Proposed Rules

Section 401 of the JOBS Act does not include any express issuer eligibility requirements. The proposed rules would have maintained Regulation A's existing issuer eligibility requirements and added two new categories of ineligible issuers.[27] The two new categories would exclude issuers that are or have been subject to any order of the Commission pursuant to Section 12(j) of the Exchange Act entered within five years before the filing of the offering statement and issuers that are required to, but that have not, filed with the Commission the ongoing reports required by the final rules during the two years immediately preceding the filing of an offering statement. Additionally, we requested comment on other potential changes to the existing issuer eligibility requirements, including whether the exemption should be limited to "operating companies," United States domestic issuers, or issuers that use a certain amount of the proceeds raised in a Regulation A offering in the United States. We also solicited comment on whether we should extend issuer eligibility to non-Canadian foreign issuers, business development companies as defined in Section 2(a)(48) of the Investment Company Act of 1940 (BDCs),[28] blank check companies,[29] or Exchange Act reporting companies, or, alternatively, eliminate shell companies or REITs from the exemptive regime.

27 Existing Regulation A limits issuer eligibility to issuers organized, and with a principal place of business, in the United States or Canada, while excluding Exchange Act reporting companies, investment companies, including business development companies, development stage companies that have no specific business plan or purpose or have indicated that their business plan is to engage in a merger or acquisition with an unidentified company or companies, issuers of fractional undivided interests in oil or gas rights or a similar interest in other mineral rights, and issuers disqualified because of Rule 262, 17 CFR 230.262 (2014). *See* 17 CFR 230.251(a) (2014).

28 15 U.S.C. 80a-2(a)(48).

29 "Blank check companies" are development stage companies that have no specific business plan or purpose or have indicated that their business plan is to engage in a merger or acquisition with an unidentified company or companies. *See* Securities Act Rule 419(a)(2)(i), 17 CFR 230.419(a)(2)(i); *see also* SEC Rel. No. 33-6949 [57 FR 36442] (July 30, 1992), at fn. 50 (clarifying that blank check companies regardless of whether they are issuing penny stock are precluded from relying on Regulation A).

b. Comments on the Proposed Rules

Commenters expressed a wide range of views on the proposed issuer eligibility requirements. A number of commenters expressed general support for the proposed issuer eligibility requirements.[30] Many commenters expressly supported the new proposed issuer eligibility criterion relating to the requirement to be current in Tier 2 ongoing reporting obligations.[31] One commenter also expressly supported the proposed exclusion of issuers subject to an order of the Commission entered pursuant to Section 12(j) of the Exchange Act from the list of eligible issuers.[32] Other commenters suggested additional limitations on issuer eligibility, including: a requirement that issuers be "operating companies,"[33] excluding shell companies and issuers of penny stock,[34] and

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30 Letter from Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 3, 2014 ("ABA BLS Letter"); Letter from Gabrielle Buckley, Chair, Section of International Law, American Bar Association, May 14, 2014 ("ABA SIL Letter"); Letter from Andrew F. Viles, Canaccord Letter Genuity Inc., March 27, 2014 ("Canaccord Letter"); Letter from Pw Carey, March 24, 2014 ("Carey Letter"); Letter from Kurt N. Schacht, CFA, Managing Director, Standards and Financial Market Integrity, and Linda L. Rittenhouse, Director, Capital Markets, CFA Institute, March 24, 2014 ("CFA Institute Letter"); Letter from Kim Wales, Executive Board Member, Crowdfund Intermediary Regulatory Advocates (CFIRA), May 14, 2014 ("CFIRA Letter 1"); Letter from Christopher Tyrrell, Chair, Crowdfunding Intermediary Regulatory Advocates, February 23, 2015 ("CFIRA Letter 2"); Robert R. Kaplan, Jr. and T. Rhys James, Kaplan Voekler Cunningham & Frank PLC, March 23, 2014 ("KVCF Letter"); Letter from William F. Galvin, Secretary, Commonwealth of Massachusetts, March 24, 2014 ("Massachusetts Letter 2"); Letter from Morrison & Foerster LLP, March 26, 2014 ("MoFo Letter"); Letter from Andrea Seidt, President, North American Securities Administrators Association (NASAA) and Ohio Securities Commissioner, March 24, 2014 ("NASAA Letter 2"); Letter from William M. Beatty, Securities Administrator, Washington Department of Financial Institutions, March 24, 2014 ("WDFI Letter"); Letter from William R. Hambrecht, Chairman, WR Hambrecht+ Co, March 4, 2014 ("WR Hambrecht + Co Letter").

31 ABA BLS Letter; CFA Institute Letter; Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

32 CFA Institute Letter.

33 CFIRA Letter 1; WR Hambrecht + Co Letter (suggesting that limiting the availability of the exemption to, among other things, operating companies would provide investors with more confidence in the offerings conducted pursuant to Regulation A). *But see* KVCF Letter (suggesting that limiting availability of the exemption to operating companies would unnecessarily limit the utility of the exemption).

34 ABA BLS Letter; MoFo Letter.

excluding other types of investment vehicles, such as commodity pools and investment funds that invest in gold or virtual currencies.[35]

A few commenters recommended allowing blank check companies and special purpose acquisition companies (SPACs) to rely on Regulation A.[36] One of these commenters recommended allowing blank check companies seeking to raise at least $10 million to use Regulation A in the same manner as any other eligible issuer, but suggested that, if a company is raising less than $10 million in a Tier 2 offering, the Commission should implement certain additional requirements.[37] Another commenter recommended allowing issuers of fractional interests in oil and gas or other mineral rights to rely on Regulation A based on a "reasonable" eligibility test to be developed by the Commission.[38] Several commenters opposed any change to the proposed issuer eligibility requirements that would exclude REITs from participating in Regulation A offerings.[39] Other commenters advocated expanding the current categories of eligible

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35 Massachusetts Letter 2.

36 Gilman Law Letter; Letter from Mark Goldberg, Chairman, Investment Program Association, March 24, 2014 ("IPA Letter"); Letter from David N. Feldman, Partner, Richardson Patel LLP, January 15, 2014 ("Richardson Patel Letter"). A SPAC is a type of blank check company created specifically to pool funds in order to finance a merger or acquisition opportunity within a set timeframe.

37 Richardson Patel Letter (recommending that for offerings of less than $10 million under Tier 2, the rules should require that: (a) monies raised be placed into escrow, minus underwriters compensation and 10% for offering expenses, until a reverse merger is completed; (b) a combination with an operating business be completed within three years; (c) full Form 10 information be disclosed regarding a pending reverse merger to investors who will have 15-20 days to reconfirm their investment or receive their money back; (d) there be no requirement that a certain percentage of investors reconfirm; and (e) accredited investors have no limit on the investment they make in the offering).

38 Letter from Mark Kosanke, President, Real Estate Investment Securities Association, March 24, 2014 ("REISA Letter") (suggesting that the Commission base the eligibility test on the issuer having an "established track record" or some minimum amount of assets).

39 ABA BLS Letter; Letter from Gilman Law LLC, March 24, 2014 ("Gilman Law Letter"); MoFo Letter; Letter from Serenity Storage, January 5, 2014 ("Serenity Storage Letter").

issuers, and specifically supported the continued inclusion of Canadian companies and shell companies as eligible issuers, as proposed.[40]

(1) Non-Canadian Foreign Issuers

Many commenters recommended making non-Canadian foreign companies eligible issuers under Regulation A.[41] Several commenters suggested that the proposed approach to non-Canadian foreign companies is inconsistent with the treatment of foreign private issuers in registered offerings.[42] Additionally, commenters noted a variety of benefits arising from allowing foreign companies to access the U.S. capital markets through Regulation A offerings, including job creation,[43] increasing the amount of disclosure available for investors in foreign companies,[44] encouraging domestic exchange listings,[45] expanding investment opportunities for U.S. investors,[46] and general economic

40 Letter from Jonathan C. Guest, McCarter & English, LLP, February 19, 2014 ("McCarter & English Letter") (also opposing any limitation on issuer eligibility on the basis of whether most of the offering proceeds were being used in connection with the issuer's operations in the United States, noting that many Canadian issuers would be excluded as a result); OTC Markets Letter.

41 ABA SIL Letter; Letter from Scott Kupor, Managing Partner, Andreessen Horowitz, and Jeffrey M. Solomon, Chief Executive Officer, Cowen and Company, February 26, 2014 ("Andreessen/Cowen Letter"); Letter from BDO USA, LLP, March 20, 2104 ("BDO Letter"); Canaccord Letter (suggesting expanding issuer eligibility to companies organized in jurisdictions with "robust securities regulation systems" such as the United Kingdom and other countries in the European Union, Australia, and Asian markets such as Singapore and Hong Kong); McCarter & English Letter; OTC Markets Letter; Richardson Patel Letter; Letter from Michael T. Lempres, Assistant General Counsel, SVB Financial Group, March 21, 2014 ("SVB Financial Letter"); Letter from Bill Soby, Managing Director, Silicon Valley Global Shares, March 24, 2014 ("SVGS Letter").

42 Andreessen/Cowen Letter; BDO Letter; Richardson Patel Letter. In the context of registered offerings, foreign private issuers may provide scaled disclosure if it qualifies as a "smaller reporting company," which is defined in Item 10(f)(1) of Regulation S-K, 17 CFR 229.10(f)(1), Securities Act Rule 405, 17 CFR 230.405, and Exchange Act Rule 12b-2, 17 CFR 240.12b-2, and rely on other disclosure accommodations.

43 ABA SIL Letter; SVGS Letter (noting that high-paying jobs would be created by expanding global tech companies).

44 SVB Financial Letter.

45 Andreessen/Cowen Letter; SVB Financial Letter.

46 Andreessen/Cowen Letter; OTC Markets Letter.

benefits.[47] One commenter recommended making all foreign private issuers eligible if they maintained a principal place of business in the United States.[48] Two commenters also recommended permitting companies relying on Exchange Act Rule 12g3-2(b) to make offerings under Regulation A.[49]

(2) BDCs

A number of commenters supported making BDCs eligible issuers under Regulation A.[50] Most of these commenters noted that BDCs serve an important function in facilitating small or emerging business capital formation or in providing a bridge from the private to public markets.[51] Several of these commenters recommended at least allowing small business investment company (SBIC) licensed BDCs to use the exemption given the review process such entities are required to undergo with the U.S. Small Business Administration.[52] One of these commenters noted that if BDCs become

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47 ABA SIL Letter; Andreessen/Cowen Letter; McCarter & English Letter; SVB Financial Letter.

48 ABA SIL Letter.

49 McCarter & English Letter; OTC Markets Letter. Rule 12g3-2(b) generally provides foreign private issuers with an automatic exemption from registration under Section 12(g) if the issuer (i) is not required to file reports under Exchange Act Sections 13(a) or 15(d); (ii) maintains a listing of the subject class of securities on one or two exchanges in non-U.S. jurisdictions that comprise more than 55% of its worldwide trading volume; and (iii) publishes in English on its website certain material items of information. *See* 17 CFR 240.12g3-2(b).

50 ABA BLS Letter; CFIRA Letter 1; Letter from Michael Sauvante, Executive Director, Commonwealth Fund LLC, March 21, 2014 ("Commonwealth Fund Letter 1"); Letter from Michael Sauvante, Executive Director, Commonwealth Fund LLC, March 22, 2014 ("Commonwealth Fund Letter 2"); KVCF Letter; Letter from Daniel Gorfine, Director, Financial Markets Policy, and Staci Warden, Executive Director, Center for Financial Markets, Milken Institute, March 19, 2014 ("Milken Institute Letter"); MoFo Letter; REISA Letter; SBIA Letter; WR Hambrecht + Co Letter.

51 ABA BLS Letter; CFIRA Letter 1; Commonwealth Fund Letter 1; Commonwealth Fund Letter 2; KVCF Letter; Milken Institute Letter; MoFo Letter; REISA Letter; SBIA Letter; WR Hambrecht + Co Letter.

52 Milken Institute Letter; SBIA Letter. A SBIC-licensed BDC is a company that is licensed by the Small Business Administration (SBA) to operate as such under the Small Business Investment Act of 1958.

eligible to use Regulation A, the Commission should consider requiring them to provide quarterly financial disclosure so as to enhance transparency and provide the market with critical investment information.[53]

(3) Potential Limits on Issuer Size

Several commenters opposed using the issuer's size to limit eligibility.[54] Two of these commenters thought that the $50 million offering limit for Tier 2 would already limit the utility of the exemption for issuers on the basis of issuer size—with smaller issuers likely benefitting most from the exemption—and recommended against size-based eligibility criteria that may be difficult to define.[55] One commenter suggested that most issuers with a large public float would likely be subject to Exchange Act reporting requirements and therefore would be ineligible to use Regulation A.[56] Another commenter noted that a size restriction based on public float would be particularly harmful to biotechnology companies, because they often have a public float that is disproportionately high in relation to their corporate structure, number of employees, or revenues.[57]

(4) Exchange Act Reporting Companies

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53 Milken Institute Letter.

54 Letter from E. Cartier Esham, Executive Vice President, Emerging Companies, Biotechnology Industry Organization (BIO), March 11, 2014 ("BIO Letter"); IPA Letter; Letter from Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, March 24, 2014 ("U.S. Chamber of Commerce Letter").

55 BIO Letter; U.S. Chamber of Commerce Letter.

56 IPA Letter.

57 BIO Letter.

A number of commenters supported allowing Exchange Act reporting companies to conduct offerings under Regulation A.[58] Several of these commenters recommended allowing Exchange Act reporting companies that are current in their reporting obligations to conduct Tier 2 offerings,[59] with one commenter limiting its recommendation to companies with a non-affiliate float of less than $250 million.[60] Three commenters further suggested that, if Exchange Act reporting companies are permitted to conduct offerings pursuant to Regulation A, Exchange Act reporting should satisfy any Regulation A reporting obligation.[61] One such commenter further suggested that Exchange Act reporting companies should be required to be current in their Exchange Act reporting obligations in order to be eligible to rely on the exemption, in a manner that is consistent with Regulation A as it existed before 1992.[62]

c. Final Rules

We are adopting the issuer eligibility criteria as proposed. Under the final rules, Regulation A will be limited to companies organized in and with their principal place of business in the United States or Canada. It will be unavailable to:

- companies subject to the ongoing reporting requirements of Section 13 or 15(d) of the Exchange Act;

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58 Andreessen/Cowen Letter; BIO Letter; OTC Markets Letter; Letter from U.S. Senator Pat Roberts, May 27, 2014 ("Sen. Roberts Letter"); Letter from Jack H. Brier, President and Founder, US Alliance Corporation, March 19, 2014 ("US Alliance Corp. Letter").

59 Andreessen/Cowen Letter; BIO Letter; OTC Markets Letter.

60 BIO Letter.

61 Andreessen/Cowen Letter; CFIRA Letter 1; OTC Markets Letter.

62 CFIRA Letter 1. Before amendments to Regulation A were adopted in 1992, Exchange Act reporting companies were permitted to conduct offerings in reliance on Regulation A, provided they were current in their public reporting. *See* 17 CFR 230.252(f) (1992).

- companies registered or required to be registered under the Investment Company Act of 1940 and BDCs;
- blank check companies;
- issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights;
- issuers that are required to, but that have not, filed with the Commission the ongoing reports required by the rules under Regulation A during the two years immediately preceding the filing of a new offering statement (or for such shorter period that the issuer was required to file such reports);
- issuers that are or have been subject to an order by the Commission denying, suspending, or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act that was entered within five years before the filing of the offering statement;[63] and
- issuers subject to "bad actor" disqualification under Rule 262.[64]

We expect that the amendments we are adopting will significantly expand the utility of the Regulation A offering exemption.

Our approach in the final rules is generally to maintain the issuer eligibility requirements of existing Regulation A with the limited addition of two new categories of ineligible issuers. We believe this approach will provide important continuity in the Regulation A regime as it expands in the way Congress mandated. For this reason, we do not believe it is necessary to adopt final rules to exclude issuers that are currently eligible

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63 *See* Rule 251(b).

64 *See* Rule 262.

to conduct Regulation A offerings. Additionally, we recognize that expanding the categories of eligible issuers, as suggested by a number of commenters, could provide certain benefits, including increased investment opportunities for investors and avenues for capital formation for certain issuers. We are concerned, however, about the implications of extending issuer eligibility before the Commission has the ability to assess the impact of the changes to Regulation A being adopted today. In light of these changes, we believe it prudent to defer expanding the categories of eligible issuers (for example, by including non-Canadian foreign issuers, BDCs, or Exchange Act reporting companies) until the Commission has had the opportunity to observe the use of the amended Regulation A exemption and assess any new market practices as they develop.

Additionally, we are not adopting further restrictions on eligibility at this time. In light of the disclosure requirements contained in the final rules, we do not believe that it is necessary to exclude additional types of issuers, such as shell companies, issuers of penny stock, or other types of investment vehicles, from relying on the exemption in Regulation A. At the same time, we are concerned about potentially increased risks to investors that could result from extending issuer eligibility to other types of entities, such as blank check companies, before the Commission has the opportunity to observe developing market practices. We therefore believe the prudent approach with respect to any potential expansion of issuer eligibility is to give the Regulation A market time to develop under rules that we are adopting today. We also do not believe it is necessary to limit availability of the exemption to issuers of a certain size, as we agree with commenters that suggested that the annual offering limit will serve to limit the utility of the exemption for larger issuers in need of greater amounts of capital. We further do not believe that it is appropriate to limit the availability of the exemption to "operating companies," as that term would restrict availability of the exemption to fewer issuers than are currently eligible under Regulation A, such as by excluding shell companies.

As proposed, the final rules include two new issuer eligibility requirements that add important investor protections to Regulation A. First, potential issuers must have filed all required ongoing reports under Regulation A during the two years immediately preceding the filing of a new offering statement (or for such shorter period that the issuer was required to file such reports) to remain eligible to conduct offerings pursuant to the rules. This requirement will benefit investors by providing them with more information, with respect to issuers that have previously made a Regulation A offering, to consider when making an investment decision, facilitate the development of an efficient secondary market in such securities, and enhance our ability to analyze and observe the Regulation A market. Second, issuers subject to orders by the Commission entered pursuant to Section 12(j) of the Exchange Act within a five-year period immediately preceding the filing of the offering statement will not be eligible to conduct an offering pursuant to Regulation A. This requirement will increase investor protection and compliment the exclusion of delinquent Regulation A filers discussed immediately above by excluding issuers with a demonstrated history of delinquent filings under the Exchange Act from the pool of eligible issuers under Regulation A.

2. Eligible Securities

a. Proposed Rules

Section 3(b)(3) of the Securities Act limits the availability of any exemption enacted under Section 3(b)(2) to "equity securities, debt securities, and debt securities convertible or exchangeable into equity interests, including any guarantees of such securities."[65] The proposed rules would have limited the types of securities eligible for sale under both Tier 1 and Tier 2 of Regulation A to the specifically enumerated list of securities in Section 3(b)(3) and also would have excluded asset-backed securities, as defined in Regulation AB, from the list of eligible securities.

b. Comments on the Proposed Rules

Several commenters supported the exclusion of asset-backed securities from the list of eligible securities.[66] One commenter recommended clarifying that warrants exercisable for equity or debt securities are eligible securities.[67]

c. Final Rules

We are adopting final rules that limit the types of securities eligible for sale under Regulation A to the specifically enumerated list in Section 3(b)(3), which includes warrants and convertible equity securities, among other equity and debt securities.[68] The final rules exclude asset-backed securities from the list of eligible securities. Asset-backed securities are subject to the provisions of Regulation AB and other rules specifically tailored to the offering process, disclosure, and reporting requirements for such securities. These rules were not in effect when Regulation A was last updated in

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65 15 U.S.C. 77c(b)(3).

66 ABA BLS Letter; Carey Letter; Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

67 ABA BLS Letter.

68 *See* Rule 261(c); *see also* Rule 405 (defining "equity security" to include, among other things, warrants and certain convertible securities). We have also revised the proposed definition in Rule 261(c) to clarify that all securities, rather than just equity securities, that are convertible or exchangeable into equity interests are eligible, subject to the other terms of Regulation A.

1992.[69] We do not believe that Section 401 of the JOBS Act was enacted to facilitate the issuance of asset-backed securities.

3. Offering Limitations and Secondary Sales

a. Proposed Rules

We proposed to amend Regulation A to create two tiers of requirements: Tier 1, for offerings of up to $5 million of securities in a 12-month period; and Tier 2, for offerings of up to $50 million of securities in a 12-month period.[70] As proposed, issuers could conduct offerings of up to $5 million under either Tier 1 or Tier 2. Consistent with the existing provisions of Regulation A, we also proposed to permit sales by selling securityholders of up to 30% of the maximum offering amount permitted under the applicable tier ($1.5 million in any 12-month period for Tier 1 and $15 million in any 12-month period for Tier 2). Sales by selling securityholders under either tier would be aggregated with sales by the issuer for purposes of calculating the maximum permissible amount of securities that may be sold during any 12-month period. In addition, we proposed to eliminate the last sentence of Rule 251(b), which prohibits affiliate resales unless the issuer has had net income from continuing operations in at least one of its last two fiscal years.

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69 Regulation AB, 17 CFR 229.1100 *et seq.*, went into effect in 2005. *See* Rel. No. 33-8518 (Dec. 22, 2004). Asset-backed securities are defined in Rule 1101(c)(1) to generally mean a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial asset, either fixed or revolving, that by its terms converts into cash within a finite time period.

70 As proposed, if the offering included securities that were convertible, exercisable, or exchangeable for other securities, the offer and sale of the underlying securities would also be required to be qualified and the aggregate offering price would include the aggregate conversion, exercise, or exchange price of such securities, regardless of when they become convertible, exercisable, or exchangeable.

b. Comments on the Proposed Rules

Commenters were generally supportive of the proposed offering limitations on primary and secondary offerings. Many commenters, however, suggested changes to the proposed offering limits for both tiers, as well as to the proposed limits on secondary sales.

(1) Offering Limitation

Several commenters recommended that the Commission increase the $50 million offering limitation for Tier 2.[71] As an alternative, one commenter recommended applying the $50 million limit on a per offering basis rather than on a 12-month basis, and suggested that the Commission consider eliminating the offering limits for certain types of issuers, such as those that have yet to generate revenue.[72] Additionally, two commenters recommended that the Commission do more to increase the utility of Tier 1 offerings by raising the Tier 1 offering limitation to $10 million or more in a 12-month period.[73] Another commenter suggested that the Commission create a third tier in between Tier 1 and Tier 2 that would have a $15 million offering limitation.[74]

71 Letter from Salomon Kamalodine, Director, Investment Banking, B. Riley & Co., March 24, 2014 ("B. Riley Letter"); Letter from William Klehm, Chairman and CEO, Fallbrook Technologies, March 22, 2014 ("Fallbrook Technologies Letter") (recommended raising the limit to $75 million); OTC Markets Letter (recommended raising the limit to $80 million); Jason Coombs, Co-Founder and CEO, Public Startup Company, Inc., March 24, 2014 ("Public Startup Co. Letter 1") (recommended raising the limit to $75 million); Richardson Patel Letter (recommended raising the limit to $100 million).

72 Richardson Patel Letter.

73 Letter from Samuel S Guzik, Guzik and Associates, March 24, 2014 ("Guzik Letter 1") (recommended raising the limit to "at least $10 million"); Letter from Christopher Cole, Senior Vice President and Senior Regulatory Counsel, Independent Community Bankers of America, March 25, 2014 ("ICBA Letter") (encouraged increasing the limit "from $5 million to $10 million").

74 Public Startup Co. Letter 1.

With respect to offering limit calculations, one commenter recommended that the aggregate offering price of the underlying security only be included in the $50 million offering limitation during the 12-month period in which such security is first convertible, exercisable, or exchangeable.[75] This commenter suggested that its recommended approach would accommodate common small business offering structures that involve warrants exercisable at a premium over several years.

(2) Secondary Sales Offering Limitation

Several commenters specifically supported the proposed limitations on secondary sales.[76] While some commenters indicated their support for resale limitations,[77] they expressed a preference for either proscribing resales entirely[78] or requiring the approval of the resale offering by a majority of the issuer's independent directors upon a finding that the offering is in the best interests of both the selling securityholders and the issuer.[79] One commenter recommended prohibiting resales under Regulation A entirely.[80] Another commenter recommended requiring selling securityholders to hold the issuer's securities for 12 months before being eligible to sell pursuant to Regulation A, in order to distinguish between investors seeking to invest in a business and investors simply seeking to sell to the public for a gain.[81]

75 Andreessen/Cowen Letter; *cf.* Proposing Release, fn. 112.

76 Massachusetts Letter 2; NASAA Letter 2; Richardson Patel Letter; WDFI Letter.

77 Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

78 Massachusetts Letter 2; NASAA Letter 2.

79 NASAA Letter 2 (supporting the proposed limits coupled with a board approval requirement in lieu of prohibiting resales entirely); WDFI Letter (not expressing a preference for prohibiting resales entirely).

80 Carey Letter.

81 Letter from Andrew M. Hartnett, Missouri Commissioner of Securities, March 24, 2014 ("MCS Letter").

Many other commenters recommended raising the resale limits or eliminating them entirely.[82] One such commenter recommended alternatively removing non-affiliate securityholders from the resale limitation since concerns over investor information asymmetries would be reduced when dealing with non-affiliate securityholders.[83] This commenter also recommended that the Commission reevaluate the need for resale limits within a year of implementing the rules. Another commenter also recommended allowing for unlimited sales by non-affiliate selling securityholders and further suggested that the rules not aggregate such sales with issuer sales.[84] Two commenters suggested that limitations on resales are contrary to the Congressional intent behind the enactment of Title IV of the JOBS Act.[85]

(3) Rule 251(b)

Many commenters specifically supported the proposed elimination of the requirement that issuers must have had net income from continuing operations in at least one of its last two fiscal years in order for affiliate resales to be permitted, generally noting that many companies have net losses for many years, including, for example, due to high research and development costs.[86]

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82 ABA BLS Letter; B. Riley Letter; Canaccord Letter; CFIRA Letter 1; Milken Institute Letter; MoFo Letter; Richardson Patel Letter; WR Hambrecht + Co Letter.

83 Milken Institute Letter.

84 B. Riley Letter.

85 CFIRA Letter 1; WR Hambrecht + Co Letter (noting that the JOBS Act contemplated an increase in the offering threshold to $50 million, but did not limit the percentage that could be sold by selling securityholders).

86 ABA BLS Letter; B. Riley Letter; Canaccord Letter; CFIRA Letter 1; Milken Institute Letter; MoFo Letter; WR Hambrecht + Co Letter.

c. Final Rules

We are adopting the proposed amendments to Regulation A with modifications to the Tier 1 offering limitation and the secondary sales offering limitation. We discuss these amendments in detail below. We are also making a technical change to clarify the description of how compliance with the offering limitations is calculated in Rule 251(a).[87]

Tier 1

As discussed more fully in the "Additional Considerations for Smaller Offerings" section below, we are making changes to the proposed rules in response to comments and to increase the utility of Tier 1 of the Regulation A exemption.[88] Several commenters[89] and a report on the impact of state securities law requirements on offerings conducted under Regulation A by the U.S Government Accountability Office (GAO), as required by Section 402 of the JOBS Act,[90] highlighted the $5 million offering limitation in existing Regulation A as one of the main factors limiting the utility of the exemption. In certain circumstances, fixed costs associated with conducting Regulation A offerings, such as legal and accounting fees, may serve as a disincentive to use the exemption for lower offering amounts. We are therefore increasing the offering limitation in the final rules for

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87 The proposed rules used the phrase "aggregate offering price for all securities sold" when discussing the gross proceeds resulting from prior or anticipated sales of securities under Regulation A. We have clarified Rule 257(a)(1) to define as "aggregate sales" gross proceeds within the prior 12 month time frame contemplated by Regulation A. We have also made conforming changes elsewhere in the final rules and forms.

88 *See* Section II.I. below.

89 *See, e.g.*, Guzik Letter 1; ICBA Letter; Public Startup Co. Letter 1.

90 *Factors that May Affect Trends in Regulation A Offerings*, GAO-12-839 (July 2012) (the "GAO Report") (*available at*: http://www.gao.gov/assets/600/592113.pdf). The GAO Report concludes that it is unclear whether increasing the Regulation A offering ceiling from $5 million to $50 million will improve the utility of the exemption.

Tier 1 offerings in a 12-month period from the proposed $5 million limitation to $20 million.[91] We believe that raising the offering limitation for Tier 1 offerings, in addition to other changes discussed in Section II.I. below, will increase the utility of the exemption for smaller issuers by providing them with additional options for capital formation and potentially increasing the proceeds received by the issuer. Consistent with the proportionate limitation on secondary sales in the proposed rules, we are also increasing the limitation on secondary sales in Tier 1 offerings in a 12-month period from the proposed $1.5 million limitation to $6 million.

Tier 2

We are adopting the proposed $50 million Tier 2 offering limitation.[92] Some commenters suggested that we raise the offering limitation to an amount above the statutory limitation set forth in Section 3(b)(2), but we do not believe an increase is warranted at this time. While Regulation A has existed as an exemption from registration for some time, today's changes are significant. We believe that the final rules for Regulation A will provide for a meaningful addition to the existing capital formation options of smaller companies while maintaining important investor protections. We are concerned, however, about expanding the offering limitation of the exemption beyond the level directly contemplated in Section 3(b)(2) at the outset of the adoption of final rules. As noted above in Section II.B.1., the final rules do not limit issuer eligibility on the basis of issuer size, as we believe that the $50 million annual offering limitation will serve to

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91 Rule 251(a)(1). We intend to revisit the Tier 1 offering limitation at the same time that we are required by Section 3(b)(5) of the Securities Act to review the Tier 2 offering limitation and will consider whether additional investor protections would be necessary if the Tier 1 offering limitation is increased.

92 Rule 251(a)(2).

limit the utility of the exemption for larger issuers in need of greater amounts of capital. Similarly, we believe that the more extensive disclosure requirements associated with Exchange Act reporting are more appropriate for larger and generally more complex issuers that raise money in the public capital markets.[93] We are therefore concerned that an increase in the offering limitation at this time may increase risks to investors by encouraging larger issuers to conduct offerings pursuant to Regulation A in instances where disclosure pursuant to a registered offering under the Securities Act would be more appropriate.

The Commission is required by Section 401 of the JOBS Act to review the Section 3(b)(2) offering limitation every two years, and we will consider the use of the final rules by market participants as part of that review. We will therefore revisit the offering limitation by April 2016, as required by the statute, with a view to considering whether to increase the $50 million offering limitation. We also are adopting the proposed $15 million limitation on secondary sales for Tier 2 as proposed, with a change in the application of the limitation for secondary sales under both Tier 1 and Tier 2 discussed in the following section.

<u>Application of the Limitation on Secondary Sales</u>

As noted in the Proposing Release, secondary sales are an important part of Regulation A. We believe that allowing selling securityholders access to avenues for liquidity will encourage them to invest in companies, although we acknowledge that providing for secondary sales in any amount may give rise to certain concerns. As highlighted by at least one commenter at the pre-proposing stage, permitting some

93 *See* discussion in Section III.C.3. below.

secondary sales pursuant to Regulation A could place investors at an informational disadvantage to selling securityholders who have potentially greater access to inside information about the issuer and does not necessarily provide capital to the issuer.[94] Other commenters stated that such concerns are misplaced in the context of secondary sales by non-affiliates, who generally do not have access to inside information.[95]

We do not believe that a wholesale prohibition on secondary sales, as suggested by some commenters, is appropriate or necessary for either Tier 1 or Tier 2 of Regulation A. However, in order to strike an appropriate balance between allowing selling securityholders continued access to avenues for liquidity in Regulation A and the concern that secondary offerings do not directly provide new capital to companies and could pose the potential risks to investors discussed above, the final rules continue to permit secondary sales but provide additional limitations on secondary sales in the first year. The final rules limit the amount of securities that selling securityholders can sell at the time of an issuer's first Regulation A offering and within the following 12 months to no more than 30% of the aggregate offering price of a particular offering.[96] While the final rules continue to provide selling securityholders with the flexibility to sell securities during this period, we believe that this approach to the final rules will help to ensure that secondary sales at the time of such offerings will be made in conjunction with capital raising events by the issuer.

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94 Letter from A. Heath Abshure, President, NASAA, April 10, 2013 ("NASAA (pre-proposal) Letter").

95 *See, e.g.*, Milken Institute Letter.

96 Rule 251(a)(3) (Additional limitation on secondary sales in first year).

Further, we are providing different requirements for secondary sales by affiliates and by non-affiliates. The final rules limit secondary sales by affiliates that occur following the expiration of the first year after an issuer's initial qualification of an offering statement to no more than $6 million, in the case of Tier 1 offerings, or no more than $15 million, in the case of Tier 2 offerings, over a 12-month period. Secondary sales by non-affiliates that are made pursuant to a qualified offering statement following the expiration of the first year after an issuer's initial qualification of an offering statement will not be limited except by the maximum offering amount permitted by either Tier 1 or Tier 2.[97] Although the secondary sales offering amount limitation will only apply to affiliates during this period, consistent with the proposal, non-affiliate secondary sales will be aggregated with sales by the issuer and sales by affiliates for purposes of calculating compliance with the maximum offering amount permissible under the respective tiers.[98]

We do not believe that the concerns expressed by one commenter about informational disadvantages that may exist with affiliate sales are present with respect to resales by non-affiliates.[99] On the contrary, in comparison to requirements for non-affiliate resales of restricted securities after the expiration of Securities Act Rule 144 holding periods,[100] we believe that Regulation A provides purchasers of such securities

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97 Rule 251(a).

98 Secondary sales of shares acquired in a Regulation A offering—which are freely tradable—are not subject to limitations on secondary sales, but must be resold under an exemption from Securities Act registration (*e.g.*, Section 4(a)(1), 15 U.S.C. 77d(a)(1)).

99 NASAA (pre-proposal) Letter.

100 Under Rule 144, non-affiliates of an issuer are, among other things, permitted to resell restricted securities after the expiration of a one-year holding period without limitations or requirements as to: (i) the availability of current public information about the issuer or its securities, (ii) the volume of resales, (iii) the manner of sale, or (iv) disclosure. *See* 17 CFR 230.144.

with the benefit of, among other things, narrative and financial disclosure that is reviewed and qualified by the Commission in transactions that are subject to Section 12(a)(2) liability and the antifraud provisions of Section 17 of the Securities Act.[101]

We also disagree with the commenters who suggested limitations on secondary sales are contrary to the legislative intent behind the enactment of Title IV of the JOBS Act. We note that Section 3(b)(2) expressly provides that the Commission may impose additional terms, conditions, or requirements as it deems necessary in the public interest and for the protection of investors.[102] For the reasons discussed above, we believe that limiting secondary sales by affiliates is not only consistent with the language and purpose of the statute but also necessary in the public interest and for the protection of investors.

Offering Limit Calculation

Under the proposal, if the offering included securities that are convertible into, or exercisable or exchangeable for, other securities (rights to acquire), the offer and sale of the underlying securities also would generally be required to be qualified,[103] and the aggregate offering price would include the aggregate conversion, exercise, or exchange price of such securities, regardless of when they become convertible, exercisable, or exchangeable.[104] Consistent with the views of at least one commenter,[105] we are concerned that the proposed requirement could have a greater impact on smaller issuers

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101 15 U.S.C. 77*l*(a)(2), 77q.

102 *See* Section 3(b)(2)(G), 15 U.S.C. 77c(b)(2)(G).

103 Qualification would not be required for securities transactions exempt from registration pursuant to Securities Act Section 3(a)(9), 15 U.S.C. 77c(a)(9). Section 3(a)(9) exempts from registration any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.

104 *See* note to proposed Rule 251(a).

105 Andreessen/Cowen Letter.

than larger issuers because smaller issuers frequently issue rights to acquire other securities in capital raising events. The proposed method of calculating the offering limit would presume the exercise price of underlying securities that, by their terms, may occur at a date in the distant future or only upon the occurrence of key events. By including all securities underlying any rights to acquire other securities in the offering limit calculation, the proposed rules could effectively limit the proceeds of an offering available to an issuer by requiring such issuers to include in the aggregate offering price at the time of qualification the securities underlying rights to acquire that may or may not become exercisable or exchangeable in the future. We are adopting final rules that will require issuers to aggregate the price of all securities for which qualification is currently being sought, including the securities underlying any rights to acquire that are convertible, exercisable, or exchangeable within the first year after qualification or at the discretion of the issuer. As such, and consistent with the treatment of rights to acquire in the context of registered offerings, if an offering includes rights to acquire other securities at a time more than one year after qualification and the issuer does not otherwise seek to qualify such underlying securities, the aggregate offering price would not include the aggregate conversion, exercise, or exchange price of the underlying securities.[106] For purposes of calculating the price of underlying securities that use a pricing formula, as opposed to a known conversion price, the issuer will be required to use the maximum estimated price for which such securities may be converted, exercised, or exchanged.[107]

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106 *See* note to Rule 251(a). In these circumstances, the securities underlying the rights to acquire would need to be separately qualified under Regulation A or, depending on the circumstances, registered, exempt from registration, or otherwise offered in an appropriate manner at the time of issuance.

107 *Id.*

Rule 251(b)

We are adopting as proposed final rules that eliminate the last sentence of Rule 251(b),[108] which prohibited affiliate resales unless the issuer had net income from continuing operations in at least one of its last two fiscal years. We agree with the views expressed by commenters that the absence of net income, by itself, is not a sufficient indicator of an enhanced risk that existing shareholders will use informational advantages to transfer their holdings to the investing public that would necessitate the continued application of the prohibition in the final rules. Further, as noted in the Proposing Release, the Commission's current disclosure review and qualification processes and enforcement programs are significantly more sophisticated and robust than they were when this provision was added to Regulation A in its original form.[109] In addition, the final rules being adopted today include revised "bad actor" disqualification provisions and additional issuer eligibility requirements aimed at limiting access to the exemption for market participants with demonstrated track records of non-compliance or abuse.[110]

4. Investment Limitation

a. Proposed Rules

Regulation A does not currently limit the amount of securities an investor can purchase in a qualified Regulation A offering. As we noted in the Proposing Release, however, we recognize that with the increased annual offering limitation provided in

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108 17 CFR 230.251(b) (2014).

109 *See* Proposing Release, at Section II.B.3.

110 *See* discussions in Section II.G (Bad Actor Disqualification) below and Section II.B.1 (Eligible Issuers) above.

Section 3(b)(2) comes a risk of commensurately greater investor losses.[111] To address that risk we proposed, among other things, to limit the amount of securities investors can purchase in a Tier 2 offering to no more than 10% of the greater of their annual income or their net worth. For this purpose, annual income and net worth would be calculated as provided in the accredited investor definition under Rule 501 of Regulation D.[112] Under the proposal, issuers would be required to make investors aware of the investment limitations,[113] but would otherwise be able to rely on an investor's representation of compliance with the proposed investment limitation unless the issuer knew, at the time of sale, that any such representation was untrue.

b. Comments on Proposed Rules

A number of commenters generally supported investment limitations for Tier 2 offerings.[114] These commenters believed that an investment limitation would serve as an important investor protection. Several commenters recommended revisiting the necessity of the limitations after a one- to three- year trial period,[115] and another commenter[116] recommended extending the investment limitation to Tier 1 offerings to make them more consistent with our proposed rules for securities-based crowdfunding transactions conducted pursuant to Section 4(a)(6) of the Securities Act.[117] Some commenters'

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111 *See* Proposing Release, at Section II.B.4.

112 17 CFR 230.501.

113 *See* paragraph (a)(5) to Part II of proposed Form 1-A.

114 CFA Institute Letter; IPA Letter; Letter from Robert Kisel, Small Business Owner, March 18, 2014 ("Kisel Letter") (erroneously referring to the 10% limit as a 5% limit); MCS Letter; REISA Letter; Richardson Patel Letter; WDFI Letter.

115 CFIRA Letter 1; Kisel Letter; Milken Institute Letter.

116 CFA Institute Letter.

117 *See* Crowdfunding, Rel. No. 33-9470 [78 FR 66427] (Nov. 5, 2013).

support for the proposed investment limitations was conditioned on suggested changes to the proposed rules that would require issuers to do more to ensure compliance with the limitations and that would impose adverse consequences on issuers for the failure to do so.[118] One commenter believed that the 10% limitation is "significantly higher" than is appropriate for "all but the wealthiest, least risk averse" investors.[119] Two commenters suggested that the 10% limitation should be aggregated across all Regulation A offerings instead of being applied on a per offering basis;[120] while one commenter specifically argued against such an aggregated limit.[121]

Numerous commenters recommended eliminating the investment limitation for Tier 2 offerings.[122] Several of these commenters alternatively recommended at least doubling the limit if the provision is not eliminated entirely.[123] Other commenters thought that the investment limitation is unnecessary in light of the other investor protections for Tier 2 offerings, such as the expanded disclosure requirements.[124] Several

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118 CFA Institute Letter; MCS Letter; WDFI Letter.

119 Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, March 24, 2014 ("CFA Letter").

120 CFA Letter (not recommending this specifically, but noting this as one reason why the investment limit was not an adequate substitute for state review of Tier 2 offerings); William A. Jacobson, Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, March 24, 2014 ("Cornell Clinic Letter").

121 KVCF Letter.

122 ABA BLS Letter; Andreessen/Cowen Letter; B. Riley Letter; CFIRA Letter 1; CFIRA Letter 2; Fallbrook Technologies Letter; Letter from Groundfloor Finance, Inc., Nov. 18, 2014 ("Groundfloor Letter"); Heritage Letter; ICBA Letter; IPA Letter; Letter from Ford C. Ladd, Esq., May 19, 2014 ("Ladd Letter 2"); Letter from John Rodenrys, Executive Director R&D, Leading Biosciences, Inc., March 24, 2014 ("Leading Biosciences Letter"); Milken Institute Letter; MoFo Letter; NASAA Letter 2; Letter from Michael L. Zuppone, Paul Hastings LLP, March 24, 2014 ("Paul Hastings Letter"); Letter from Jason Coombs, Co-Founder and CEO, Public Startup Company, Inc., April 2, 2014 ("Public Startup Co. Letter 7"); SVB Financial Letter.

123 Fallbrook Technologies Letter; Leading Biosciences Letter; ICBA Letter.

124 ABA BLS Letter; Andreessen/Cowen Letter; B. Riley Letter; MoFo Letter; Paul Hastings Letter; SVB Financial Letter.

commenters noted that the limit does not have a statutory basis and suggested that it may be contrary to Congressional intent,[125] or contrary to the principles underlying federal securities law, which focus on fraud prevention and full disclosure.[126] One commenter recommended eliminating the investment limitations only if the final rules do not preempt state law registration requirements for Tier 2 offerings, arguing that the limitations may conflict with state investor suitability standards,[127] while another commenter indicated that investment limitations would be unnecessary with appropriate state oversight, but supported limits for retail investors in startup companies and high-risk offerings.[128] Another commenter recommended creating various categories of investor sophistication with corresponding requirements and limitations for each.[129]

Many commenters, including those both for and against the investment limit, recommended providing exceptions to the limit for certain types of investors, such as accredited investors, or altering the application of the limit to such types of investors.[130] These commenters believed that the investor protections afforded by the investment limit would not be necessary for all types of investors or in all types of Regulation A offerings. Some commenters recommended eliminating the investment limit for accredited

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125 ABA BLS Letter; Andreessen/Cowen Letter; CFIRA Letter 1; Heritage Letter; MoFo Letter; WR Hambrecht + Co Letter.

126 ABA BLS Letter; B. Riley Letter; Heritage Letter; Milken Institute Letter.

127 Groundfloor Letter.

128 NASAA Letter 2.

129 Cornell Clinic Letter (recommending the tiered investment limits in our proposed rules for securities-based crowdfunding as an example).

130 ABA BLS Letter; Andreessen/Cowen Letter; Canaccord Letter; Cornell Clinic Letter; Fallbrook Technologies Letter; Heritage Letter; Ladd Letter 2; Leading Biosciences Letter; McCarter & English Letter; MCS Letter; Milken Institute Letter; MoFo Letter; Paul Hastings Letter; Richardson Patel Letter; SVB Financial Letter; WR Hambrecht + Co Letter.

investors.[131] One such commenter recommended eliminating the investment limit generally and, if not, at least for institutional investors and offerings of securities listed on securities exchanges.[132] Several commenters recommended eliminating the investment limit for non-natural persons or institutional investors.[133] Other commenters recommended eliminating the investment limits for other types of investors or offerings.[134] Two commenters noted that it would be difficult to apply the investment limits to non-natural persons (such as small businesses and IRAs) if the rules use an income or net worth test.[135] One of these commenters recommended that, if the test applies to such investors, it should be based on assets or revenue.[136]

Many commenters explicitly supported allowing issuers to rely on an investor's representation of compliance with the 10% investment limit.[137] Most of these

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131 ABA BLS Letter; Andreessen/Cowen Letter; Canaccord Letter; Fallbrook Technologies Letter;; Heritage Letter; Ladd Letter 2; Leading Biosciences Letter; McCarter & English Letter; MCS Letter; MoFo Letter; Paul Hastings Letter; Richardson Patel Letter; SVB Financial Letter; *cf.* Cornell Clinic Letter (recommending an unspecified higher limit for accredited investors); Milken Institute Letter; WR Hambrecht + Co Letter (supporting eliminating the investment limit generally).

132 Milken Institute Letter.

133 ABA BLS Letter; Canaccord Letter; Milken Institute Letter; MoFo Letter; WR Hambrecht + Co Letter. Several of these commenters believed that, as proposed, the investment limitations would not apply to non-natural persons and asked the Commission to confirm or clarify this point.

134 Cornell Clinic Letter (creating a separate, higher limit for institutional investors and other types of non-retail investors included in the "accredited investor" definition); Heritage Letter (eliminating the investment limit for "any current or former investor, employee or officer of the issuer"); Ladd Letter 2 (eliminating the investment limit for any non-accredited affiliates, founders, employees, agents, independent contractors and owners); Milken Institute Letter (eliminating the investment limit for investors that purchase Tier 2 securities on an exchange); Paul Hastings Letter (eliminating the investment limit for offerings conducted by registered broker-dealers); Richardson Patel Letter (eliminating the investment limit for any non-individual investor with at least $100,000 in assets or $100,000 in revenue in the previous fiscal year).

135 McCarter & English Letter; Richardson Patel Letter.

136 Richardson Patel Letter.

137 Fallbrook Technologies Letter; Heritage Letter; IPA Letter; KVCF Letter; Leading Biosciences Letter; REISA Letter.

commenters stated that any more rigorous verification process would cause the compliance costs to be too high. One commenter recommended eliminating any obligation for the issuer to monitor the 10% investment limit and allowing the issuer to rely on a representation by the investor that he or she will notify the issuer upon exceeding the 10% limit.[138] Another commenter recommended permitting an issuer to rely on representations from its underwriters or broker-dealers as to the 10% investment limit, rather than having to seek this directly from investors.[139] This commenter believed that the issuers in most Tier 2 offerings would have little direct contact with the investors and that the intermediaries would be better positioned to assess compliance (possibly already having information about the investor's finances).

Several commenters disagreed with allowing investors to represent compliance with the investment limitation and recommended a standard that would require an issuer to do more to ensure compliance.[140] Two commenters recommended adopting a standard requiring issuers to take reasonable steps to verify that the purchasers are in compliance with the 10% investment limit.[141] Two commenters recommended requiring an issuer to have a "reasonable belief" or "reasonable basis" that it can rely on an investor's representation of compliance with the 10% investment limit.[142] One such commenter also suggested allowing accredited investors to exceed the 10% investment limit, but

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138 REISA Letter.

139 KVCF Letter.

140 Letter from Paul Sigelman, President & CEO, Accredited Assurance, March 24, 2014 ("Accredited Assurance Letter"); CFA Letter; CFA Institute Letter; Cornell Clinic Letter; MCS Letter; WDFI Letter.

141 Accredited Assurance Letter; WDFI Letter.

142 CFA Institute Letter; MCS Letter.

requiring that the issuer take reasonable steps to verify accredited investor status.[143] One commenter recommended requiring a "duty of inquiry" so that the issuer would have to follow-up on any "red flags."[144] Additionally, this commenter recommended that the Commission create an independent and secure means of verifying investor income or to require a mandatory questionnaire for individual investors to complete before buying a security issued under Regulation A.

c. **Final Rules**

We are adopting an investment limitation for Tier 2 offerings in the final rules, with minor modifications from the proposed rules. We believe that the investment limitation serves as an important investor protection and may help to mitigate the risk that with the increased annual offering limitation provided in Section 3(b)(2) comes a risk of commensurately greater investor losses. We do not believe that the limitation is needed for accredited investors because investors that qualify as accredited under our rules satisfy certain criteria that suggest they are capable of protecting themselves in transactions that are exempt from registration under the Securities Act.[145] We also do not believe that the limitation is necessary for investments in securities that will be listed on a national securities exchange upon qualification because of the issuer listing requirements and the potential liquidity that exchanges provide to investors that seek to reduce their holdings. These both are important investor protections that help to mitigate concerns

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143 MCS Letter.

144 Cornell Clinic Letter.

145 *See* Rule 501(a) of Regulation D, 17 CFR 230.501(a); *see also SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

about the magnitude of loss that could potentially result from an investor purchasing a large amount of securities in a single offering.

Under the final rules, the investment limitations for purchasers in Tier 2 offerings will not apply to purchasers who qualify as accredited investors under Rule 501 of Regulation D.[146] Further, investment limitations in a Tier 2 offering will not apply to the sale of securities that will be listed on a national securities exchange upon qualification since such issuers will be required to meet the listing standards of a national securities exchange[147] and become subject to ongoing Exchange Act reporting, resulting in additional investor protections.

In response to questions raised by commenters, we are clarifying that non-accredited, non-natural persons are subject to the investment limitation and should calculate the limitation based on no more than 10% of the greater of the purchaser's revenue or net assets (as of the purchaser's most recent fiscal year end).[148] Non-accredited, natural persons must calculate the investment limitations on the basis of

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146 *See* Rule 252(c)(2). Under Rule 501, natural persons are accredited investors if: (i) their income exceeds $200,000 in each of the two most recent years (or $300,000 in joint income with a person's spouse), and they reasonably expect to reach the same income level in the current year; (ii) they serve as executives or directors of the issuer; or (iii) their net worth exceeds $1,000,000 (individual or jointly with a spouse), excluding the value of their primary residence. Certain enumerated entities that satisfy an asset-based test also qualify as accredited investors, while others, including regulated entities such as banks and registered investment companies, are not subject to the asset test. *See* 17 CFR 230.501. The accredited investor definition is intended to encompass those individuals and entities "whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary." *See, e.g.*, Rel. No. 33-6683 (Jan. 16, 1987) [52 FR 3015] (Regulation D Revisions; Exemption for Certain Employee Benefit Plans).

147 National securities exchanges impose certain requirements on issuers, in addition to those generally required by the Commission, in order for an issuer's securities to be approved for listing. *See* discussion of listing requirements for, and additional investor protections associated with, national securities exchanges in Section II.E.3.c. below; *see also* fns. 721, 722 below.

148 Rule 251(d)(2)(i)(C)(*1*).

10% of the greater of the purchaser's annual income or net worth (determined as provided in Rule 501 of Regulation D).[149]

If the investor is purchasing securities that are convertible into, or exercisable or exchangeable for, other securities, if such securities are exercisable within a year or otherwise are being qualified, the investment limitation will include the aggregate conversion, exercise, or exchange price of such securities, in addition to the purchase price.[150] We believe this is an appropriate calculation because it is consistent with the offering limit calculation for the respective tiers[151] and because it applies investment limitations to reasonably foreseeable investment decisions (*i.e.*, those involving securities exercisable within a year or otherwise qualified by the issuer) while reducing the risk that issuers may seek to sell large amounts of securities that are convertible, exercisable or exchangeable into other securities in the near term at a low cost in an effort to avoid the 10% limitation.

As proposed, we are adopting final rules that require issuers to notify investors of the investment limitations.[152] Issuers may rely on a representation of compliance with the investment limitation from the investor, unless the issuer knew at the time of sale that any such representation was untrue.[153] As we noted in the Proposing Release, we are cognizant of the privacy issues and practical difficulties associated with verifying

149 Rule 251(d)(2)(i)(C)(*2*). *See* Securities Act Rule 501(a)(5) [17 CFR 230.501(a)(5)] (net worth). Consistent with this rule, the calculation of a natural person's net worth for purposes of the investment limit excludes the value of the primary residence of such person.

150 *See* note to Rule 251(d)(2)(i).

151 *See* discussion in Section II.B.3.c. above.

152 *See* paragraph (a)(5) to Part II of Form 1-A.

153 Rule 251(d)(2)(i)(D). Similarly, issuers may also rely on representations of investor compliance with the investment limitations from participating broker-dealers, unless the issuer knew at the time of sale that any such representation was untrue.

individual income and net worth and, therefore, are not requiring investors to disclose personal information to issuers in order to verify compliance.[154]

Some commenters suggested requiring an issuer to have a reasonable belief that it can rely on an investor's representation of compliance with the investment limitations or to take reasonable steps to verify compliance, while other commenters suggested we establish consequences for issuers (and intermediaries, when applicable) if an investor failed to comply with the limitations.[155] At the same time, many commenters supported the proposed approach, noting the low compliance costs and the certainty it would provide issuers and their intermediaries.[156] We believe that the rules, as adopted, will limit potential losses for non-accredited investors with respect to individual offerings, while providing certainty to, and lower compliance costs for, issuers and intermediaries.

We do not believe that additional requirements for issuers and their intermediaries, such as requiring issuers to take reasonable steps to verify an investors' compliance with the investment limitations, are necessary to protect investors in light of the total package of investor protections included in the final rules for Tier 2 offerings.[157] We believe that additional requirements, like the ones suggested by some commenters, may have an unintended consequence of dissuading issuers from selling to non-accredited investors in Tier 2 offerings by increasing compliance uncertainties and

154 *See* Proposing Release, at Section II.B.4.

155 *See* fn. 140-144 above.

156 *See* fn. 137 above.

157 For example, the final rules include limitations on issuer eligibility, bad actor disqualification provisions, a requirement that offering statements must be qualified by the Commission, narrative and financial disclosure requirements, which for Tier 2 offerings must include audited financial statements on an initial and annual basis, as well as annual, semiannual, and current event reporting.

obligations. We are therefore not adopting any additional compliance requirements with respect to investment limitations in the final rules.

While many commenters urged the Commission to eliminate or provide less restrictive investment limitations in the final rules,[158] we believe that these requirements, as proposed and adopted, usefully augment other requirements for, and investor protections applicable to, Tier 2 offerings. As we noted in the Proposing Release, Title IV of the JOBS Act mandates certain investor protections[159] and suggests that the Commission consider others as part of its Section 3(b)(2) rulemaking.[160] Congress recognized in Section 3(b)(2) that investor protections beyond those expressly provided in Title IV of the JOBS Act may be necessary in the revised regulation. To that end, Section 3(b)(2)(G) indicates that the Commission may include in the expanded exemption "such other terms, conditions, or requirements . . . necessary in the public interest and for the protection of investors . . . ." Limiting the amount of securities that a non-accredited investor can purchase in a particular Tier 2 offering (other than a Tier 2 offering of securities listed on a national securities exchange) should help to mitigate concerns that such investors may not be able to absorb the potential loss of the investment and is consistent with the authority granted to the Commission in

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158 *See* fn. 122 above.

159 *See* Section 3(b)(2)(D) (expressly providing for Section 12(a)(2) liability for any person offering or selling Section 3(b)(2) securities); Section 3(b)(2)(F) (requiring issuers to file audited financial statements with the Commission annually).

160 *See* Section 3(b)(2)(G) (inviting the Commission to consider, among other things, requiring audited financial statements in the offering statement and implementing bad actor disqualification provisions); Section 3(b)(4) (inviting the Commission to consider implementing ongoing reporting requirements).

Section 3(b)(2).[161] We further believe that setting the investment limitation at 10% of the greater of such investor's net worth/net assets and annual income/revenue, as opposed to some other percentage (*e.g.*, 5% or 20%), is generally consistent with similar maximum investment limitations placed on investors in Title III of the JOBS Act and will help to set a loss limitation standard in such offerings.[162]

Despite the suggestions of some commenters,[163] we do not believe that further distinctions as to the applicability of investment limitations are appropriate among investors that do not qualify as accredited investors. On the contrary, we believe that the regulatory distinctions among accredited and non-accredited investors and the familiarity many market participants have with such terms will help to ease compliance with, and determinations about the applicability of, the investment limitations and will avoid unnecessary complexity associated with other, additional distinctions.

5. Integration

a. Proposed Rules

We proposed amending Rule 251(c) of Regulation A, which governs the integration of Regulation A offerings with other offerings, to provide that offerings under Regulation A would not to be integrated with any of the following:[164]

- prior offers or sales of securities; or

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161 As proposed and adopted, an underwriter in a firm commitment underwritten Regulation A offering, or participating broker-dealer that is involved in stabilization activities with respect to an offering of Regulation A securities will not be considered an investor that is subject to the investment limitations.

162 Section 301 of the JOBS Act; *see also* Securities Act Section 4(a)(6), 15 U.S.C. 77d(a)(6).

163 *See* fn. 134 above.

164 The integration doctrine seeks to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings such that Securities Act exemptions would apply to multiple offerings that would not be available for the combined offering.

- certain specified subsequent offers and sales of securities.[165]

The proposed safe harbor was substantially the same as the existing integration safe harbor in Rule 251(c), with the addition of a separate provision for securities-based crowdfunding transactions conducted pursuant to Section 4(a)(6) of the Securities Act.[166]

We further proposed to amend Rule 254(d) to provide that, where an issuer decides to register an offering after soliciting interest in a contemplated, but abandoned, Regulation A offering, any offers made pursuant to Regulation A would not be subject to integration with the registered offering, unless the issuer engaged in solicitations of interest in reliance on Regulation A to persons other than qualified institutional buyers (QIBs)[167] and institutional accredited investors permitted by Section 5(d)[168] of the Securities Act.[169] As proposed, an issuer (and any underwriter, broker, dealer, or agent that is acting on behalf of the issuer in connection with the proposed offering) soliciting interest in a Regulation A offering to persons other than QIBs and institutional accredited investors would need to wait at least 30 calendar days between the last such solicitation of interest in the Regulation A offering and the filing of the registration statement with

165 *See* proposed Rule 251(c), which included in the safe harbor subsequent offers or sales that are registered under the Securities Act, or made pursuant to Securities Act Rule 701, an employee benefit plan, Regulation S, proposed Regulation Crowdfunding (*see* Rel. No. 33-9470), or more than six months after completion of the Regulation A offering.

166 Section 4(a)(6) was added to the Securities Act by Section 302 of the JOBS Act.

167 QIBs are large institutions meeting specific requirements outlined in Rule 144A, or entities the seller (or a person acting on its behalf) reasonably believes to be QIBs. *See* Rule 144A, 17 CFR 230.144A.

168 15 U.S.C. 77e(d); *see also* fn. 537 below.

169 Proposed Rule 255(e).

the Commission.[170] The Proposing Release also provided guidance on the applicability of the integration doctrine for offerings conducted outside the scope of the safe harbor.[171]

b. Comments on the Proposed Rules

One commenter specifically supported the proposed changes to the integration provisions of Regulation A.[172] Another commenter objected to the proposed changes to the integration provisions and related guidance.[173] This commenter cautioned that it would be very difficult to police compliance with these provisions and suggested that they would be used to evade regulatory requirements.

c. Final Rules

We are adopting, as proposed, an integration safe harbor, with one clarifying change. Under the final rules, offerings pursuant to Regulation A will not be integrated with:

- prior offers or sales of securities; or
- subsequent offers and sales of securities that are:
  - registered under the Securities Act, except as provided in Rule 255(c);
  - made pursuant to Rule 701 under the Securities Act;
  - made pursuant to an employee benefit plan;
  - made pursuant to Regulation S;
  - made pursuant to Section 4(a)(6) of the Securities Act; or
  - made more than six months after completion of the Regulation A

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170 *Id.*

171 *See* Proposing Release, Section II.B.5.

172 ABA BLS Letter.

173 CFA Letter.

offering.[174]

We believe that the integration safe harbor has historically provided and, as amended, will continue to provide, issuers, particularly smaller issuers whose capital needs often change, with valuable certainty as to the contours of a given offering and their eligibility for an exemption from Securities Act registration. The addition of subsequent offers or sales made pursuant to Section 4(a)(6), which is the only substantive change to the existing safe harbor being adopted today, should not significantly alter the application of the doctrine in practice. Given the unique capital formation method available to issuers and investors through Section 4(a)(6) of the Securities Act and the small dollar amounts involved, we believe that the addition to the safe harbor list of subsequent crowdfunding offers and sales conducted pursuant to such section is appropriate and will not unduly increase risks to investors.[175] As with any exemption from registration, the burden of proof of compliance with a claimed exemption rests with the party claiming it.[176] In our view, the benefits of providing issuers with certainty as to the scope of the integration doctrine, particularly for Regulation A, outweighs the concern expressed by one commenter that compliance with the doctrine may be difficult to enforce.[177] In light of the broad permissible target audience of Regulation A solicitations, the potential for expanded use of solicitation materials in Regulation A discussed more fully in Section II.D. below, and the addition of similar provisions for registered offerings under Section 5(d), we believe the integration provisions in the final

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174 Rule 251(c).

175 *See* 15 U.S.C.77d(a)(6); *see also* Rel. No. 33-9470.

176 *See Ralston Purina Co.*, 346 U.S. 119.

177 CFA Letter.

rule are necessary to ensure that amended Regulation A functions as a viable capital raising option for issuers.

We are also clarifying in the final rules the scope of the proposed safe harbor from integration in instances where an issuer abandons a contemplated Regulation A offering before qualification, but after soliciting interest in such offering to persons other than QIBs and institutional accredited investors. The proposed language could be read to imply that issuers must wait at least 30 calendar days to avoid integration with a subsequent registered offering or else be subject to integration. The final rules clarify that waiting less than 30 calendar days before a subsequent registered offering would not necessarily result in integration and would instead depend on the particular facts and circumstances.[178]

We are also reaffirming the integration guidance provided in the Proposing Release, which is consistent with guidance provided by the Commission in a 2007 rule proposal on Regulation D.[179] As noted in the Proposing Release, we believe that an offering made in reliance on Regulation A should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the exemption that is being relied upon for the particular offering. For example, an issuer conducting a concurrent exempt offering for which general solicitation is not

178 *See* Note to Rule 251(c) and Rule 255(e); *see also* Section II.D. below for a discussion on solicitation materials.

179 *See* Revision of Limited Offering Exemptions in Regulation D, Release No. 33-8828 (Aug. 3, 2007) (expressing the view that the determination as to whether the filing of the registration statement should be considered to be a general solicitation or general advertising that would affect the availability of an exemption under Securities Act Section 4(a)(2) for such a concurrent unregistered offering should be based on a consideration of whether the investors in the private placement were solicited by the registration statement or through some other means that would otherwise not foreclose the availability of the Section 4(a)(2) exemption).

permitted will need to be satisfied that purchasers in that offering were not solicited by means of the offering made in reliance on Regulation A, including without limitation any "testing the waters" communications.[180] Alternatively, an issuer conducting a concurrent exempt offering for which general solicitation is permitted, for example, under Rule 506(c), could not include in any such general solicitation an advertisement of the terms of a Regulation A offering, unless that advertisement also included the necessary legends for, and otherwise complied with, Regulation A.[181]

6. Treatment under Section 12(g)

a. Proposed Rules

Exchange Act Section 12(g) requires, among other things, that an issuer with total assets exceeding $10,000,000 and a class of equity securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class of securities with the Commission.[182] We did not propose to exempt Regulation A securities from mandatory registration under Section 12(g), but we solicited comment on whether Regulation A securities should be granted such an exemption, either conditionally or otherwise.

b. Comments on Proposed Rules

Commenters generally expressed support for some form of exemption from the registration requirements under Section 12(g). Numerous commenters recommended

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[180] For a concurrent offering under Rule 506(b), an issuer will have to conclude that purchasers in the Rule 506(b) offering were not solicited by means of a Regulation A general solicitation. For example, the issuer may have had a preexisting substantive relationship with such purchasers. Otherwise, the solicitation conducted in connection with the Regulation A offering may preclude reliance on Rule 506(b). *See also* Rel. No. 33-8828 (Aug. 3, 2007) [72 FR 45116].

[181] *See* discussion in Section II.D. below.

[182] 15 U.S.C. 78*l*(g).

exempting Regulation A securities from Section 12(g).[183] Several of these commenters expressed concern that the Section 12(g) record holder count would decrease the utility of the Regulation A exemption by incentivizing issuers to sell to accredited investors over non-accredited investors, likely resulting in issuers electing to rely on a potentially less costly exemption, such as Rule 506 of Regulation D.[184] These commenters also expressed concern that Section 12(g) would decrease the utility of the exemption because secondary trading in otherwise unrestricted Regulation A securities might result in issuers inadvertently crossing the Section 12(g) registration threshold.[185] Other commenters questioned the extent to which Regulation A securities would be held in street name through brokers, which the proposal mentions as a factor that could potentially limit the impact of not proposing an exemption from Section 12(g).[186] Some commenters suggested that the reporting regime under Tier 2 would be a sufficient means by which issuers could provide investors with current information and that therefore Exchange Act

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183 B. Riley Letter; CFIRA Letter 1; CFIRA Letter 2; Fallbrook Technologies Letter; Letter from Jonathan Frutkin, Principal, The Frutkin Law Firm, PLC, March 24, 2014 ("Frutkin Law Letter"); Guzik Letter 1; Letter from Samuel S Guzik, October 25, 2014 ("Guzik Letter 2"); Heritage Letter; IPA Letter; Ladd Letter 2; Milken Institute Letter; MoFo Letter; SBIA Letter (recommending that the trigger be "raised or remedied," but not explicitly calling for elimination); US Alliance Corp. Letter; U.S. Chamber of Commerce Letter; WR Hambrecht + Co Letter.

184 CFIRA Letter 1; Fallbrook Technologies Letter; Frutkin Law Letter; Heritage Letter; IPA Letter; Milken Institute Letter; MoFo Letter; SBIA Letter; U.S. Chamber of Commerce Letter.

185 *Id.*

186 Guzik Letter 1 (noting the statements of other commenters); Heritage Letter; Ladd Letter 2 (citing discussions with various brokers); MoFo Letter; SBIA Letter; WR Hambrecht + Co Letter; *see also* OTC Markets Letter (highlighting difficulties associated with issuer securities becoming eligible for Depository Trust Company (DTC) services, which services typically limit the number of an issuer's record holders thereby minimizing the impact of the Section 12(g) mandatory registration provisions; further suggesting that companies issuing Regulation A securities be required to use registered transfer agents).

reporting would be unnecessary.[187] Two commenters believed that the legislative history of the JOBS Act supported an exemption from Section 12(g).[188]

Several commenters recommended changing, delaying, or conditioning the application of Section 12(g)'s registration requirements, especially the corresponding Section 13 reporting obligations that come with registration.[189] One of these commenters recommended delaying the application of Exchange Act reporting requirements for Tier 2 issuers until the issuer's non-affiliate market capitalization reached $250 million, so long as the issuer filed reports under Regulation A.[190] This commenter believed that non-affiliate market capitalization was a superior proxy for market interest than the thresholds under Section 12(g) and noted that the Commission uses the measure in establishing primary S-3 eligibility. Another commenter recommended exempting initial Tier 2 issuers from all or part of Exchange Act reporting obligations until the earliest of the occurrence of several events.[191] Yet another commenter suggested exempting Tier 2 issuers from Exchange Act reporting until they reach a certain unspecified level of revenue or market capitalization.[192] Two commenters recommended deeming Tier 2 issuers' ongoing reports under Regulation A to satisfy the issuer's Exchange Act

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187 B. Riley Letter; Fallbrook Technologies Letter; Milken Institute Letter; MoFo Letter.

188 Ladd Letter 2; WR Hambrecht + Co Letter.

189 Heritage Letter; KVCF Letter; McCarter & English Letter; Milken Institute Letter; MoFo Letter; Paul Hastings Letter; SBIA Letter.

190 Paul Hastings Letter.

191 McCarter & English Letter (suggesting the earliest of: (1) the last day of any fiscal year of the issuer during which it had annual gross revenues of $250 million; (2) the last day of any fiscal year following the fifth anniversary of the date of the first sale of equity securities under Regulation A; and (3) the date on which the issuer has an aggregate worldwide market value of voting and non-voting equity held by its non-affiliates of at least $75 million computed as of the last business day of the issuer's most recently completed second quarter).

192 Milken Institute Letter.

reporting obligations for a phase-in period.[193] One commenter recommended at least allowing for 2,000 holders of record (whether accredited or not) without being subject to Exchange Act registration requirements,[194] while two other commenters suggested eliminating the cap of 500 non-accredited investors.[195] One commenter conditioned its support for a conditional exemption from Section 12(g) on the Commission requiring Tier 2 issuers to remain current in their ongoing Regulation A reporting requirements.[196]

c. Final Rules

We are adopting today final rules that exempt securities issued in a Tier 2 offering from the provisions of Section 12(g) for so long as the issuer remains subject to, and is current in (as of its fiscal year end),[197] its Regulation A periodic reporting obligations.[198] Additionally, in order for the conditional exemption to apply, issuers are required to engage the services of a transfer agent registered with the Commission pursuant to Section 17A of the Exchange Act. The final rules also provide that the exemption from Section 12(g) is only available to companies that meet requirements similar to those in the "smaller reporting company" definition under Securities Act and Exchange Act

193 ABA BLS Letter (a 24 month phase-in period that could expire earlier if the company triggered Exchange Act reporting in some other manner); MoFo Letter.

194 Heritage Letter.

195 KVCF Letter; SBIA Letter.

196 MoFo Letter.

197 The determination as to "current" reporting status is determined at the time of fiscal year end in reference to the filing of all periodic reports, including special financial reports, required to be filed during such fiscal year. For these purposes, a newly qualified issuer that at fiscal year end has not yet been obligated to file a periodic report, including, if applicable, a special financial report, would be considered "current" for these purposes.

198 Rule 12g5-1(a)(7).

rules.[199] As such, the conditional exemption in the final rules is limited to issuers that have a public float of less than $75 million, determined as of the last business day of its most recently completed semiannual period,[200] or, in the absence of a public float, annual revenues of less than $50 million, as of the most recently completed fiscal year.[201] An issuer that exceeds either of the thresholds, in addition to exceeding the threshold in Section 12(g) of the Exchange Act, would be granted a two-year transition period before it would be required to register its class of securities pursuant to Section 12(g), provided it timely files all ongoing reports due pursuant to Rule 257 during such period.[202] Section 12(g) registration will only be required if, on the last day of the fiscal year in which the company exceeded the public float or annual revenue threshold, the company has total assets of more than $10 million and the class of equity securities is

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199 "Smaller reporting company" is defined in Securities Act Rule 405, 17 CFR 230.405, Exchange Act Rule 12b-2, 17 CFR 240.12b-2, and Item 10(f)(1) of Regulation S-K, 17 CFR 229.10(f)(1). The provision of the smaller reporting company definition relating to initial registration statements under the Securities Act is not applicable to exempt offering pursuant to Regulation A. *See* Item 10(f)(1)(a)(ii) of Regulation S-K, 17 CFR 229.10(f)(a)(ii). The final rules do not therefore incorporate this concept for purposes of Rule 12g5-1(a)(7). *See* Rule 12g5-1(a)(7).

200 Consistent with the smaller reporting company definition, an issuer will calculate "public float" by multiplying the aggregate worldwide number of shares of its common equity securities held by non-affiliates by the price at which such securities were last sold (or the average bid and asked prices of such securities) in the principal market for such securities. Rule 12g5-1(a)(7). *See also*, *e.g.*, Item 10(f)(1)(i) of Regulation S-K.

201 Rule 12g5-1(a)(7). The Commission adopted the smaller reporting company regime in 2007. *See* SEC Rel. No. 33-8876 (Dec. 19, 2007) [73 FR 934]. Some commentators, such as the Commission's Advisory Committee on Small and Emerging Companies, have suggested that the Commission revisit the smaller reporting company regime, including the definitional thresholds. *Recommendations Regarding Disclosure and Other Requirements for Smaller Public Companies*, Securities and Exchange Commission, Advisory Committee on Small and Emerging Companies (February 1, 2013), at 2-3, *available at:* http://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-smaller-public-co-ltr.pdf. Although the Commission has not yet responded to this recommendation, in considering any potential changes to the smaller reporting company regime, we would expect to consider whether corresponding changes to the thresholds included in Rule 12g5-1(a)(7) should also be made, taking into account how the Regulation A regime is working.

202 *Id.*

held by more than 2,000 persons or 500 persons who are not accredited investors.[203] In such circumstances, an issuer that exceeds the thresholds in Section 12(g) and Rule 12g5-1(a)(7) would be required to begin reporting under the Exchange Act the fiscal year immediately following the end of the two-year transition period.[204] An issuer entering Exchange Act reporting will be considered an "emerging growth company" to the extent the issuer otherwise qualifies for such status.[205]

In determining to provide a conditional exemption from the provisions of Section 12(g), we have considered a number of factors. First, we believe the conditional exemption we are adopting today is consistent with the intent behind the original enactment of Section 12(g) to the extent it ensures that relevant information about issuers will be made routinely available to investors and the marketplace.[206] Second, we believe the additional requirement that Regulation A issuers use a registered transfer agent will provide an important investor protection in this context. The use of a transfer agent registered under the Exchange Act, which, in the absence of a conditional exemption from the provisions of Section 12(g), would be required of issuers when they register under the Exchange Act, will provide added comfort that securityholder records and secondary trades will be handled accurately. Third, we believe that phasing out the

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203 15 U.S.C. 78*l*(g).

204 *Id.* *See* Section II.E.4.b(2). below for a discussion on suspension or termination of the duty to file ongoing reports pursuant to Rule 257.

205 *See* fn. 726 below and accompanying text.

206 Section 12(g) was originally enacted by Congress as a way to ensure that investors in over-the-counter securities about which there was little or no information, but which had a significant shareholder base, were provided with ongoing information about their investment. *See, generally, Report of the Special Study of Securities Markets of the Securities and Exchange Commission*, House Document No. 95, House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (1963), at 60-62

exemption once companies grow and expand their shareholder base is consistent with the intent behind Title IV of the JOBS Act, which was enacted to facilitate smaller company capital formation.[207] Finally, we are concerned that, as commenters suggested, the lack of an exemption from mandatory registration under the Exchange Act may undermine the utility of amended Regulation A either by discouraging use of the exemption altogether or by dissuading issuers from making sales to non-accredited investors in Regulation A offerings in an effort to avoid the application of Section 12(g).

While we believe, as we noted in the Proposing Release, that the Section 12(g) record holder threshold continues to provide an important baseline above which issuers should generally be subject to the disclosure obligations of the Exchange Act, we are persuaded that this need not be the case where an issuer is a smaller company that is subject to, and current in, its periodic reporting obligations under Tier 2 of Regulation A and engages the services of a transfer agent that is registered with the Commission under the Exchange Act. Regulation A, as amended in the final rules, requires issuers that conduct Tier 2 offerings to provide periodic disclosure to their investors and updates for certain important corporate events.[208] While such reports provide less information than is required of an Exchange Act reporting company, we believe a conditional exemption from registration under Section 12(g) is warranted for smaller Tier 2 issuers since such companies are required to provide investors with ongoing information about themselves and the securities offered, and the ongoing reporting regime we are adopting today is

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207 *See, e.g.*, H.R. Rep. No. 112-206 (2011), at 4 ("Small companies are critical to economic growth in the United States. Amending Regulation A to make it viable for small companies to access capital will permit greater investment in these companies, resulting in economic growth and jobs.").

208 *See* Rule 257.

more appropriately tailored for such companies. Additionally, in order to address situations where an issuer that conducts a Tier 2 offering could remain subject to its ongoing reporting requirements indefinitely and thereby avoid having to comply with Exchange Act reporting requirements regardless of the size of its shareholder base, we note that the exemption from Section 12(g) is conditional and that an issuer that does not meet its conditions, including the limitation on public float and annual revenues, will be required to register under the Exchange Act.

C. Offering Statement

Section 3(b)(2)(G)(i) gives the Commission discretion to require an offering statement in such form and with such content as it determines necessary in the public interest and for the protection of investors.[209] The provision permits electronic filing of offering statements, and provides a non-exhaustive list of potential content that may be required in the offering statement, including audited financial statements, a description of the issuer's business operations, financial condition, corporate governance principles, use of investor funds, and other appropriate matters.

1. Electronic Filing; Delivery Requirements

a. Proposed Rules

Consistent with the language of Section 3(b)(2)(G)(i), we proposed to require Regulation A offering statements to be filed with the Commission electronically on EDGAR.[210] We further proposed to amend Form 1-A, but to continue to have the form consist of three parts:

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209 15 U.S.C. 77c(b)(2)(G)(i).

210 *See* proposed Rule 252(e).

- Part I: an eXtensible Markup Language (XML) based fillable form;
- Part II: a text file attachment containing the body of the disclosure document and financial statements; and
- Part III: text file attachments, containing the signatures, exhibits index, and the exhibits to the offering statement.[211]

We further proposed to require all other documents required to be submitted or filed with the Commission in conjunction with a Regulation A offering, such as ongoing reports, to be submitted or filed electronically on EDGAR.[212]

Additionally, we proposed an access equals delivery model for Regulation A final offering circulars.[213] Under the proposed rules, issuers would be required to include a notice in any preliminary offering circular used that would inform potential investors that the issuer may satisfy its delivery obligations for the final offering circular electronically.[214] As with registered offerings, we also proposed aftermarket delivery obligations for dealers that would be satisfied if the final offering circular is filed and available on EDGAR and the appropriate notice was given by the dealer.[215]

Consistent with prior Commission releases on the use of electronic media for delivery purposes, we proposed that "electronic-only" offerings of Regulation A securities

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211 *See* Proposing Release, at Section II.C.1.

212 *Id.*

213 *Id.*

214 *See* proposed Rule 254(a).

215 As proposed, a dealer would generally be required to deliver a copy of the current offering circular to purchasers for all sales that occur within 90 calendar days after qualification, although this requirement would be satisfied when the final offering circular is filed and available on EDGAR and the dealer has otherwise complied with the obligation to deliver a notice of sales to the purchaser not later than two business days after completion of such sale. *See* proposed Rules 251(d)(2)(ii)-(iii).

would not be prohibited, but an issuer and its participating intermediaries would have to obtain the consent of investors to the electronic delivery of:

- the preliminary offering circular and other information, but not the final offering circular, in instances where, upon qualification, the issuer plans to sell Regulation A securities based on offers made using a preliminary offering circular; and
- all documents and information, including the final offering circular, when the issuer sells Regulation A securities based on offers conducted during the post-qualification period using a final offering circular.[216]

We further proposed to maintain the existing requirements in Regulation A, which require dealers to deliver a copy of the current offering circular to purchasers for sales that take place within 90 calendar days after qualification.[217] We proposed to update and amend Rule 251(d)(2)(i)[218] to require issuers and participating broker-dealers to deliver only a preliminary offering circular to prospective purchasers[219] at least 48 hours in advance of sale when a preliminary offering circular is used during the prequalification period to offer such securities to potential investors. We also proposed to continue to require a final offering circular to accompany or precede any written communication that constitutes an offer in the post-qualification period.[220]

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216 *See* Proposing Release, at Section II.C.1.

217 *See* proposed Rule 251(d)(2)(iii).

218 17 CFR 230.251(d)(2)(i) (2014).

219 *See* proposed Rule 251(d)(2)(i).

220 *See* proposed Rule 251(d)(1)(iii).

In addition to the revised delivery requirements discussed above, we proposed to add a provision analogous to Rule 173,[221] which would require issuers, underwriters, and dealers, not later than two business days after completion of a sale, to provide purchasers with a copy of the final offering circular or a notice stating that the sale occurred pursuant to a qualified offering statement.[222] As proposed, the notice must include the website address[223] where the final offering circular, or the offering statement of which such final offering circular is part, may be obtained on EDGAR and contact information sufficient to notify a purchaser how it may request and receive a final offering circular from the issuer.[224]

We further proposed to allow an issuer to withdraw an offering statement, with the Commission's consent, if none of the securities that are the subject of such offering statement has been sold and such offering statement is not the subject of a Commission order temporarily suspending a Regulation A exemption. Under the proposed rules, the Commission also would be able to declare an offering statement abandoned if the offering statement has been on file with the Commission for nine months without amendment and has not become qualified. These withdrawal and abandonment procedures are similar to the ones that apply to registration statements under the Securities Act.[225]

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221 17 CFR 230.173.

222 *See* proposed Rule 251(d)(2)(ii).

223 In the case of an electronic-only offering, the notice must include an active hyperlink to the final offering circular or to the offering statement of which such final offering circular is part.

224 *See* proposed Rule 251(d)(2)(ii).

225 *See* Securities Act Rule 477, 17 CFR 230.477, and Rule 479, 17 CFR 230.479.

b. Comments on the Proposed Rules

No commenters opposed the proposed requirement that issuers be required to file offering statements and related material electronically with the Commission on EDGAR, while two commenters expressly supported such a requirement.[226] One commenter recommended only requiring preliminary or final offering circular delivery 48 hours in advance of sale for initial public offerings and not for offerings by issuers that are already subject to Tier 2 ongoing reporting requirements.[227] This commenter also recommended eliminating dealer offering circular delivery requirements for Tier 2 issuers that are subject to ongoing reporting.

A few commenters opposed an access equals delivery model of final offering circular delivery.[228] These commenters raised concerns about the perceived challenge of finding these materials on EDGAR and not requiring delivery 48 hours in advance of sale in all circumstances.

One commenter recommended, in addition to requiring electronic filing on EDGAR, requiring issuers to maintain a corporate web site where the public may access copies of all non-confidential filings in a timely manner so that investors not familiar with EDGAR may access the most complete information provided to the Commission.[229] In addition to suggested changes to the filing process itself, several commenters

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[226] *See* MCS Letter; OTC Markets Letter.

[227] Paul Hastings Letter.

[228] Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

[229] Ladd Letter 2.

encouraged the Commission to find ways to reduce the staff's review time for offering statements.[230]

c. **Final Rules**

(1) **Filing Requirements**

We are adopting provisions for electronic filing and delivery requirements in the final rules for Regulation A substantially as proposed.[231] We agree with commenters that support requiring electronic filing of offering and related materials and believe that this requirement will ultimately benefit issuers and investors by streamlining the offering process. As adopted, issuers must file their Regulation A offering statements with the Commission electronically on EDGAR.[232] Further, as proposed, we are amending Form 1-A to consist of the following three parts:

- Part I: an eXtensible Markup Language (XML) based fillable form, which captures key information about the issuer and its offering using an easy to complete online form, similar to Form D, with drop-down menus, indicator boxes or buttons, and text boxes, and assists issuers in determining their ability to rely on the exemption. The XML-based fillable form will provide a convenient means of assembling and transmitting information to EDGAR,

230 Frutkin Law Letter; Heritage Letter (suggesting that the review time needs to be reduced by two-thirds); Letter from Gregory S. Fryer, Esq., Partner, Verrill Dana LLP, February 28, 2014 ("Verrill Dana Letter 1") (recommending providing guidance to issuers, staff training, and more discretion to the staff to make materiality determinations and to work informally with issuers); Letter from Ted J. Coombs, Chief Technology Officer, Workers On Call, March 24, 2014 ("WOC Letter").

231 In conjunction with the adoption of final rules for electronic filing and delivery, we are making clarifying revisions to the proposed rules that renumber some of the proposed provisions in the final rules. *See*, *e.g.*, Rule 251(e), (f) (originally proposed Rules 252(c), (e), respectively).

232 *See* Rule 101(a)(vii), (xvii) of Regulation S-T, 17 CFR 232.101(a)(xvii); *see also* Rule 251(f). As proposed, and in conjunction with this change, Item 101(c)(6) of Regulation S-T (17 CFR 232.101(c)(6)) is revised so that it no longer prohibits electronic submission of filings related to Regulation A offerings.

without requiring the issuer to purchase or maintain additional software or technology;[233]

- Part II: a text file attachment containing the body of the disclosure document and financial statements, formatted in HyperText Markup Language (HTML) or American Standard Code for Information Interchange (ASCII) to be compatible with the EDGAR filing system;[234] and
- Part III: text file attachments, containing the signatures, exhibits index, and the exhibits to the offering statement, formatted in HTML or ASCII to be compatible with the EDGAR filing system.[235]

As proposed and adopted, all other documents required to be submitted or filed with the Commission in conjunction with a Regulation A offering, such as ongoing reports, must generally be submitted or filed electronically on EDGAR.[236] As materials will be available on EDGAR, we do not see a need to separately require issuers to maintain a corporate website where the public may access all non-confidential filings. Issuers may, however, elect to provide the filings on their website or to their EDGAR filing page. Consistent with current Regulation A, there are no filing fees associated with the Regulation A filing and qualification process.

We believe the approach to electronic filing adopted today will be both practical and useful for issuers of Regulation A securities, investors in such securities, and other

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233 Part I (Notification) of Form 1-A. As discussed more fully in Section II.C.3.a. below, the cover page and Part I of current Form 1-A would be converted into, and form the basis of, the XML-based fillable form.

234 Part II (Offering Circular) of Form 1-A. *See* discussion in Section II.C.3.b. below.

235 Part III (Exhibits) of Form 1-A. *See* discussion in Section II.C.3.c. below.

236 For a discussion on the ongoing reporting requirements, *see* Section II.E. below.

market participants. Issuers will be able to maintain better control over their filing process, reduce the printing costs associated with filings, obtain immediate confirmation of acceptance of an offering statement, and ultimately save time in the qualification process. Investors will gain real-time access to the information contained in Regulation A filings.[237] We anticipate that the efficiency of the Regulation A market should improve with the increased accessibility of information about Regulation A issuers and offerings. Additionally, as with registered offerings, electronic filing on EDGAR will allow for more efficient storing, processing, and disseminating of Regulation A filings than paper filings, which should improve the efficiency of the staff review and qualification processes.

Electronic filing also will facilitate the capture of important financial and other information about Regulation A issuers and offerings that will enable the Commission and market participants to analyze any market that develops in Regulation A securities, including, for example, information about issuer size, issuer location, key financial metrics, summary information about securities offered and offering amounts, the jurisdictions in which offerings take place, and expenses associated with Regulation A offerings.[238]

We appreciate that requiring EDGAR filing will impose some new costs on issuers, as addressed more fully in the Economic Analysis section of the release.[239] We do not, however, believe that the incremental cost associated with the EDGAR filing

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237 Investors would not, however, have immediate access to non-public submissions of draft offering statements. *See* discussion in Section II.C.2. below.

238 The specific disclosure requirements included in the XML-based fillable form are discussed more fully in Section II.C.3.a. below.

239 *See* Section III. below.

requirements justifies maintaining a paper-only filing requirement. On the contrary, we believe that the potential additional cost to issuers associated with the EDGAR filing requirement should be minimal and electronic filing on EDGAR would eliminate any processing delays and costs otherwise associated with the current paper filing system, such as printing or mailing costs.

(2) Delivery Requirements

We are adopting, as proposed, an access equals delivery model for Regulation A final offering circulars when sales are made on the basis of offers conducted during the prequalification period and the final offering circular is filed and available on EDGAR. The expanded use of the Internet and continuing technological developments suggest that we should update the final offering circular delivery method for Regulation A in a manner that is consistent with similar updates to delivery requirements for registered offerings.[240] Contrary to the views of some commenters,[241] we do not believe that access to EDGAR generally has proven to be a challenge for investors in registered offerings since the adoption of the Securities Offering Reform Release in 2005. We also do not believe that it will be a challenge for investors under Regulation A or raise investor protection concerns, particularly in light of our final delivery requirements (including, where applicable, the inclusion of hyperlinks to offering materials on EDGAR that must be provided to investors by issuers and intermediaries).[242] Therefore, where sales of Regulation A securities occur after qualification on the basis of offers made using a preliminary offering circular, issuers and intermediaries can presume that investors have

240 *See* Securities Offering Reform, Rel. No. 33-8591.

241 *See* fn. 228 above.

242 *See* Rule 251(d)(2), Rule 254(a), and Rule 255(b) and (d).

access to the Internet and may satisfy their delivery requirements for the final offering circular by filing it on EDGAR.[243] Issuers are, however, required to include a notice in any preliminary offering circular that will inform potential investors that the issuer may satisfy its delivery obligations for the final offering circular electronically.[244]

Further, as proposed, "electronic-only" offerings of Regulation A securities will be permitted under the final rules, provided that issuers and intermediaries comply with relevant Commission guidance.[245] Specifically, in such offerings, an issuer and its participating intermediaries must obtain the consent of investors to, or otherwise be able to evidence the receipt of, the electronic delivery of:

- the preliminary offering circular and information other than the final offering circular, in instances where the issuer sells Regulation A securities based on offers made using a preliminary offering circular; and
- all documents and information, including the final offering circular, when the issuer sells Regulation A securities based on offers made during the post-qualification period using a final offering circular.

As we noted in the Proposing Release, in light of the proposed requirements for electronic delivery and in order to be consistent with requirements for registered offerings, we believe it appropriate to permit dealers, during the aftermarket delivery

243 *Cf.* Rel. No. 33-8591, at 244.

244 *See* Rule 254(a).

245 An electronic-only offering is an offering in which investors are permitted to participate only if they agree to accept the electronic delivery of all documents and other information in connection with the offering. *See* Rel. No. 34-37182 (May 9, 1996) [61 FR 24644] (Use of Electronic Media by Broker-Dealers, Transfer Agents and Investment Advisers for Delivery of Information), Rel. No. 34-42728 (Apr. 28, 2000) [65 FR 25843] (Use of Electronic Media), and Rel. No. 33-7233 (Oct. 6, 1995) [60 FR 53458] (Use of Electronic Media for Delivery Purposes).

period, to be deemed to satisfy their final offering circular delivery requirements if such document is filed and available on EDGAR.[246] We are amending Rule 251(d)(2)(ii) of existing Regulation A to make clear that dealers, like issuers and intermediaries, can also rely on the provisions for access equals delivery.[247] Additionally, the amendment clarifies that a dealer can rely on access equals delivery for a final offering circular provided it complies with the requirements of Rule 251(d)(2)(ii). This clarifying amendment is necessary to avoid any confusion that the final rules could be read to impose a double delivery requirement on dealers during the aftermarket delivery period.

Separately, we are modifying the terms of Rule 251(d)(2)(ii) to make it more consistent with the dealer delivery requirements for registered offerings under Securities Act Rule 174.[248] As proposed, the rules would have required dealers in all circumstances to deliver a copy of the current offering circular to purchasers for sales that take place within 90 calendar days after qualification.[249] Consistent with the suggestion of one commenter,[250] we are revising the proposed rules to more closely align the Regulation A delivery requirements with those required in Securities Act Rules 174(b) and (d).[251] We, therefore, are adopting the proposed 90 calendar day dealer delivery requirement, but eliminating the dealer delivery requirement when the issuer is subject immediately prior

246 *See* Proposing Release, at Section II.C.1.

247 *See* Rule 251(d)(2)(ii). Notwithstanding the final delivery requirements, broker-dealers remain subject to the anti-fraud provisions of Section 15 of the Exchange Act.

248 While we have made clarifying revisions to proposed Rule 251(d)(2)(iii) and renumbered it as Rule 251(d)(2)(ii), the final rule is consistent with Rule 174, as there is no need for an analog to Rule 174(g), which covers the dealer delivery obligations in registered offerings by blank check companies under Rule 174(g). Blank check companies are ineligible issuers under Regulation A. *See* Rule 251(b).

249 *See* proposed Rule 251(d)(2)(iii).

250 Paul Hastings Letter.

251 *See* 17 CFR 230.174(b), (d).

to filing the offering statement to Tier 2 ongoing reporting[252] and reducing the length of the delivery requirement to 25 calendar days after the later of the qualification date of the offering statement or the first bona fide offering of securities if the securities will be listed on a national securities exchange.[253] As adopted, the final rules reduce dealer aftermarket delivery requirements, which should aid dealers in compliance with the final rules.

The final rules also update and amend Rule 251(d)(2)(i) to align with changes in the prospectus delivery requirements for registered offerings that have occurred since these requirements were last updated in Regulation A.[254] We believe the delivery of the preliminary offering circular to potential investors before they make an investment decision on the basis of information provided during the prequalification period remains an important investor protection that the final rules should preserve, particularly in light of the proposed expanded use of "testing the waters" solicitation materials to include the period of time after non-public submission or filing of the offering statement, as discussed further in Section II.D. below.[255] We also recognize that updating and amending Regulation A's offering circular delivery requirements will likely benefit market participants by minimizing discrepancies between the requirements of broker-dealers in Regulation A and registered offerings.

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252 Rule 251(d)(2)(ii)(D); *see also* Securities Act Rule 174(b).

253 Rule 251(d)(2)(ii)(C); *see also* Securities Act Rule 174(d).

254 *See* Proposing Release, at Section II.C.1.

255 *See* Securities Offering Reform, Rel. No. 33-8591, at 245 (noting that access equals delivery is not appropriate for preliminary prospectus delivery obligations in IPOs because it is important for potential investors to be sent the preliminary prospectus).

We therefore are amending, as proposed, Rule 251(d)(2)(i) to require issuers and participating broker-dealers to deliver only a preliminary offering circular to prospective purchasers[256] at least 48 hours in advance of sale only when a preliminary offering circular is used during the prequalification period to offer such securities to potential investors.[257] To make the final rules more consistent with the requirements of Exchange Act Rule 15c2-8(b) for issuers who already provide continuous, ongoing information to investors and the market, the final rules do not require an issuer or its intermediaries to deliver a preliminary offering circular at least 48 hours in advance of sale where the issuer is already subject to a Tier 2 reporting obligation. In such instances, however, the issuer and its intermediaries will otherwise remain subject to the general delivery requirements of the rules, including compliance with the requirements for making offers pursuant to Rule 251(d)(1) and for including a preliminary offering circular in any solicitation materials used after filing the offering statement with the Commission pursuant to Rule 255. As proposed and adopted, the delivery requirements under the final rules apply to both issuers and participating broker-dealers.[258] We believe these delivery requirements are an important investor protection that should apply to issuers in advance of sale, in addition to their intermediaries, and is consistent with current

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256 Prospective purchasers include any person that has indicated an interest in purchasing the Regulation A securities before qualification, including, but not limited to, those investors that respond to an issuer's solicitation materials. *See* Rule 251(d)(2)(i).

257 In accordance with time of sale provisions discussed in Securities Offering Reform, *see* Rel. No. 33-8591, at p. 173 *et seq.*, the final rules provide that the 48-hour delivery obligation must be made in advance of "sale" rather than the "mailing of the confirmation of sale." *See also* Section II.D. below for a discussion of the delivery requirements for solicitation materials used after publicly filing the offering statement.

258 Issuers may rely on reasonable assurances of delivery from participating broker-dealers to satisfy their delivery obligations.

Regulation A.[259] We are also adopting, as proposed, the requirement that a final offering circular must accompany or precede any written communications that constitute offers in the post-qualification period.[260]

In addition to the revised delivery requirements discussed above, we are adopting, as proposed, final rules analogous to Securities Act Rule 173.[261] Rule 251(d)(2)(ii) requires issuers and participating broker-dealers, not later than two business days after completion of the sale, to provide the purchaser with a copy of the final offering circular or a notice stating that the sale occurred pursuant to a qualified offering statement.[262] The notice must include the URL[263] where the final offering circular, or the offering statement of which such final offering circular is part, may be obtained on EDGAR and contact information sufficient to notify a purchaser where a request for a final offering circular can be sent and received in response.

(3) Withdrawal of an Offering Statement

The final rules will, as proposed, permit an issuer to withdraw an offering statement, with the Commission's consent, if none of the securities that are the subject of

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259 *See also* 17 CFR 230.460 (Distribution of Preliminary Prospectus in Registered Offerings). Additionally, with continued improvements in information and communication technologies, we believe direct public offerings (*i.e.*, offerings conducted by an issuer without the involvement of an underwriter) may become a more attractive option for certain issuers. For that reason, it is important that the advance preliminary offering circular delivery requirements for participating broker-dealers apply equally to issuers.

260 *See* Rule 251(d)(1)(iii). For written confirmations and notices of allocation in the post-qualification period, issuers and intermediaries may rely on the EDGAR filing of the final offering circular to satisfy any delivery requirements that may apply under Rule 251(d)(1)(iii). This approach is consistent with Rule 172(a) in the context of registered offerings. For a discussion of Rule 172(a), *see* Securities Offering Reform, Rel. No. 33-8591, at 251.

261 17 CFR 230.173.

262 *See* Rule 251(d)(2)(ii).

263 As proposed, the final rules make clear that, in the case of an electronic-only offering, the notice must include an active hyperlink to the final offering circular or to the offering statement of which such final offering circular is part. *See* Rule 251(d)(2)(ii)(E).

such offering statement have been sold and such offering statement is not the subject of a Commission order temporarily suspending a Regulation A exemption.[264] The final rules also permit, as proposed, the Commission to declare an offering statement abandoned if the offering statement has been on file with the Commission for nine months without amendment and has not become qualified.[265] These withdrawal and abandonment procedures are similar to the ones that apply to issuers in registered offerings.

2. Non-Public Submission of Draft Offering Statements

a. Proposed Rules

We proposed to allow the non-public submission of draft offering statements by issuers of Regulation A securities. As we noted in the Proposing Release, such submissions would not be subject to the statutorily-mandated confidentiality of draft initial public offering (IPO) registration statements confidentially submitted by "emerging growth companies"[266] under Title I of the JOBS Act.[267] Instead, where an issuer seeks to non-publicly submit a draft offering statement, the proposal indicated it could do so in compliance with the Commission's Rule 83.[268] We also sought comment

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264 *See* Rule 259(a). As discussed in Section II.C.5. below in the context of qualification, we are amending the delegated authority of the director of the Division of Corporation Finance to permit the Division to consent to the withdrawal of an offering statement or to declare an offering statement abandoned, as opposed to requiring the Commission to issue an order. Rule 30-1(b)(3), 17 CFR 200.30-1(b)(3).

265 *See* Rule 259(b).

266 Under Section 2(a)(19) of the Securities Act, an "emerging growth company" is defined as, among other things, an issuer that had total annual gross revenues of less than $1 billion during its most recently completed fiscal year. 15 U.S.C. 77b(a)(19).

267 Under Section 6(e)(2) of the Securities Act, confidential submissions of draft registration statements by emerging growth companies are protected from compelled disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552). There is no similar provision under Section 3(b) of the Securities Act.

268 *See* proposed Rule 252(f); *see also* Proposing Release, at fn. 212.

on whether we should instead adopt a new rule relating to confidential treatment of draft offering statements in Regulation A.

Under the proposed rules, issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A or an effective registration statement under the Securities Act would be permitted to submit to the Commission a draft offering statement for non-public review. As with the confidential submission of draft registration statements by emerging growth companies, all non-public submissions of draft offering statements would be submitted via EDGAR. The initial non-public submission, all non-public amendments thereto, and correspondence with Commission staff regarding such submissions would be required to be publicly filed and available on EDGAR as exhibits to the offering statement not less than 21 calendar days before qualification of the offering statement.[269] Unlike emerging growth companies in registered offerings, which must publicly file any confidential submissions not later than 21 calendar days before a road show, the timing requirements for filing by issuers seeking qualification under Regulation A would not depend on whether or not the issuer conducts a road show.

b. Comments on Proposed Rules

Commenters were generally supportive of the proposed non-public submission process for Regulation A offerings.[270] One commenter recommended keeping all filings confidential other than the final qualified version and possibly any interim version

[269] *See* proposed Rule 252(f).

[270] BIO Letter; McCarter & English Letter; Paul Hastings Letter; Richardson Patel Letter.

actually used in conjunction with solicitation materials.[271] Another commenter recommended requiring the inclusion of a legend on non-public offering statements so that the confidentiality of such submissions would be automatic, without the need for a separate confidentiality request,[272] while another commenter recommended treating the proposed non-public submissions the same way that draft registration statements are treated under Title I of the JOBS Act.[273]

c. Final Rules

We are adopting rules that will, as proposed, provide for the submission of non-public draft offering statements under Regulation A.[274] In a change from the proposal, however, the final rules do not require an issuer seeking non-public staff review of its draft offering statement to submit such draft pursuant to the Commission's Rule 83. Instead, all such draft offering statements under Rule 252(a) shall receive non-public review. The final rules only permit issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A or an effective registration statement under the Securities Act to submit to the Commission a draft offering statement for non-public review. Consistent with the treatment of draft registration statements in registered offerings by emerging growth companies, a non-publicly submitted offering statement must be substantially complete upon submission in order for staff of the Division of Corporation Finance to begin its review. All non-public

271 Verrill Dana Letter 1.

272 McCarter & English Letter. The Proposing Release indicated that issuers seeking to non-publicly submit offering statements should submit such statements under cover of the Commission's Rule 83, 17 CFR 200.83, which deals with confidential treatment requests.

273 Milken Institute Letter (recommending that the Commission seek Congressional authority, if necessary, to protect these submissions from requests under the FOIA.

274 *See* Rule 252(d).

submissions of draft offering statements must be submitted via EDGAR, and the initial non-public submission, all non-public amendments thereto, and correspondence submitted by or on behalf of the issuer to the Commission staff regarding such submissions must be publicly filed and available on EDGAR as exhibits to the offering statement not less than 21 calendar days before qualification of the offering statement.

We do not believe, as was suggested by at least one commenter,[275] that requiring issuers to file only the qualified version of the offering statement and any earlier versions used in conjunction with solicitation materials would provide investors with sufficient disclosure to make informed investment decisions. Further, in light of the preemption of state securities laws registration requirements for Tier 2 offerings in the final rules,[276] the 21 calendar day filing requirement will insure that state securities regulators are able to require first-time issuers that non-publicly submit draft offering statements to file such material with them for a minimum of 21 calendar days before any potential sales to investors in their respective states.[277] Unlike emerging growth companies, the timing requirement for filing by issuers seeking qualification under Regulation A does not depend on whether or not the issuer conducts a road show or tests the waters in a contemplated offering before qualification.[278]

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[275] Verrill Dana Letter 1.

[276] *See* discussion in Section II.H. below.

[277] Notwithstanding the final rules that provide for the preemption of state securities laws' registration and qualification requirements of Tier 2 offerings, state securities regulators retain, among other things, their authority to require the filing with them of any documents filed with the Commission. *See, e.g.*, Section 18(c)(2) of the Securities Act. The timing of filing requirements at the state level, however, may reduce the time period in which an offering statement and related materials are on file with the state before Commission qualification.

[278] *See* Section II.D. below for a discussion on the timing and requirements for the use of solicitation materials under Rule 255. Regulation A's testing the waters provisions encompass a variety of activities, including, but not limited to, activities that could constitute a traditional road show.

Unlike Title I of the JOBS Act, Title IV does not provide for confidential submissions of offering statements under Regulation A.[279] Consequently, the requirements of the FOIA are controlling on the scope of the Commission's ability to adopt confidentiality rules for non-publicly submitted offering statements. We are therefore not adopting any specific additional rule or requirement for non-public submissions that would deem such submissions "confidential." However, where an issuer seeks confidential treatment for non-publicly submitted offering materials, or any portion thereof, for which it believes an exemption from the FOIA exists, it should continue to do so in compliance with the Commission's Rule 83.[280]

While non-publicly submitted offering statements must be submitted electronically on EDGAR, the Commission and its staff will not make such offering statements publicly available on EDGAR as a matter of course.[281] The treatment of non-public submissions in this regard is consistent with the Commission staff's approach to the public availability of draft registration statements submitted by foreign private issuers for registered offerings.[282] As there is no statutory basis for withholding non-public submissions from production, absent an exemption from the FOIA,[283] issuers that rely on our provisions for non-public submission should be aware that the Commission may, under certain circumstances, be compelled to provide such materials to a requesting party

279 *See* fn. 267 above.

280 *See* 17 CFR 200.83. Where an issuer seeks confidential treatment of any information included in a publicly filed offering statement or related materials, it should do so in compliance with Securities Act Rule 406. *See* 17 CFR 230.406. *See* Rule 251(e) (confidential treatment).

281 This is in contrast to publicly filed draft and final offering statements that will be made automatically available on EDGAR at the time of filing.

282 *See* Non-Public Submissions from Foreign Private Issuers, *available at*: http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm.

283 *See* 5 U.S.C. 552.

(or to otherwise make them publicly available) before the date on which an issuer would otherwise have been required to publicly file on EDGAR.

3. Form and Content

Section 3(b)(2)(G)(i) of the Securities Act identifies certain disclosure requirements that the Commission may require for offerings relying on the Regulation A exemption. The requirements largely coincide with the existing offering statement disclosure requirements of Form 1-A, such as financial statements,[284] a description of the issuer's business operations,[285] financial condition,[286] and use of investor funds.[287] The proposed rules, comments received on the proposed rules, and the final rules being adopted today for each of Part I, II, and III of Form 1-A are discussed in detail below.

a. Part I (Notification)

(1) Proposed Rules

Part I of Form 1-A serves as a notice of certain basic information about the issuer and its proposed offering, which also helps to confirm the availability of the exemption.[288] As proposed, Part I of Form 1-A would be converted into an online XML-based fillable form with indicator boxes or buttons and text boxes and would be filed

284 *See* Form 1-A, Part II, Part F/S (2014). Section 3(b)(2)(G)(i) also contemplates that the Commission may require issuers to submit audited financial statements. Currently, the financial statements required under Regulation A need to be audited only if the issuer has them otherwise available.

285 *Id.*, Part II, *e.g.*, Model B, Item 6 (Description of Business).

286 *Id.*, *e.g.*, Part F/S.

287 *Id.*, *e.g.*, Item 5 (Use of Proceeds to Issuer).

288 Rel. No. 33-6275 [46 FR 2637], at 2638.

online with the Commission.[289] The information would be publicly available on EDGAR, as an online data cover sheet, but not otherwise required to be distributed to investors.[290]

(2) Comments on Proposed Rules

We received several comments with recommendations specific to certain items on Part I of Form 1-A. With respect to Item 1 of Part I, one commenter recommended defining the term "publicly traded," eliminating the "Financial Statements" section of Item 1 of Part I or conforming it to the existing disclosures required by Item 301 of Regulation S-K, or conforming the line item descriptions in Item 1 to those in Regulation S-X.[291] Other commenters recommended clarifying that an auditor and related fees need not be listed in Part I if audited financial statements are not included.[292] With respect to Item 5 of Part I, another commenter supported the proposal's inclusion of checkboxes specifying the jurisdictions in which the securities are intended to be offered,[293] while a different commenter recommended expanding the list of jurisdictions so that issuers could indicate the Canadian provinces in which they intended to conduct

289 As proposed, the cover page to current Form 1-A would be eliminated as a standalone requirement, while portions of the information required on the cover page would be combined with Item 1 of Part I of Form 1-A in the XML fillable form.

290 The Commission would make the information available on EDGAR in a format that provides normal text for reading and XML-tagged data for analysis. With the exception of the items that focus issuers on eligibility to use Regulation A, much of the information called for in the XML-based fillable form is also required to be disclosed to investors in Part II of Form 1-A.

291 Letter from Ernst & Young LLP, March 24, 2014 ("E&Y Letter").

292 Letter from Cynthia M. Fornelli, Executive Director, Center for Audit Quality, March 24, 2014 ("CAQ Letter"); Letter from Deloitte & Touche LLP, March 24, 2014 ("Deloitte Letter"); E&Y Letter; Letter from PricewaterhouseCoopers LLP, March 24, 2014 ("PwC Letter").

293 NASAA Letter 2.

their offerings.[294] With respect to Item 6 of Part I, one commenter recommended defining the term "affiliated issuer."[295] This commenter recommended defining the term to refer to entities controlled by the issuer, noting that otherwise it may require disclosure by parent and sister entities, which is information unrelated to the capitalization of the issuer.

Other commenters recommended including additional disclosure in Part I. Two of these commenters recommended requiring issuers to include their website address and the jurisdiction of their principal place of business.[296] These commenters also objected to removing the disclosure and contact information for persons that are covered by the bad actor rules.[297]

(3) Final Rules

With the exception of technical clarifications, we are adopting provisions for Part I as proposed. The notification in Part I of Form 1-A will require disclosure in response to the following items:

- Item 1. (Issuer Information) will require information about the issuer's identity, industry, number of employees, financial statements and capital structure, as well as contact information.[298]

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[294] Letter from Mike Liles, Jr., Attorney, Karr Tuttle Campbell, January 17, 2014 ("Karr Tuttle Letter").

[295] Paul Hastings Letter.

[296] NASAA Letter 2; WDFI Letter. These commenters requested that this information be included in XBRL format, rather than XML. We note that XBRL is a form of XML, and generally requires labeling information with data "tags" rather than providing the information through fillable forms.

[297] NASAA Letter 2; WDFI Letter.

[298] Some of the information in Item 1, such as the name of the issuer, jurisdiction of incorporation, contact information, primary Standard Industrial Classification Code Number, and I.R.S. Employer Identification Number is already required to be included on the cover page of Form 1-A.

- Item 2. (Issuer Eligibility) will require the issuer to certify that it meets various issuer eligibility criteria.
- Item 3. (Application of Rule 262 ("bad actor" disqualification and disclosure)) will require the issuer to certify that no disqualifying events have occurred and to indicate whether related disclosure will be included in the offering circular (*i.e.*, events that would have been disqualifying, but occurred before the effective date of the amendments to Regulation A).[299]
- Item 4. (Summary Information Regarding the Offering and other Current or Proposed Offerings) will include indicator boxes or buttons and text boxes eliciting information about the offering (including whether the issuer is conducting a Tier 1 or Tier 2 offering, amount and type of securities offered, proposed sales by selling securityholders and affiliates, type of offering, estimated aggregate sales of any concurrent offerings pursuant to Regulation A, anticipated fees in connection with the offering, and the names of audit and legal service providers, underwriters, and certain others providing services in connection with the offering).
- Item 5. (Jurisdictions in Which Securities are to be Offered) will include information about the jurisdiction(s) in which the securities will be offered.
- Item 6. (Unregistered Securities Issued or Sold Within One Year) will require disclosure about unregistered issuances or sales of securities within the last year, but will not include a requirement to provide the names and identities of the persons to whom unregistered securities were issued.

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299 *See* discussion of Rule 262(a)(3) and (a)(5) in Section II.G. below.

We are adopting, as proposed, further changes to Part I of Form 1-A. We are eliminating Item 1 (Significant Parties) of current Part I, which requires disclosure of the names, business address, and residential address of all the persons covered by current Rule 262. Instead, we are requiring only narrative disclosure in Part II of Form 1-A when the issuer has determined that a relevant party has a disclosable, but not disqualifying, "bad actor" event.[300] We also are eliminating Item 3 of current Part I relating to affiliate sales, because we are eliminating the current restrictions on affiliate resales under Rule 251(b).[301] Information about the amount of expected secondary sales and the existence of affiliate sales in the offering, however, will continue to be disclosed in Item 4. Item 6 (Other Present or Proposed Offerings) and Item 9 (Use of a Solicitation of Interest Document) of current Part I will be incorporated into Item 4 (Summary Information Regarding the Offering and Other Current or Proposed Offerings). We also are eliminating Item 7 (Marketing Arrangements) and Item 8 (Relationship with Issuer of Experts Named in Offering Statement) of current Part I, as disclosure of this information is required in Part II (Offering Circular).

Some of the technical changes from the proposed rules are non-substantive procedural revisions to the form that are needed to conform the form with the technical requirements of EDGAR, while the others will, as suggested by commenters, provide clarifications to the terms and requirements of Part I.

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300 *See* discussion in Section II.G. below.

301 The primary purpose of Item 3 (Affiliate Sales) in Part I of Form 1-A (2014) is to ensure compliance with certain restrictions on affiliate resales under Rule 251(b). *See* discussion in Section II.B.3. above.

We do not, however, believe that the additional disclosure items suggested by some commenters,[302] such as the issuer's website address and the jurisdiction of the issuer's principal place of business, are necessary additional disclosures in Part I of Form 1-A. As proposed and adopted, Item 1 (Issuer Information) of Part I requires issuers to disclose the location of their principal executive offices, while Item 1 (Cover Page of Offering Circular) of Part II requires issuers to provide investors with their website address, if the issuer has a website. In light of these required disclosures, we do not believe that the additional suggested disclosure items for Part I are necessary or would provide investors with any additional relevant information about the issuer. Additionally, notwithstanding the view of some commenters,[303] we do not believe that the disclosure requirements for the application of Rule 262 (Disqualification Provisions) in Item 3 to Part I of Form 1-A need to include descriptions and addresses of persons that trigger disqualification for several reasons. An issuer that has a disqualified person involved in its offering will not be eligible to conduct a Regulation A offering, issuers will have to certify their compliance with Rule 262, and, with the exception of the addresses of covered persons, much of the requested disclosure, as it applies to persons that would have been disqualified but whose conduct occurred before effectiveness of the final rules or have received a waiver from disqualification,[304] will be required in Part II of

302 NASAA Letter 2; WDFI Letter.

303 *Id.*

304 Rule 262(b)(1)-(2).

the offering statement.[305] Therefore, as proposed and adopted, the final rules for Part I of Form 1-A no longer require the disclosure of such information.

Consistent with a comment received,[306] we are making technical amendments to the financial statement requirements of Item 1 (Issuer Information) of Part I to clarify and require the use of certain industry-specific terminology and, wherever possible, to use terminology that is consistent with Regulation S-X and GAAP. These changes are designed to minimize potential confusion on the part of issuers in the banking and insurance industries that could result from the use of more general financial accounting terminology. We disagree, however, with the suggestion that we eliminate the financial statement section.[307] As we noted in the Proposing Release, the disclosure of this type of information will provide the Commission (and market participants) with more information about the Regulation A market as it develops to use as it considers potential changes to the regulation in the future. We also believe that the disclosure of this information will provide relevant and useful information about issuers and their offerings to investors and market participants that will help to facilitate informed investment decisions. We do not anticipate that the disclosure of financial information in response to Item 1 to Part I of Form 1-A will materially alter the compliance obligations of issuers given that the requirements draw from disclosure already required in the financial statements included in the offering circular. Additionally, we are revising Item 1 to

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305 *See* paragraph (a)(2) to Part II of Form 1-A. Additionally, underwriters, those receiving sales commissions and finders' fees, promoters, counsel, executive officers, directors, and significant securityholders, among others, must be identified in the offering statement in most instances. *See, e.g.*, Item 4 of Part I and Items 1, 10, and 11 of the Offering Circular, Part II of Form 1-A.

306 E&Y Letter.

307 *Id.*

require issuers to provide up to two e-mail addresses to which the Commission's staff may send comment letters relating to an offering statement, rather than making this optional as proposed. The e-mail addresses, however, will no longer be disseminated with the filings. We believe this change will result in faster reviews of offering statements by the Commission's staff.[308] Finally, consistent with the concerns underlying a comment we received, we recognize that the use of the term "publicly traded" in the outstanding securities table of Item 1 may be confusing in the context of a Regulation A offering.[309] Accordingly, we have revised Item 1 to only request the name of the trading center or quotation medium, if any, for outstanding securities.

Consistent with the views of several commenters,[310] we are clarifying that in the fee table included in Item 4 of Part I (Summary Information Regarding the Offering and Other Current or Proposed Offerings), auditor fees only need to be disclosed when the issuer is providing audited financial statements because, for example, an auditor might not be used for a Tier 1 offering.[311] This and similar items in the fee table could be left blank if not applicable and responses could be clarified in the text box following the table.

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308 In the review of registered offerings the Commission's staff will call filers to obtain e-mail addresses so as to issue comment letters electronically. Depending on the responsiveness of the filer, this can be a time consuming process.

309 *See* E&Y Letter.

310 *See* fn. 292 above.

311 Disclosure is only required in the fee table to the extent applicable fees were incurred by the issuer in connection with the offering.

As suggested by one commenter,[312] we are expanding the list of jurisdictions in Item 5 (Jurisdiction in Which Securities are to be Offered) so that issuers can indicate the Canadian provinces in which they intend to conduct their offerings.[313]

Finally, in response to one comment,[314] we are clarifying, in this release, that the scope of the term "affiliated issuer" in proposed Item 6 of Part I is only meant to include affiliates of the issuer that are issuing securities in the same offering for which qualification is currently being sought under Regulation A. We believe this clarification is necessary in the final rules in order to avoid potential confusion among issuers as to the scope of the definition, in light of the broader definition of "affiliate" as it appears in Securities Act Rule 405.[315]

b. Part II (Offering Circular)

(1) Narrative Disclosure

(a) Proposed Rules for Narrative Disclosure

Part II (Offering Circular) in existing Form 1-A provides issuers with three options for their narrative disclosure: Model A, Model B, and Part I of Form S-1.[316] We proposed to eliminate the Model A question-and-answer format as a disclosure option, to update and retain Model B as a disclosure option (renaming it "Offering Circular"), and

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312 Karr Tuttle Letter.

313 Item 5 of Part I of proposed Form 1-A did not include Canadian provinces, despite Canadian issuers being eligible issuers. Item 5, as adopted, corrects the form for Canadian issuers or for offerings that contemplate offers or sales in Canada.

314 Paul Hastings Letter.

315 Rule 405 defines "affiliate" to include, among other things, persons controlling the issuer or under common control with the issuer. 17 CFR 230.405.

316 Non-corporate issuers are not permitted to use Model A.

to continue to permit issuers to rely on Part I of Form S-1 to satisfy the disclosure obligations of Part II of Form 1-A.[317]

We further proposed to create new requirements for audited financial statements and for a section containing management's discussion and analysis (MD&A) of the issuer's liquidity, capital resources, and results of operations.[318] As proposed, issuers that have not generated revenue from operations during each of the three fiscal years immediately before the filing of the offering statement would be required to describe their plan of operations for the 12 months following qualification of the offering statement, including a statement about whether, in the issuer's opinion, it will be necessary to raise additional funds within the next six months to implement the plan of operations.[319]

Consistent with the treatment of issuers in registered offerings, we further proposed to permit issuers to incorporate by reference into Part II of Form 1-A certain items previously submitted or filed on EDGAR, regardless of whether they were provided pursuant to Regulation A disclosure requirements. As proposed, incorporation by reference would be limited to documents publicly submitted or filed under Regulation A and issuers would have to be subject to the ongoing reporting obligations for Tier 2 offerings.[320] Issuers would be required to describe the information

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317 *See* Proposing Release, at Section II.C.3.

318 *See* Proposing Release, at Section II.C.3(b)(1).

319 *See* Item 9(c) of Offering Circular, Part II of proposed Form 1-A.

320 Issuers following the Offering Circular disclosure model would be permitted to incorporate by reference Items 2 through 14, whereas issuers following the narrative disclosure in Part I of Form S-1 would be permitted to incorporate by reference Items 3 through 11 (other than Item 11(e)) of Part I of Form S-1. *See* General Instruction III to proposed Form 1-A. As with Model B, the item numbers in the Offering Circular format of proposed Part II of Form 1-A and Part I of Form S-1 do not align.

incorporated by reference, and include a separate hyperlink to the relevant document on EDGAR, which need not remain active after the filing of the related offering statement.

(b) Comments on Proposed Rules

Several commenters recommended against the proposed elimination of the Model A disclosure format, and instead recommended that the Commission retain an updated version of the format.[321] Two of these commenters recommended including a Model A disclosure format that reflects the most recent version of NASAA's Form U-7.[322] One commenter recommended retaining existing Form 1-A with minor changes until such time as the Commission and NASAA could develop an improved form.[323] Six commenters, however, suggested that the Commission eliminate Model A and the proposed Offering Circular disclosure formats and instead recommended requiring disclosure by reference to Regulation S-K (with reduced disclosure requirements in some instances).[324] These commenters believed that such a change would increase efficiency and comparability. One of these commenters was concerned that differences between Items 303 and 402 of Regulation S-K and the comparable disclosure requirements of the Offering Circular format might cause confusion.[325] Two commenters recommended requiring REITs to incorporate certain of the items contained in Industry Guide 5 and Form S-11.[326]

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321 BIO Letter; Karr Tuttle Letter; NASAA Letter 2; Verrill Dana Letter 1; WDFI Letter.

322 Karr Tuttle Letter; Verrill Dana Letter 1.

323 NASAA Letter 2.

324 Canaccord Letter; CFIRA Letter 1; E&Y Letter; Ladd Letter 2 (recommending the change only to the extent that the Commission believed it would increase the speed of staff reviews); McCarter & English Letter; WR Hambrecht + Co Letter.

325 E&Y Letter.

326 ABA BLS Letter; MoFo Letter.

Several commenters had specific recommendations on disclosure requirements. Four commenters recommended that the Commission find a way to require more concise risk factor disclosure.[327] One of these commenters recommended possibly imposing a limit on the number of risk factors or guidance to avoid repetition and emphasizing that disclosure should not be repeated throughout the offering circular.[328] Two commenters recommended expanding the dilution disclosure requirement in the Offering Circular format's Item 4.[329] As proposed, Item 4 only requires disclosure of any material disparity between the public offering price and the effective cash cost to insiders over the past year. These commenters recommended removing the one year restriction. One commenter recommended focusing the disclosure requirements in the offering statement on valuation assessments and a discussion of management's expectations about the company's future performance, including projections.[330] Another commenter recommended requiring disclosure of the names of "those holding more than 20% of shares" and a description of the ownership and capital structure, including descriptions of how the exercise of rights by principal shareowners could negatively affect the purchasers of shares being offered.[331] Two commenters recommended reducing and clarifying the disclosure obligations for executive compensation and management's discussion and analysis for smaller offerings.[332] One commenter recommended requiring

327 CFIRA Letter 1; MoFo Letter; SVB Financial Letter; WR Hambrecht + Co Letter.

328 WR Hambrecht + Co Letter.

329 NASAA Letter 2; WDFI Letter.

330 WR Hambrecht + Co Letter (indicating that, absent this requirement, such information would be shared orally by management or research analysts with only the biggest investors).

331 CFA Institute Letter.

332 Letter from Rutheford B. Campbell, Jr., Spears-Gilbert Professor of Law, University of Kentucky, March 5, 2014 ("Campbell Letter"); MoFo Letter (recommending that the Commission reduce and

disclosure regarding the existence of a code of ethics and corporate governance principles in a manner that would encourage issuers to adopt internal controls.[333]

(c) Final Rules for Narrative Disclosure

With the exception of clarifying changes, certain additional scaled disclosure items applicable to Tier 1 offerings, and additional guidance to issuers designed to streamline disclosure, we are adopting final rules for narrative disclosure in Form 1-A substantially as proposed. As adopted, Offering Circular disclosure in Part II of Form 1-A will cover:[334]

- Basic information about the issuer and the offering, including identification of any underwriters and disclosure of any underwriting discounts and commissions (Item 1: Cover Page of Offering Circular);
- Table of Contents (Item 2);
- The most significant factors that make the offering speculative or substantially risky (Item 3: Summary and Risk Factors);
- Material disparities between the public offering price and the effective cash costs for shares acquired by insiders during the past year (Item 4: Dilution);
- Plan of distribution for the offering and disclosure regarding selling securityholders (Item 5: Plan of Distribution and Selling Securityholders);
- Use of proceeds (Item 6: Use of Proceeds to Issuer);

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clarify the disclosure obligations for executive compensation and management's discussion and analysis by eliminating the need to repeat information already required to be included in the financial statements, reducing the number of years of business experience disclosure required to be included and clarifying the instructions of the executive compensation section).

333 Ladd Letter 2 (referring to PCAOB AU 325 and 9325).

334 Financial statements disclosure requirements for Part F/S of Form 1-A are discussed in Section II.C.3.b(2)(c). below.

- Business operations of the issuer for the prior three fiscal years (or, if in existence for less than three years, since inception) (Item 7: Description of Business);
- Material physical properties (Item 8: Description of Property);
- Discussion and analysis of the issuer's liquidity and capital resources and results of operations through the eyes of management covering the two most recently completed fiscal years and interim periods, if required; and, for issuers that have not received revenue from operations during each of the three fiscal years immediately before the filing of the offering statement (or since inception, whichever is shorter), the plan of operations for the 12 months following qualification of the offering statement, including a statement about whether the issuer anticipates that it will be necessary to raise additional funds within the next six months (Item 9: Management's Discussion and Analysis of Financial Condition and Results of Operations);
- Identification of directors, executive officers and significant employees with a discussion of any family relationships within that group, business experience during the past five years, and involvement in certain legal proceedings during the past five years (Item 10: Directors, Executive Officers and Significant Employees);
- Group-level executive compensation disclosure for the most recent fiscal year for the three highest paid executive officers or directors with Tier 2 requiring individual disclosure of the three highest paid executive officers or directors (Item 11: Compensation of Directors and Executive Officers);

- Beneficial ownership of voting securities by executive officers, directors, and 10% owners (Item 12: Security Ownership of Management and Certain Securityholders);
- Transactions with related persons, promoters and certain control persons (Item 13: Interest of Management and Others in Certain Transactions);
- The material terms of the securities being offered (Item 14: Securities Being Offered); and
- Any events that would have triggered disqualification of the offering under Rule 262 if the issuer could not rely on the provisions in Rule 262(b)(1).[335]

The final rules eliminate Model A as a disclosure format for Regulation A offerings, as proposed. While some commenters suggested that the Commission should preserve Model A as an additional disclosure format for Part II of Form 1-A or update existing Model A with NASAA's more recent Form U-7, we are not persuaded that a question-and-answer format should be retained in the final rules. As we noted in the Proposing Release, the Model A disclosure format has historically been used less frequently, and resulted in less-uniform disclosure and a longer time to qualification than the Model B disclosure format.[336] We do not believe that the use of Form U-7, which is largely similar to Model A and is also in a question-and-answer format, will alter this result. While the question-and-answer disclosure format does provide issuers with additional flexibility, we believe that the Offering Circular disclosure format (formerly

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335 *See* discussion of the final disqualification provisions in Section II.G. below. The final rules require issuers to provide this "bad actor" disclosure even if it elects to follow the Part I of Form S-1 disclosure format.

336 *See* Proposing Release, at Section II.C.3.

called Model B) and Part I of Forms S-1 or S-11 provide issuers with sufficient flexibility in choosing their disclosure format without any of the potential delays or uniform disclosure issues associated with Model A, either currently or even if it is updated with Form U-7. We are further concerned that a question-and-answer format may not best serve the interests of investors in Regulation A offerings by providing them with less-uniform disclosure in a potentially unfamiliar format. Additionally, we are concerned that a question-and-answer format may incorrectly lead issuers to believe that, despite the guidance contained in the form itself, less complete disclosure is required under this format, thereby causing unnecessary delays in the qualification process. Lastly, and particularly with respect to Tier 2 offerings, we do not believe that a question-and-answer format is appropriate for issuers and investors in larger-sized offerings that generally benefit from disclosure that is comparable between offerings in format and information disclosed. For similar reasons, we do not believe that this format is appropriate in offerings of any size by issuers that seek to foster potential trading in the secondary markets.[337]

As proposed, the final rules will require issuers to provide disclosure in Part II of Form 1-A that follows the Offering Circular or Part I of Form S-1 disclosure format. Additionally, we agree with commenters that certain additional disclosure requirements may be appropriate for offerings by REITs and similar issuers. The final rules, therefore, also permit issuers to follow, in addition to the Offering Circular and Part I of Form S-1 formats, the form disclosure requirements of Part I of Form S-11.[338] An issuer may,

337 *See* Section II.E. below for a discussion of the final rules for ongoing reporting.

338 As proposed, issuers must choose one format to follow for the offering circular and may not combine items from different formats. *See* General Instruction II to proposed and final Form 1-A.

however, only use Part I of Form S-11 if the securities are eligible to be registered on that form. As proposed and adopted with respect to disclosure under Part I of Form S-1, issuers following Part I of Form S-11 may follow smaller reporting company narrative disclosure requirements if they meet the definition of that term in Securities Act Rule 405.[339]

Contrary to the suggestions of some commenters, we are not adopting rules that would limit the number of risk factors disclosed. While we appreciate the concern that certain issuers and their advisors may take an overly cautious approach to the application of our disclosure requirements resulting in numerous risk disclosures, the decision as to the appropriate mix of information that should be disclosed to investors must be based on the particular facts and circumstances of each company. We do not believe that a limit on risk factor disclosure is an appropriate substitute for the judgments of issuers and their advisors. A form-based limitation on the number of risk factors, beyond the guidance in Item 3 of Part II, could lead to incomplete disclosure that may place investors at a higher risk of potential loss and issuers at a higher risk for potential litigation if it results in appropriate risk factors being excluded.

Further, we believe that certain other commenter concerns and suggestions as to specific narrative disclosures are already appropriately addressed by the final rules. For example, one commenter suggested that we require disclosure of the names of those holding more than 20% beneficial ownership of the issuer and a description of the

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In order to avoid confusion and to facilitate the review of offering circulars by investors and the Commission's staff, the final rules will also require issuers to indicate on the offering circular cover page which format they are following. *See* Part II(a)(1) of Form 1-A.

339 17 CFR 230.405.

issuer's ownership and capital structure, including descriptions of the exercise of rights of principal shareholders.[340] The final rules substantially address these topics. Item 12 of the Offering Circular, as proposed and adopted, requires disclosure relating to more than 10% beneficial ownership and Item 14, which is adopted as proposed, requires disclosure of the terms of all classes of outstanding capital stock.

As adopted, the Offering Circular includes disclosure based on disclosure guidelines set forth in the Securities Act Industry Guides as well as guidance applicable to limited partnerships and limited liability companies.[341] As suggested by commenters,[342] in order to create more flexibility in disclosure matters for smaller issuers, we are adding a materiality threshold for disclosure as it relates to time and dollar expenditures on research and development.[343] Additionally, the final rules require issuers to provide financial statements, which in the case of Tier 2 offerings must be audited,[344] as well as a section on management's discussion and analysis (MD&A) of the issuer's liquidity, capital resources, and results of operations.[345] We are amending the MD&A disclosure requirements in Item 9 to align more closely with the language in Regulation S-K that applies to domestic registrants[346] and smaller reporting companies.[347]

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340 CFA Institute Letter.

341 *See* Item 7(c)-(d) of Offering Circular, Part II of Form 1-A ; *see also* Rel. No. 33-6900 (June 17, 1991) [56 FR 28979] (setting forth the Commission's view on the disclosure requirements for limited partnerships).

342 CFIRA Letter 1; MoFo Letter; WR Hambrecht + Co Letter.

343 Item 7(a)(1)(iii) of Offering Circular, Part II of Form 1-A.

344 *See* discussion in Section II.C.3.b(2)(c). below.

345 *See* Item 9 of Offering Circular, Part II of Form 1-A.

346 Item 9(b)(1) of Offering Circular, Part II of proposed Form 1-A is amended to track more closely the language and requirements of domestic issuers, as opposed to foreign private issuers. As proposed, the language more closely followed the requirements contained in Form 20-F for foreign private issuers.

Consistency with Regulation S-K in this regard may assist companies with compliance with the rules for registered offerings to the extent Tier 2 issuers eventually become Exchange Act reporting companies, while also making sure that Regulation A issuers do not have a greater disclosure obligation than registered domestic issuers.[348] Further, consistent with the proposed rules, issuers that have not generated revenue from operations during each of the three fiscal years immediately before the filing of the offering statement (or since inception, whichever is shorter) will be required to describe their plan of operations for the 12 months following qualification of the offering statement.[349] For companies that have been in existence for less than three years, the final rules clarify that this disclosure requirement applies to them since inception.[350]

The changes to the Offering Circular format adopted today will result in Offering Circular disclosure, particularly for Tier 2 offerings, more akin to what is required of smaller reporting companies in a prospectus for a registered offering. For example, the final rules require issuers in both Tier 1 and Tier 2 offerings to disclose beneficial ownership of their voting securities, as opposed to record ownership of voting and non-voting securities.[351] With respect to transactions with related persons, promoters, and certain control persons in Tier 2 offerings, issuers will no longer be required to disclose transactions in excess of $50,000 in the prior two years (or similar transactions currently

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347 We are eliminating proposed Item 9(b)(2)-(3) of Offering Circular, Part II of Form 1-A. As proposed, these disclosures would have increased the disclosure obligations of Regulation A issuers in comparison to those required of smaller reporting companies under Item 305 of Regulation S-K. 17 CFR 229.305.

348 *See also* discussion of the final rules for simplifying Exchange Act registration of Tier 2 issuers in Section II.E.3.c. below.

349 Item 9(c) of Offering Circular, Part II of Form 1-A.

350 *Id.*

351 Item 12 of Offering Circular, Part II of Form 1-A.

contemplated), but rather must follow the requirements for smaller reporting company disclosure of transactions during the prior two fiscal years that exceed the lesser of $120,000 or 1% of the average total assets at year end for the last two completed fiscal years.[352] We originally proposed to apply this threshold to Tier 1 offerings also, but believe that the 1% of average total assets threshold could result in a lower disclosure threshold for smaller issuers than was otherwise required of such issuers under the existing rules. The final rules therefore preserve the related party transaction disclosure requirements of Regulation A, as they existed before the adoption of final rules today, for Tier 1 offerings so that issuers in such offerings are only required to disclose such transactions in excess of $50,000 in the prior two years (or similar transactions currently contemplated).[353]

In addition to preserving the related party transaction disclosure threshold for Tier 1 offerings, we are adopting a change applicable to Tier 1 that will provide an additional scaled disclosure option for issuers in the Offering Circular. This change is consistent with the general views of a number of commenters that urged the Commission to consider additional potential scaling for smaller issuers generally and Tier 1 offerings in particular.[354] The final rules alter the format of, but not the ultimate aggregate amount of information required to be disclosed in, the proposed executive compensation disclosure requirements for Tier 1 offerings. Instead of providing executive

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352 Item 13 of Offering Circular, Part II of Form 1-A. As adopted, Tier 2 issuers that have more than $5 million in average total assets at year end for the last two completed fiscal years would be required to disclose related party transactions at a higher threshold (*i.e.*, 1% or more) than was previously required under Regulation A, which required the disclosure of transactions in excess of $50,000 in the prior two years.

353 *Id.*

354 *See, e.g.,* Campbell Letter; MoFo Letter.

compensation data on an individual basis for the three highest paid officers or directors and on a group basis for all directors, as was proposed for both Tier 1 and Tier 2, issuers in Tier 1 offerings will instead be required to disclose only group-level compensation data as it applies to the three highest paid executives or directors and all directors as a collective group, including the number of persons comprising such group, covering the period of the issuer's last completed fiscal year.[355] In this regard, the final rules for Tier 1 offerings will continue to require the disclosure of important compensation data to investors, but on an aggregate, rather than individual, basis. The group-level disclosure format for the highest paid executives and all directors should help smaller issuers avoid some of the harm that could follow compensation disclosure of individual executives or directors to the market and competitors, especially when disclosure of such information would not necessarily be required in the context of a private placement or other exempt offering.[356] Further, the additional requirement to disclose the total number of persons comprising any group for which group-level data is required to be disclosed will preserve the ability of investors in Tier 1 offerings to determine the average compensation paid to all persons within the group.[357] Consistent with the suggestions of some commenters,[358]

355 *See* Item 11 of Offering Circular, Part II of Form 1-A. The number of persons comprising the director-level group data is also required of issuers providing compensation data under Tier 2.

356 For example, there are no rule-based disclosure requirements for private placements pursuant to Rule 506 of Regulation D, 17 CFR 230.500 *et seq.*, when the issuer only sells to accredited investors. Contrary to the requirements of Regulation D, we believe mandated compensation (and other) disclosure is appropriate in the context of a public offering under Regulation A. Additionally, however, we believe that the final disclosure rules for such information are appropriately tailored to provide information to investors.

357 This requirement is a change to the disclosure requirements of group-level data in both Tiers. Although this information would have been ascertainable under Tier 2 by comparing the group-level disclosure of director compensation to the number of directors disclosed pursuant to Item 10 of the Offering Circular, we believe the change will facilitate investors' calculations of average director compensation without significantly increasing the burden on Tier 2 issuers.

we believe that this change to the final rules will assist smaller issuers with more appropriately tailored executive compensation disclosure requirements and will provide investors with useful information.

We do not, however, believe that further scaling of smaller issuers' MD&A is necessary under the final rules. As we noted in the Proposing Release, while the final rules provide issuers with more detailed instructions on MD&A disclosure, similar disclosure is already called for under existing requirements.[359] The final MD&A requirements clarify existing requirements and will likely save issuers time by providing more express guidance regarding the type of information and analysis that should be included. We believe the clearer requirements will lead to improved MD&A disclosure, which will provide investors with better visibility into management's perspective on the issuer's financial condition and operations. The final provisions for MD&A disclosure in the Offering Circular, however, are not as extensive as those required under Item 303 of Regulation S-K.[360] As proposed, the final Offering Circular format includes detailed guidance and requirements similar to Item 303 with respect to liquidity, capital resources, and results of operations, including the most significant trend information,[361] but does not separately call for disclosure of off-balance sheet arrangements or a table of contractual

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358 Campbell Letter; MoFo Letter.

359 MD&A disclosure is specifically required by Model A. Model B calls for similar information in Item 6, which requires disclosure of the characteristics of the issuer's operations or industry that may have a material impact upon the issuer's future financial performance. Item 6 also requires disclosure of the issuer's plan of operations and short-term liquidity if the issuer has not received revenue from operations during each of the three fiscal years immediately prior to filing the offering statement.

360 17 CFR 229.303.

361 17 CFR 303(a)(1)-(3). *Cf.* Form 20-F, at Item 5.

obligations.[362] Similar to smaller reporting companies in registered offerings, Regulation A issuers are required to disclose information about the issuer's results of operations for the two most recently completed fiscal years and interim periods, when applicable.[363]

Except as noted above, the updates to the Offering Circular disclosure requirements will not result in an overall increase in an issuer's disclosure obligations. For example, as mentioned above, certain issuers will have a higher threshold for reporting related party transactions than would have previously been required under Regulation A. Additionally, Tier 1 issuers (which will likely be smaller companies) will, in comparison to the proposed rules, benefit from further scaling of related party transactions and compensation-related disclosures. Further, as proposed, all issuers will be permitted to provide more streamlined disclosure of dilutive transactions with insiders by no longer being required to present a dilution table based on the net tangible book value per share of the issuer's securities.[364] While we disagree with commenters that suggested we should expand disclosure provisions related to dilution,[365] the final rules, which reduce the disclosure time period from three years to one year, are consistent with their view that the disclosure of this information should not depend on when such shares were acquired. We do not believe that information regarding dilution covering more than

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362 An issuer may, however, be required to disclose such information during the course of the qualification process, if material to an understanding of the issuer's financial condition.

363 When management's discussion and analysis of the financial condition and results of operations is provided for interim period financial statements, any material change in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet should be discussed. Also, any material changes in results of operations with respect to the most recent fiscal year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year shall be discussed. *See* Instruction 3 to Item 9(a) of the Offering Circular, Part II of Form 1-A.

364 *See* Item 4 (Dilution) of the Offering Circular, Part II of Form 1-A.

365 *See* NASAA Letter 2, at fn. 50; WDFI Letter, at 9.

the prior year is necessary for the smaller issuers likely to conduct Regulation A offerings, nor do we believe that a reduction in the required disclosure from three years to one year, as proposed and adopted, will negatively affect investor protection. Additionally, the final provisions for MD&A disclosure clarify existing requirements and should benefit issuers by providing more express guidance regarding the type of information and analysis that should be included, including instructions about disclosure of operating results. We believe that these clarifications should also lead to improved MD&A disclosure, which will provide investors with better visibility into management's perspective on the issuer's financial condition and results of operations. Investors, particularly in Tier 2 offerings, will also benefit from disclosure that is more consistent across issuers in both registered offerings and Regulation A offerings.

We are making one change to the disclosure requirements of Item 6 (Use of Proceeds) in the final rules. As proposed, issuers were required to disclose if any material amount of other funds are to be used in conjunction with the proceeds raised in the offering. If so, an issuer would be required to state the amounts and sources of such other funds. The final rules include these proposed provisions, but add a requirement that the issuer further provide disclosure about whether such other funds are firm or contingent. While we did not receive any comment specifically addressing this issue, where applicable, this type of information would generally be required to be disclosed as part of the staff review and comment process before qualification. We believe an express requirement in the final rules will ultimately save issuers time in the qualification process and therefore are including language addressing this issue in the final rules.[366]

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366 *See* Instruction 5 to Item 6 (Use of Proceeds) of Part II of Form 1-A.

For clarity, we are moving the requirements to furnish certain supplemental information found in Item 7 (Business Description) of Part II to Form 1-A to General Instruction IV (Supplemental Information) to Form 1-A, where similar requirements are found. We believe that providing these instructions in one place will help issuers understand and comply with the process for furnishing supplemental information to the Commission. The process for furnishing supplemental information to the Commission pursuant to Form 1-A is similar to the treatment of such information in registered offerings.[367] Additionally, since we believe it is important for the Commission to be aware of the existence—rather than the non-existence—of such reports, the final rules no longer require an issuer to inform the Commission if no such report has been prepared. Item 7 is further revised to clarify that issuers must only disclose distinctive or special characteristics of the issuer's operation or industry that are reasonably likely to have a material impact on its future financial performance.[368]

The final rules also clarify in Item 5 (Plan of Distribution and Selling Securityholders) the calculation of selling securityholder ownership prior to an offering, which we believe will facilitate compliance with, and calculations pursuant to, this requirement. Additionally, in order to avoid potential confusion as to the scope of Items 11 and 13 to Part II of Form 1-A, the final rules make clear that issuers are required

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367 In this regard, we have also clarified in General Instruction IV that supplemental information provided to the Commission may be returned in certain circumstances and will be handled by the Commission in a similar manner to supplemental information provided in connection with registered offerings.

368 The language in proposed Item 7 to Part II of Form 1-A indicated that issuers had to disclose characteristics that "may" have a material impact on its future financial performance. We believe this clarifying change in the final rules will help facilitate compliance by smaller issuers.

to provide disclosure for "executive officers" rather than "officers."[369] Contrary to the suggestion of one commenter,[370] we do not believe that requiring disclosure regarding the existence of a code of ethics and corporate governance principles should be a required disclosure item for the types of issuers likely to conduct Regulation A offerings. While nothing in Part II of Form 1-A would prevent an issuer from providing more disclosure than is otherwise required in the form itself, we do not believe it would be appropriate to mandate this type of disclosure for all issuers because we anticipate that issuers of Regulation A securities will generally be smaller companies with less complex organizational structures.[371] We further believe that the disclosure requirements of Part II of Form 1-A will provide investors with the information they need to adequately evaluate an issuer's business and securities.

As proposed, the final rules permit issuers to incorporate by reference into Part II of Form 1-A certain items previously submitted or filed on EDGAR. In a change from the proposed rules, issuers will be permitted to incorporate by reference any documents publicly submitted or filed on EDGAR, as opposed to being limited to documents submitted or filed pursuant to Regulation A. We believe that this change will continue to facilitate the provision of required information to investors, while taking a consistent approach to information previously provided to the Commission and publicly available on EDGAR. Issuers following the Offering Circular disclosure model will be permitted to incorporate by reference into Items 2 through 14; issuers following the narrative

369 The language in proposed Items 11 and 13 to Part II of Form 1-A indicated that issuers had to disclose information regarding directors and officers. We believe the clarifying language will help smaller issuers comply with the final rules.

370 Ladd Letter 2 (referring to PCAOB AU 325 and 9325).

371 *See* fn. 93 above and Section III.C.3. below.

disclosure in Part I of Form S-1 will be permitted to incorporate by reference into Items 3 through 11 (other than Item 11(e)) of Part I of Form S-1; issuers following the narrative disclosure in Part I of Form S-11 will be permitted to incorporate by reference into Items 3 through 26, Item 28, and Item 30 of Part I of Form S-11.[372] The final rules require issuers to describe the information incorporated by reference, and include a separate hyperlink to the relevant document on EDGAR, which need not remain active after the filing of the related offering statement. Additionally, Form 1-A encourages issuers to cross-reference items within the form, where applicable.[373] Further, in order to avoid incorporation by reference to stale information without requiring the latest version of the document to be filed, Form 1-A indicates that, if any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.[374]

(2) Financial Statements

(a) Proposed Rules for Financial Statements

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372 *See* General Instruction III to Form 1-A. Since, as proposed, the financial statements required by Part F/S would apply to those following the Form S-1 format, rather than Item 11(e), we have removed the reference to that item in General Instruction III for clarity. Although, as proposed, Items 11(f) and (g) are also not required for those following the Form S-1 format, we continue to specifically allow for cross-referencing and incorporation by reference in those items for those voluntarily choosing to provide such disclosure. As with Model B, the item numbers in the Offering Circular format of Part II of Form 1-A and Part I of Form S-1 do not align.

373 *Id.* Issuers may, for example, add a cross-reference to disclosure found in the financial statements. However, they may not incorporate by reference or add a cross-reference within the financial statements to disclosures found elsewhere. *See* General Instruction III to Form 1-A, which does not allow for incorporation by reference in Part F/S.

374 *Cf.* Securities Act Rule 411(c) and Exchange Act Rule 12b-32 (providing a similar requirement when incorporating exhibits by reference in filings under the Securities Act and Exchange Act).

Part F/S of Form 1-A currently requires issuers[375] in Regulation A offerings to provide the following financial statements prepared in accordance with U.S. GAAP:[376]

- a balance sheet as of a date within 90 days before filing the offering statement (or as of an earlier date, not more than six months before filing, if the Commission approves upon a showing of good cause) but, for filings made more than 90 days after the end of the issuer's most recent fiscal year, the balance sheet must be dated as of the end of the fiscal year;
- statements of income, cash flows, and stockholders' equity for each of the two fiscal years preceding the date of the most recent balance sheet, and for any interim period between the end of the most recent fiscal year and the date of the most recent balance sheet;
- financial statements of significant acquired or to be acquired businesses; and
- pro forma information relating to significant business combinations.

The required financial statements may be unaudited unless the issuer has already obtained an audit for another purpose.[377]

We proposed to generally maintain the existing financial statement requirements of current Part F/S of Form 1-A for Tier 1 offerings, while requiring Tier 2 issuers to file audited financial statements.[378] We proposed to require all issuers to file balance sheets

375 The requirements also apply to the issuer's predecessors or any business to which the issuer is a successor.

376 *See* Form 1-A, Part F/S (2014).

377 The issuer would be considered to have audited financial statements if the qualifications and reports of the auditor meet the requirements of Article 2 of Regulation S-X (17 CFR 210.1 *et seq.*) and the audit was conducted in accordance with U.S. GAAS or the standards of the PCAOB. The auditor is not required to be registered with the PCAOB.

378 *See* paragraph (c) of Part F/S of proposed Form 1-A.

as of the two most recently completed fiscal year ends (or for such shorter time that they have been in existence), instead of the current requirement to file a balance sheet as of only the most recently completed fiscal year end. As proposed, financial statements for U.S.-domiciled issuers would be required to be prepared in accordance with U.S. GAAP. Additionally, however, we proposed to permit Canadian issuers to prepare financial statements in accordance with either U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB).[379]

As proposed, issuers conducting Tier 1 offerings would be required to follow the requirements for the form and content of their financial statements set out in Part F/S, rather than the requirements in Regulation S-X. In certain less common circumstances, however, such as for an acquired business or subsidiary guarantors, Part F/S would direct issuers conducting Tier 1 offerings to comply with certain portions of Regulation S-X, which provides guidance on the financial statements required for entities other than the issuer.[380]

For all Tier 2 offerings, the proposed rules would require issuers to follow the financial statement requirements of Article 8 of Regulation S-X, as if the issuer

379 If the proposed financial statements comply with IFRS as issued by the IASB, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB. *See* General Rule (a)(2) to Part F/S of proposed Form 1-A. *Cf.* Item 17(c) of Form 20-F.

380 We proposed to update the requirements for financial statements of businesses acquired or to be acquired in Part F/S to refer to the requirements of Rule 8-04 of Regulation S-X. We also proposed to provide specific references to the relevant provisions of Regulation S-X regarding the requirements for financial statements of guarantors and the issuers of guaranteed securities (Rule 3-10 of Regulation S-X), financial statements of affiliates whose securities collateralize an issuance of securities (Rule 3-16 of Regulation S-X), and financial statements provided in connection with oil and gas producing activities (Rule 4-10 of Regulation S-X). As proposed, the financial statements provided in these circumstances would only be required to be audited to the extent the issuer had already obtained an audit of its financial statements for other purposes.

conducting a Tier 2 offering were a smaller reporting company, unless otherwise noted in Part F/S. This requirement would include any financial information with respect to acquired businesses required by Rule 8-04 and 8-05 of Regulation S-X.[381]

As proposed, issuers conducting Tier 2 offerings would be required to have their financial statements audited. As with Tier 1 offerings, the auditor of financial statements would need to be independent under Rule 2-01 of Regulation S-X and must comply with the other requirements of Article 2 of Regulation S-X, but need not be PCAOB-registered.[382] Unlike Tier 1 issuers, issuers conducting Tier 2 offerings would be required to provide financial statements that are audited in accordance with the standards issued by the PCAOB.

Additionally, we proposed to update the Form 1-A financial statement requirements to be consistent with the proposed timetable for ongoing reporting.[383] Under existing Regulation A, issuers are required to prepare a balance sheet as of a date not more than 90 days before filing the offering statement, or not more than six months before filing if approved by the Commission upon a showing of good cause.[384] In practice, issuers often receive a six-month accommodation. If the financial statements

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381 Tier 2 issuers would, however, follow paragraph (a)(3) of Part F/S of proposed Form 1-A with respect to the age of the financial statements and the periods to be presented. In Tier 2 offerings, the form and contents of financial statements for other entities follow the requirements of Article 8 of Regulation S-X.

382 *See* Part F/S of proposed Form 1-A (referencing Article 2 of Regulation S-X, 17 CFR 210.2-01 *et seq.*).

383 The rules for ongoing reporting are discussed in Section II.E. below.

384 *See* Form 1-A, Part F/S (2014).

are filed more than 90 days after the end of the issuer's most recently completed fiscal year, the financial statements must include that fiscal year.[385]

We proposed to extend the permissible age of financial statements in Form 1-A to nine months, in order to permit the provision of financial statements that are updated on a timetable consistent with our proposed requirement for semiannual interim reporting.[386] We also proposed to add a new limitation on the age of financial statements at qualification, under which an offering statement could not be qualified if the date of the balance sheet included under Part F/S were more than nine months before the date of qualification.[387] For filings made more than three months after the end of the issuer's most recent fiscal year, the balance sheet would be required to be dated as of the end of the most recent fiscal year.[388] For filings made more than nine months after the end of the issuer's most recent fiscal year, the balance sheet would be required to be dated no earlier than as of six months after the end of the most recent fiscal year.[389] If interim financial statements are required, they would be required to cover a period of at least six months.[390] In the Proposing Release, we noted that requiring issuers to file interim financial statements no older than nine months and covering a minimum of six months

385 *Id.*

386 This age of financial statements requirement is also consistent with the treatment of foreign private issuers in the context of registered offerings. *See* Division of Corporation Finance's Financial Reporting Manual, at 6620, *available at*: http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf#topic6.

387 Form 1-A currently does not expressly limit the age of financial statements at qualification. In practice, however, Commission staff requires issuers to update financial statements before qualification to the extent such financial statements no longer satisfy Form 1-A's requirements for the age of financial statements at the time of filing.

388 *See* paragraph (a)(3)(i) to Part F/S of proposed Form 1-A.

389 *Id.*

390 *See* paragraph (a)(3)(iv) to Part F/S of proposed Form 1-A.

would have the beneficial effect of eliminating what could otherwise be a requirement for certain issuers to provide quarterly interim financial statements during the qualification process and would be consistent with the timing of our proposed ongoing reporting requirements.[391] We proposed to generally maintain the timing requirement of existing Form 1-A concerning the date after which an issuer must provide financial statements dated as of the most recently completed fiscal year, but to change the interval from 90 calendar days to three months.[392] While not proposed, we additionally solicited comment on whether Tier 2 issuers should be required to submit financial statements in interactive data format using the eXtensible Business Reporting Language (XBRL).

(b) Comments on Proposed Rules

We received numerous detailed suggestions from commenters on our proposed financial statement requirements for Part F/S of Form 1-A. Commenters were generally supportive of the proposed rules, but also raised concerns as to the effect some of the proposed requirements for audits in Tier 2 offerings could have on issuers and recommended clarifying revisions that would help to make the financial statements more consistent in some respects with those required in registered offerings, while also eliminating potentially confusing or inconsistent terminology.

Commenters generally supported the proposed increase to two years of balance sheets.[393] One commenter noted that the Commission's proposal to require two years of balance sheets was appropriate, particularly in light of the existing requirement to provide

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391 *See* discussion in Section II.E.1. below.

392 *See* paragraph (a)(3)(i) to Part F/S of proposed Form 1-A.

393 *See, e.g.*, CFA Institute Letter; ABA BLS Letter.

statements of income, cash flows and stockholders' equity for two years.[394] Another commenter, however, argued against two years of balance sheets for Tier 1 issuers instead of the one year required under existing Regulation A.[395]

While commenters generally approved of the proposed rules not requiring audits for Tier 1 issuers,[396] many recommended making changes to the proposed auditing requirements for the financial statements included in an offering.[397] One commenter recommended not requiring audited financial statements until after the first year of operations as a "public startup company" or not at all for companies that are pre-revenue or that have paid-in capital, assets and revenues below a specified threshold.[398] Many commenters recommended allowing Tier 1 issuers to designate financial statements as "audited" if the auditor was only independent in accordance with the rules of the AICPA and not in accordance with the Commission's auditor independence rules.[399] These commenters noted that the proposed requirements for financial statements only to qualify as "audited" if the auditor complies with the independence standards of Article 2 of Regulation S-X, as opposed to the independence standards of the AICPA, may increase costs to smaller issuers due to the increased likelihood that an issuer would need to have

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394 ABA BLS Letter (noting that in light of the existing requirements, the proposed change did not seem unduly burdensome).

395 Campbell Letter.

396 *See, e.g.*, CFA Institute Letter; ABA BLS Letter; Campbell Letter.

397 ABA BLS Letter; BDO Letter; Canaccord Letter; CAQ Letter; CFA Letter; CFIRA Letter 2; Deloitte Letter; E&Y Letter; Letter from KPMG LLP, March 24, 2014 ("KPMG Letter"); Letter from McGladrey LLP ("McGladrey Letter"); MoFo Letter; WOC Letter; WR Hambrecht + Co Letter.

398 Letter from Jason Coombs, Co-Founder and CEO, Public Startup Company, Inc., March 25, 2014 ("Public Startup Co. Letter 3") (suggesting three tiers, where at least the first two would not require audited financial statements); Public Startup Co. Letter 6.

399 BDO Letter; CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter.

their financial statements audited a second time by an auditor who was independent under Rule 2-01 of Regulation S-X. One commenter requested clarification of whether a Tier 1 issuer could voluntarily provide an audit opinion on its financial statements that was obtained for other purposes if the auditor complied with U.S. GAAS, including AICPA independence standards, but not with the Commission's independence rules.[400] Several commenters recommended requiring Tier 1 issuers that provide unaudited financial statements to label them as unaudited.[401]

Many commenters recommended allowing financial statements in Tier 2 offerings to be audited in accordance with either PCAOB standards or U.S. GAAS.[402] One commenter limited its recommendation to smaller Tier 2 issuers and conditioned this recommendation on the Commission not altering the requirement that auditors be independent under Rule 2-01 of Regulation S-X.[403] This commenter also recommended conditioning the ability to follow U.S. GAAS under Tier 2 on the issuer's showing of undue cost and impracticability in the offering statement and also limiting this relief to the issuer's initial Tier 2 offering. One commenter noted that because Regulation A issuers are not "issuers" (as defined in Section 2(a)(7) of the Sarbanes-Oxley Act of 2002),[404] when the audit is performed in accordance with PCAOB standards, AICPA rules would require the audit to be compliant with both AICPA and PCAOB standards

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400 CAQ Letter.

401 CAQ Letter (recommending that such issuers disclose that the financial statements have not been subject to an audit or review by an independent accountant); E&Y Letter; KPMG Letter.

402 ABA BLS Letter; BDO Letter; Canaccord Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter; MoFo Letter; WR Hambrecht + Co Letter.

403 ABA BLS Letter.

404 15 U.S.C. 7201(a) *et seq.*

and the auditor's report would have to reference both AICPA and PCAOB standards. This commenter also noted, however, that given recent changes to the auditor's report under AICPA standards, it may not be possible for the auditor to be in compliance with both AICPA and PCAOB standards from a reporting perspective.[405]

Additionally, two commenters expressed concern about potential confusion that could result from requiring PCAOB standards in Tier 2 offerings, but not requiring PCAOB registration.[406] One of these commenters recommended avoiding any potential confusion by allowing for audits under U.S. GAAS in Tier 2 offerings.[407] Another commenter stated that the issue could be resolved by requiring either the use of PCAOB-registered auditors for Tier 2 offerings or appropriate disclosure of the auditor's PCAOB registration status, noting that the disclosure option would result in lower costs to the issuer and fewer instances in which an issuer would need to have its financial statements audited a second time under PCAOB standards.[408]

One commenter asked the Commission to clarify issues relating to transition reporting for Tier 1 issuers that have previously conducted an offering pursuant to the exemption under Section 4(a)(6) and were required to file reviewed annual financial statements.[409] Another commenter asked the Commission to clarify the application of the audit requirements applicable to Tier 1 issuers that have audited financial statements prepared for other purposes, in light of potentially contradictory references in proposed

405 KPMG Letter.

406 BDO Letter; Deloitte Letter.

407 Deloitte Letter.

408 BDO Letter.

409 E&Y Letter.

Form 1-A to the "standards of the PCAOB" and the PCAOB auditing standards.[410] One commenter recommended not requiring audited financials under either Tier 1 or Tier 2 for "small companies with limited revenues and assets."[411] Another commenter raised concerns about allowing Tier 1 issuers to include financial statements audited using U.S. GAAS and not requiring that all audits be conducted by PCAOB–registered auditors.[412]

Many commenters recommended making other changes to the financial statement requirements not directly related to audit requirements.[413] A number of commenters suggested allowing companies to use alternatives under U.S. GAAP for non-public business entities when preparing their financial statements, since Regulation A issuers would otherwise be considered "public business entities" under FASB standards.[414] These commenters were concerned about the need for issuers to have their financial statements prepared and audited a second time under U.S. GAAP applicable to public business entities, as discussed in greater detail below. One commenter did not address this issue with respect to Tier 1, but recommended allowing the smallest Tier 2 issuers to follow alternatives under U.S. GAAP applicable to non-public business entities.[415] One commenter recommended allowing companies to include financial statements prepared in accordance with alternatives under U.S. GAAP for non-public business entities in

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410 CAQ Letter.

411 WOC Letter.

412 CFA Letter.

413 ABA BLS Letter; BDO Letter; Letter from Frederick D. Lipman, Blank Rome LLP, March 17, 2014 ("Blank Rome Letter"); Canaccord Letter; CAQ Letter; CFIRA Letter 1; Deloitte Letter; E&Y Letter; KPMG Letter; Karr Tuttle Letter; McGladrey Letter; MoFo Letter; PwC Letter; WR Hambrecht + Co Letter.

414 ABA BLS Letter; Canaccord Letter; CAQ Letter; CFIRA Letter 1; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter; MoFo Letter; WR Hambrecht + Co Letter.

415 ABA BLS Letter.

offerings up to a specified minimum, suggesting $10 million or $20 million.[416] Another commenter recommended explicitly stating that Regulation A issuers are subject to "public business entity" requirements if the final rules do not provide for the use of, or a non-costly transition from, financial statements based on alternatives under U.S. GAAP for non-public business entities.[417] One commenter limited its recommendation with respect to the applicability of alternatives under U.S. GAAP for non-public business entities to Tier 1 issuers and to entities whose financial statements are required to be included in offering statements relying on Tier 1.[418] Another commenter noted that significant acquired businesses will qualify as "public business entities" because their financial statements are filed with the Commission.[419] As a result, financial statements of those businesses would also need to be revised, and an issuer would potentially need to have their financial statements prepared and audited a second time under U.S. GAAP applicable to public business entities.

Several commenters recommended allowing issuers under Regulation A to defer adopting new or revised accounting standards effective for public companies if non-public business entities have a delayed effective date (similar to accommodations for emerging growth companies under Section 102(b) of the JOBS Act).[420] Two commenters recommended either clarifying how the disclosure requirements for pro forma financial information in Part F/S for Tier 1 issuers differ from Rule 8-05 of Regulation S-X or

416 McGladrey Letter.

417 KPMG Letter.

418 E&Y Letter.

419 Deloitte Letter.

420 CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter.

requiring such Tier 1 issuers to follow Rule 8-05.[421] One commenter recommended allowing companies formed within nine months of the filing date of the offering statement to provide only a discussion of their financial condition and operations since inception, rather than financial statements as of a date within nine months of the date of filing.[422] This commenter further recommended aligning the financial statement updating requirements with the timing of periodic reports (*e.g.*, allowing for 120 days before year end financial statements are required in the offering statement, rather than 90 days).[423] This commenter also recommended that the Commission consider additional scaling for Regulation A offerings in the requirements concerning the financial statements of: acquired or to-be-acquired businesses; guarantors of issuers of guaranteed securities; and, affiliates that collateralize an issuance.[424]

Another commenter recommended that Tier 2 issuers not be subject to Rule 8-04(b)(3) of Regulation S-X when the to-be-acquired business has significant loss operations.[425] This commenter recommended at least not applying Rule 8-04(b)(3) in situations where companies intend to eliminate the losses by dropping certain products or service lines of business that produced the loss. Another commenter recommended clarifying whether financial statements should also be dated within nine months of the qualification date of the offering statement.[426]

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421 CAQ Letter; PwC Letter.

422 E&Y Letter.

423 *Id.*

424 *Id.*

425 Blank Rome Letter.

426 E&Y Letter (referring to paragraphs (a)(3)(i) and (b)(2) of Part F/S of proposed Form 1-A).

One commenter made a number of specific recommendations that we clarify language in particular paragraphs of the proposed requirements for financial statements in Part F/S of Form 1-A.[427] A different commenter indicated that proposed Form 1-A seemed to require issuers to disclose "selected financial information" and objected to any such requirement as being more onerous than the requirements otherwise applicable to smaller reporting companies.[428]

Several commenters specifically supported allowing Canadian issuers to prepare their financial statements in accordance with IFRS as issued by the IASB, as proposed.[429] More generally, many commenters recommended allowing foreign issuers to use IFRS as issued by the IASB to prepare their financial statements.[430] One commenter recommended allowing U.S. companies to use IFRS when conducting offerings in Canada.[431] This comment was made within the context of providing U.S. companies the ability to list on a Canadian exchange without being subject to resale restrictions imposed by Regulation S. Three commenters specifically opposed adding an XBRL requirement.[432]

(c) Final Rules for Financial Statements

As discussed more fully below, we are adopting requirements for financial statements in Part F/S of Form 1-A with changes from the proposed rules that are

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427 E&Y Letter, Appendix B.

428 CAQ Letter. *See* Section II.C.3.a. above.

429 ABA BLS Letter; Canaccord Letter; MoFo Letter; NASAA Letter 2; PwC Letter.

430 ABA BLS Letter (although supporting excluding non-Canadian foreign companies); Andreessen/Cowen Letter; Canaccord Letter (stating generally that the Commission should clarify that companies may use IFRS); CAQ Letter; Deloitte Letter; PwC Letter.

431 Karr Tuttle Letter.

432 BIO Letter; MoFo Letter; U.S. Chamber of Commerce Letter.

designed to simplify and lower the cost of compliance for issuers, while maintaining important investor protections. As proposed, the final rules require Tier 1 and Tier 2 issuers to file balance sheets and other required financial statements as of the two most recently completed fiscal year ends (or for such shorter time that they have been in existence). With the exception of the requirement to file two years of balance sheets, the final rules largely maintain the existing financial statement requirements of current Part F/S for Tier 1 offerings, while requiring Tier 2 issuers to file audited financial statements in Part F/S.

Financial statements for U.S.-domiciled issuers will be required to be prepared in accordance with U.S. GAAP, as is currently the case. Canadian issuers, however, may prepare financial statements in accordance with either U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB).[433]

Additionally, consistent with the suggestions of commenters and in order to be consistent with the treatment of emerging growth companies under Section 102(b)(1) of the JOBS Act, the final rules permit issuers, where applicable, to delay the implementation of new accounting standards to the extent such standards provide for delayed implementation by non-public business entities.[434] In this regard, with respect to the delayed implementation of new or revised financial accounting standards, if the issuer

433 If the financial statements comply with IFRS as issued by the IASB, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB. *See* General Rule (a)(2) to Part F/S of Form 1-A.

434 CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter. *See also* Section 7(a)(2)(B) of the Securities Act, 15 U.S.C. 77g(a)(2)(B), and Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a).

chooses to take advantage of the extended transition period to the same extent that a "non-issuer" company is permitted to, the issuer:

- Must disclose such choice at the time the issuer files the offering statement; and
- May not take advantage of the extended transition period with respect to some standards and not others, but must apply the same choice to all standards.[435]

However, issuers electing not to use this accommodation must forgo this accommodation for all financial accounting standards and may not elect to rely on this accommodation in any future filings.[436]

As proposed, the final rules require issuers conducting Tier 1 offerings to follow the requirements for the form and content of their financial statements set out in Part F/S, rather than following the requirements in Regulation S-X.[437] However, consistent with a comment received,[438] in certain less common circumstances, such as for an acquired business or subsidiary guarantors, Part F/S directs issuers conducting Tier 1 offerings to certain portions of Regulation S-X that provide guidance on when financial statements for entities other than the issuer are required.[439] In Tier 1 offerings the form and content

435 *See* paragraph (a)(3) of Part F/S of Form 1-A.

436 *Id.*

437 *See* paragraph (b) of Part F/S of Form 1-A.

438 E&Y Letter.

439 We are updating the requirements for financial statements of businesses acquired or to be acquired in Part F/S to refer to the requirements of Rule 8-04 of Regulation S-X. We are also providing specific references to the relevant provisions of Regulation S-X regarding the requirements for financial statements of guarantors and the issuers of guaranteed securities (Rule 3-10 of Regulation S-X), financial statements of affiliates whose securities collateralize an issuance of securities (Rule 3-16 of Regulation S-X), financial statements provided in connection with oil and gas producing activities (Rule 4-10 of Regulation S-X), pro forma financial information (Rule 8-05 of Regulation S-X) and income statements for real estate operations acquired or to be acquired (Rule 8-06 of Regulation S-X). The financial statements provided in these circumstances

of the financial statements for those other entities also follow the requirements set out in Part F/S. We believe this guidance will assist issuers with compliance with the general requirements for financial statement disclosure in these less common circumstances and is an appropriate change in the final rules. In an effort to reduce confusion, as suggested by commenters,[440] the final rules also direct issuers to Rule 8-05 of Regulation S-X for pro forma information disclosure requirements. Additionally, the final rules require compliance with Rule 8-06 of Regulation S-X for real estate operations acquired because real estate companies and REITs are eligible issuers.

The final rules require Tier 2 issuers to follow the financial statement requirements of Article 8 of Regulation S-X, as if the issuer were a smaller reporting company, unless otherwise noted in Part F/S.[441] This requirement also includes any financial information required for Tier 1 offerings, as discussed above, such as acquired businesses required by Rule 8-04 and 8-05 of Regulation S-X.[442]

As adopted, financial statements in a Tier 1 offering are not required to be audited. Consistent with the suggestions of commenters,[443] and in order to avoid potential confusion as to the presentation of financial statements, issuers in Tier 1 offerings that do not provide audited financial statements must label their financial statements as unaudited. However, the final rules clarify that, if an issuer conducting a

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would only be required to be audited to the extent the issuer had already obtained an audit of those financial statements for other purposes.

440 CAQ Letter; PwC Letter.

441 *See* paragraph (c) of Part F/S of Form 1-A.

442 Tier 2 issuers would, however, follow paragraphs (c)(1) of Part F/S of Form 1-A with respect to the age of the financial statements and the periods to be presented. In Tier 2 offerings, the form and content of financial statements for other entities follow the requirement of Article 8 of Regulation S-X.

443 CAQ Letter; E&Y Letter; KPMG Letter.

Tier 1 offering has already obtained an audit of its financial statements for other purposes, and that audit was performed in accordance with U.S. GAAS or the standards of the PCAOB, and the auditor followed the independence standards of either Rule 2-01 of Regulation S-X or the independence standards of the AICPA, then those audited financial statements must be filed.[444] We believe the requirement to file already available audited financial statements will benefit investors. The auditor need not be registered with the PCAOB. While audited financial statements are not generally required to be filed for Tier 1 offerings, allowing auditors to follow the independence standards of the AICPA or Rule 2-01 of Regulation S-X is consistent with the suggestions of most commenters and will provide smaller issuers that seek to submit "audited" financial statements in Tier 1 offerings with greater flexibility in satisfying the financial statement requirements.[445] We agree that, when available, financial statements that satisfy the financial statement requirements and that have been audited by an auditor that meets the independence standards of the AICPA should be deemed "audited" for purposes of Tier 1 offerings.

Issuers conducting Tier 2 offerings are, by contrast, required to have their financial statements audited. The auditor of financial statements being filed as part of a Tier 2 offering must be independent under Rule 2-01 of Regulation S-X and must comply with the other requirements of Article 2 of Regulation S-X, but need not be PCAOB-registered.[446] In a change from the proposed rules, and consistent with the

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444 *See* CAQ Letter (requesting clarification on this issue).

445 While not a requirement, issuers in Tier 1 offerings may have independent business reasons why they seek to provide, or investors that may otherwise demand, audited financial statements.

446 *See* paragraph (c)(1)(iii) of Part F/S of Form 1-A.

suggestions of commenters,[447] the final rules require issuers conducting Tier 2 offerings to provide financial statements that are audited in accordance with either U.S. GAAS or the standards issued by the PCAOB.

As noted above, one commenter indicated that, because Regulation A issuers are not "issuers," as defined by Section 2(a)(7) of the Sarbanes-Oxley Act of 2002, AICPA rules would require the audit to be compliant with U.S. GAAS even if the auditor has conducted the audit in accordance with PCAOB standards. Staff of the Commission consulted with the AICPA on this issue and has been advised that an audit performed by its members of an issuer conducting an offering pursuant to Regulation A would be required to comply with U.S. GAAS in accordance with the AICPA's Code of Professional Conduct.[448] As a result, an auditor for a Regulation A issuer who is conducting its audit in accordance with PCAOB standards would also be required to comply with U.S. GAAS, and the auditor would need to comply with the reporting requirements of both the AICPA standards and the PCAOB standards. As further noted by this commenter,[449] there may be some question as to whether an auditor can currently comply with both sets of standards when issuing its auditor's report. Commission staff also consulted with the AICPA on this issue and has been informed that the AICPA will consider taking action to address this potential conflict so that an auditor's report would be able to comply with both sets of auditing standards.

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447 ABA BLS Letter; BDO Letter; Canaccord Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter; MoFo Letter; WR Hambrecht + Co Letter.

448 The AICPA Code of Professional Conduct is available at: http://pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf.

449 *See* KPMG Letter.

Thus, requiring issuers in Tier 2 offerings to have their financial statements audited in accordance with PCAOB standards would have the effect of requiring issuers to comply with two sets of auditing standards and potentially result in audits for Tier 2 issuers being subject to additional incremental costs than would be required for registered offerings (which are only subject to PCAOB auditing standards). To avoid such a result, the final rules permit Tier 2 issuers the option of following U.S. GAAS or the standards of the PCAOB.[450]

We believe that providing issuers with this option could help reduce the cost of required audits in Tier 2 offerings while maintaining appropriate safeguards for investors. We believe audits conducted in accordance with U.S. GAAS provide sufficient protection for investors in Regulation A offerings, especially in light of the requirement that auditors for Tier 2 offerings must be independent under Rule 2-01 of Regulation S-X. Moreover, we believe that the flexibility adopted in the final rules is more appropriately tailored for the different types of issuers likely to conduct Tier 2 offerings because it will not only eliminate the potential that existed under the proposed rules that some issuers would need to have their financial statements audited a second time under PCAOB standards, but also continue to permit issuers, such as those that may seek concurrent registration of a class of securities under the Exchange Act, to comply with the PCAOB standards if they so choose.[451]

An issuer that includes financial statements audited in accordance with U.S. GAAS and PCAOB standards will likely incur additional incremental costs compared

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450 As discussed above, however, compliance with PCAOB standards could also require compliance with U.S. GAAS.

451 *See, e.g.*, Section II.E.3.c (Exchange Act Registration of Regulation A Securities) below.

with an issuer that includes financial statements audited only in accordance with U.S. GAAS. However, we assume that an issuer would only elect to comply with both sets of auditing standards because it has concluded that the benefit of doing so (for example, to facilitate Exchange Act registration) justify these additional incremental costs. Commission staff understands that many firms that conduct audits using PCAOB standards have developed their methodology in a manner that would comply with both sets of standards, which could help contain the costs related to complying with both U.S. GAAS and PCAOB auditing standards.

An issuer conducting a Regulation A offering that seeks to concurrently register its securities under the Exchange Act would be required to file audited financial statements that are prepared in accordance with the standards of the PCAOB by an auditor that is PCAOB-registered.[452] The final rules therefore provide Regulation A issuers with the option to provide financial statements in Part F/S of Form 1-A that comply with correlating requirements under the Exchange Act.[453]

The Form 1-A financial statement requirements are being further updated to be consistent with the timetable for ongoing reporting.[454] The final rules extend the permissible age of financial statements in Form 1-A to nine months, in order to permit the provision of financial statements that are updated on a timetable consistent with our

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452 *See* Section 12 of the Exchange Act, Section 102 of the Sarbanes Oxley Act of 2002 and Article 2 of Regulation S-X.

453 If the final rules did not permit issuers to prepare audited financial statements in accordance with the standards of the PCAOB, Regulation A issuers that rely on the amendments to Form 8-A adopted today in order to register a class of securities pursuant to Section 12 of the Exchange Act would have to have their financial statements audited a second time under PCAOB standards by a PCAOB registered auditor.

454 Our final rules for ongoing reporting are discussed in Section II.E.1. below.

requirement for semiannual interim reporting.[455] As proposed, the final rules add a new limitation on the age of financial statements at qualification, under which an offering statement cannot be qualified if the date of the most recent balance sheet included under Part F/S is more than nine months before the date of qualification.[456] For filings made more than three months but no more than nine months after the end of the issuer's most recently completed fiscal year end, issuers are required to include a balance sheet as of the two most recently completed fiscal year ends.[457] For filings made more than nine months after the end of the issuer's most recently completed fiscal year end, the balance sheet is required to be dated as of the two most recently completed fiscal year ends and an interim balance sheet must be included as of a date no earlier than six months after the end of the most recently completed fiscal year.[458] If interim financial statements are required, they are required to cover a period of at least six months.[459] Requiring issuers to file interim financial statements no older than nine months and covering a minimum of six months has the beneficial effect of eliminating what would otherwise be a requirement for certain issuers to provide quarterly interim financial statements during the qualification process and is consistent with the timing of the ongoing reporting requirements adopted today.[460] We are generally maintaining the requirement of existing Form 1-A concerning the date after which an issuer must provide financial statements

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455 *See* paragraph(s) (b)(3)-(4) of Part F/S of Form 1-A for Tier 1 issuers, which also apply to Tier 2 issuers by virtue of paragraph (c)(1) of Part F/S of Form 1-A.

456 *Id.*

457 *See* paragraph (b)(3)(A) of Part F/S of Form 1-A.

458 *See* paragraph (b)(3)(B) of Part F/S of Form 1-A.

459 *See* paragraph (b)(4) of Part F/S of Form 1-A.

460 *See, e.g.*, discussion in Section II.E.1. below.

dated as of the most recently completed fiscal year, but are changing the interval from 90 calendar days to three months, which we believe will simplify compliance by allowing issuers to follow full months. In order to further simplify compliance with the final rules, we also revised Part F/S of Form 1-A to streamline the application of, and simplify the language in, the rules without substantively changing the required content.

Although we solicited comment on whether issuers conducting Tier 2 offerings should be required to provide their financial statements to the Commission and on their corporate websites in interactive data format using XBRL, we are not adopting any such requirement in the final rules.[461] Commenters that addressed this issue opposed requiring the use of XBRL in Regulation A filings.[462] We agree and do not believe that requiring the use of XBRL in Regulation A filings would be an appropriately tailored requirement for smaller issuers at this time.[463]

On December 23, 2013, after we proposed rules for Regulation A, the Financial Accounting Standards Board (FASB) and Private Company Council (PCC) issued a guide for evaluating financial accounting and reporting for non-public business entities.[464] The PCC was created in 2012 by the FASB and the Financial Accounting Foundation (FAF) to improve the standard-setting process, and provide for accounting

461 Data becomes interactive when it is labeled or "tagged" using a computer markup language such as XBRL that software can process for analysis. For a discussion of current financial statement interactive data requirements, *see* Rel. No. 33-9002 (Jan. 30, 2009) [74 FR 6776].

462 BIO Letter; MoFo Letter; US Chamber of Commerce Letter.

463 We recognize, however, that future technological developments may lessen the burden to smaller issuers associated currently with XBRL, at which time we may revisit this initial determination.

464 The Private Company Decision-Making Framework: A Guide for Evaluating Financial Accounting and Reporting for Private Companies (the "PCC Guide"), *available at*: http://www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176163703583.

and reporting alternatives, for non-public business entities under U.S. GAAP.[465] As the standards for non-public business entities are new, there are currently very few distinctions between U.S. GAAP for public and non-public business entities. Over time, however, more distinctions between non-public business entity and public company accounting standards could develop.

Issuers that offer securities pursuant to Regulation A will be considered "public business entities" as defined by the FASB and, therefore, ineligible to rely on any alternative accounting or reporting standards for non-public business entities.[466] Even though issuers of securities in a Regulation A offering fit within the definition of "public business entity," the Commission retains the authority to determine whether or not such issuers would be permitted to rely on the developing non-public business entity standards.[467]

The distinction between public and non-public business entity standards was not directly contemplated in the Proposing Release, as the FASB/PCC Guide was issued after the Regulation A proposal was approved by the Commission.[468] Commenters, however, generally expressed concern about the costs associated with requiring non-public business entities (*e.g.*, non-Exchange Act reporting companies) to follow public company

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465 For a brief history behind the creation of the PCC, *see*: http://www.fasb.org/cs/ContentServer?c=Page&pagename=FASB%2FPage%2FSectionPage&cid=1351027243391.

466 *See* numbered paragraph 12 of the PCC Guide, p. 3.

467 *Id.*

468 The Commission approved the proposed rules on December 18, 2013, while the PCC Guide was issued on December 23, 2013.

U.S. GAAP accounting standards, particularly on a going forward basis.[469] Commenters also expressed concern about the potential that an issuer would need to have its financial statements prepared and audited a second time, which would likely increase the costs associated with any previously obtained financial statements by a non-public business entity that would not comply with the financial statement requirements of an exemption that requires such issuer to follow the standards applicable to public business entities.[470]

The final rules do not allow Regulation A issuers to use the alternatives available to non-public business entities under U.S. GAAP in the preparation of their financial statements. One of the significant factors considered by the FASB in developing its definition of "public business entity" was the number of primary users of the financial statements and their access to management.[471] As the FASB noted, "users of private company financial statements have continuous access to management and the ability to obtain financial information throughout the year."[472] As the number of investors increases and the ability to influence management decreases, it is important that all investors receive or have timely access to comprehensive financial information. As a result, the Commission believes that investor protection is enhanced by Regulation A issuers providing financial statements prepared in the same manner as other entities meeting the FASB's definition of "public business entity."

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469 ABA BLS Letter; Canaccord Letter; CAQ Letter; CFIRA Letter 1; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter; MoFo Letter; WR Hambrecht + Co Letter.

470 *Id.*

471 PCC Guide, p. 6.

472 *Id.*

c. **Part III (Exhibits)**

We proposed to maintain the existing exhibit requirements in Part III of Form 1-A. Additionally, we proposed to continue to permit issuers to incorporate by reference certain information in documents filed under Regulation A that is already available on EDGAR, but also require issuers to describe the information incorporated by reference and include a hyperlink to such exhibit on EDGAR.[473] As proposed, issuers also would have to be subject to the ongoing reporting obligations for Tier 2 offerings in order to avail themselves of this accommodation.

We did not receive any comments on the proposed exhibit requirements for Part III of Form 1-A, and are adopting the proposed exhibit requirements substantially as proposed. As adopted, issuers will be required to file the following exhibits with the offering statement: underwriting agreement; charter and by-laws; instrument defining the rights of securityholders; subscription agreement; voting trust agreement; material contracts; plan of acquisition, reorganization, arrangement, liquidation, or succession; escrow agreements; consents; opinion regarding legality; "testing the waters" materials; appointment of agent for service of process; and any additional exhibits the issuer may wish to file.[474] In a change from the proposed requirements, however, the final rules no longer require issuers to file schedules (or similar attachments) to material contracts in all instances. As adopted, issuers are permitted to exclude schedules (or similar attachments) to material contracts if not material to an investment decision or if the

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473 *See* General Instruction III to proposed Form 1-A and discussion in Section II.C.3.b(1). above regarding incorporation by reference in Part II of Form 1-A. The hyperlink must be active at the time of filing, but need not remain active after filing.

474 *See* Part III (Exhibits) of Form 1-A.

material information contained in such schedules is otherwise disclosed in the agreement or the offering statement. Any material contract filed in response to Item 17, however, must contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

We are adopting final rules that permit issuers to incorporate by reference certain information that is already available on EDGAR. In a change from the proposed rules, incorporation by reference will not be limited to documents previously filed pursuant to Regulation A and will not be limited to issuers subject to Tier 2 ongoing reporting obligations. We believe that this change will continue to facilitate the provision of required information to investors, while taking a consistent approach to information previously provided to the Commission and publicly available on EDGAR. Issuers that seek to incorporate by reference are further required to describe the information incorporated by reference and include a hyperlink to such exhibit on EDGAR.[475] As proposed, such issuers must be subject to the ongoing reporting obligations for Tier 2 offerings. Additionally, as proposed, to the extent post-qualification amendments to offering statements must include audited financial statements, the final rules require the consent of the certifying accountant to the use of such accountant's report in connection with amended financial statements to be included as an exhibit.[476] The final rule,

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475 *See* General Instruction III to Form 1-A. The hyperlink must be active at the time of filing, but need not remain active after filing.

476 This is consistent with current practice under Regulation A, but will be made an express requirement under the final rules. *See* Rule 252(f)(1)(ii).

however, clarifies that the requirement to file the consent of the certifying accountant only applies where the financial statements required to be filed are amended.[477]

d. Signature Requirements

Similar to the requirement for issuers in registered offerings, we proposed to require issuers to manually sign a copy of the offering statement before or at the time of filing and retain it for a period of five years.[478] Issuers would be required to produce the manually signed copy to the Commission, upon request.[479] Additionally, we proposed to eliminate the requirement that, where an issuer filing a Form 1-A is a Canadian issuer, its authorized representative in the United States is required to sign the offering statement.[480] Also, we proposed to maintain the requirement that Canadian issuers file a Form F-X[481] to provide an express consent to service of process in connection with offerings qualified under Form 1-A. This treatment is similar to requirements for Canadian companies making filings under the multijurisdictional disclosure system.[482]

We did not receive any comments on this aspect of the proposal, and are adopting these provisions, as proposed, in the final rules.[483]

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477 *See id.*

478 *See* Instructions 2 and 3 to Signatures in proposed Form 1-A; *cf.* Rule 402(e), 17 CFR 230.402(e).

479 *Id.*

480 *See* 17 CFR 230.252(f) (2014) and Instruction 1 to Signatures of Form 1-A (2014).

481 17 CFR 239.42.

482 *See* Rel. No. 33-6902 (June 21, 1991) [56 FR 30036] (adopting the multijurisdictional disclosure system).

483 *See* Instructions to Signatures, Form 1-A.

4. Continuous or Delayed Offerings and Offering Circular Supplements

a. Proposed Rules

Rule 251(d)(3) currently allows for continuous or delayed offerings under Regulation A if permitted by Rule 415.[484] By reference to the undertakings of Item 512(a) of Regulation S-K,[485] Rule 415 does not necessarily require every change in the information contained in a prospectus to a registration statement in a continuous offering to be reflected in a post-effective amendment.[486] On the other hand, currently Regulation A requires every revised or updated offering circular in a continuous offering to be filed as an amendment to the offering statement to which it relates and to be qualified in a process similar to the Commission staff review, comment and qualification process for initial offering statements.[487] The requalification process can be costly and time consuming for smaller issuers conducting continuous offerings of securities pursuant to Regulation A. We proposed to clarify in the rules for Regulation A the scope of permissible continuous or delayed offerings and the related concept of offering circular supplements.

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484 17 CFR 230.415. Certain shelf offerings, however, are only permissible in offerings on Form S-3, which Regulation A issuers are ineligible to use. *See*, *e.g.*, Rule 415(a)(1)(x).

485 17 CFR 230.415(a)(3).

486 *See* 17 CFR 229.512(a)(1) (requiring issuers to file a post-effective amendment for purposes of an update under Section 10(a)(3) of the Securities Act, to reflect any facts or events arising after effectiveness that, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement, or to include, subject to certain exceptions, any material information with respect to the plan of distribution not previously disclosed (or material changes to information previously disclosed) in the registration statement).

487 *See* 17 CFR 230.253(e) (2014); 17 CFR 230.252(h)(1) (2014).

Rule 415 attempts to promote efficiency and cost savings in the securities markets by allowing for the registration of certain traditional and other shelf offerings.[488] Prior to the adoption of final rules today, Rule 251(d)(3) of Regulation A allowed for continuous or delayed offerings under Regulation A if permitted by Rule 415.[489] When Rule 415 was adopted, the Commission recognized that certain traditional shelf offerings have been allowed by administrative practice for many years despite the absence of such a rule.[490] Since Rule 415 only addresses registered offerings, however, the precise scope of continuous or delayed offerings under Regulation A has been unclear.

The proposed rules would clarify the scope of permissible continuous or delayed offerings under Regulation A and the related concept of offering circular supplements, and otherwise continue to allow for certain traditional shelf offerings to promote flexibility, efficiency, and to reduce unnecessary offerings costs.[491] Further, as proposed, an issuer's ability to sell securities in a continuous or delayed offering would be conditioned on being current with the Tier 2 ongoing reporting requirements at the time of sale.[492]

To provide clarity regarding the application of Rule 415 concepts to Regulation A offerings, we proposed to add a provision to Regulation A similar to Rule 415, but with

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488 *See* Rel. No. 33-6499 [48 FR 52889] (Nov. 23, 1983) (noting the efficiency and cost savings issuers experienced during the eighteen month trial period for a previous temporary version of the rule).

489 17 CFR 230.415.

490 Certain "traditional shelf offerings" have been allowed since at least 1968 by the Commission's guides for the preparation and filing of registration statements, such as Guide 4, and related administrative practice. *See id.*; *see also* Rel. No. 33-4936 [33 FR 18617] (Dec. 9, 1968) (adopting Guide 4 and other Commission guides).

491 *See* Proposing Release, at Section II.C.4.

492 Proposed Rule 251(d)(3)(i)(F).

limitations that we believed would be appropriate for Regulation A. The provision would establish time limits similar to those in Rule 415 and make conforming changes as necessary.[493]

In the Proposing Release we proposed excluding types of shelf offerings that cannot be conducted under existing Regulation A, such as offerings requiring registration on Form F-6, offerings requiring primary eligibility to use Forms S-3 or F-3,[494] offerings conducted by issuers ineligible to use Regulation A,[495] as well as certain offerings that we do not currently believe would be appropriate to include in the Regulation A framework. Further, we proposed prohibiting all "at the market" offerings under Regulation A.[496]

Additionally, as proposed, changes in the information contained in the offering statement would no longer necessarily trigger an obligation to amend.[497] Offering circulars for continuous Regulation A offerings would, however, continue to be required to be updated annually through the filing of a post-qualification amendment. These annual post-qualification amendments would include updated financial statements and post-qualification amendments would also be required when updating the offering circular to reflect facts or events arising after qualification which, in the aggregate, represent a fundamental change in the information set forth in the offering statement.[498]

In addition to these post-qualification amendments to the offering statement that must be qualified, we also proposed to allow issuers to use offering circular supplements

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493 Proposed Rule 251(d)(3).

494 *See also* fn. 484 above.

495 Rule 415(a)(1)(xi) discusses investment companies and BDCs.

496 *See* proposed Rule 251(d)(3)(ii).

497 *See* proposed Rule 252(h)(2).

498 *Id.*

in certain situations.[499] Further, we proposed to permit issuers in continuous offerings to qualify additional securities in reliance on Regulation A by a post-qualification amendment.[500]

We also proposed provisions similar to Rule 424 that would require issuers omitting certain information from an offering statement at the time of qualification, in reliance on proposed Rule 253(b), to file such information as an offering circular supplement no later than two business days following the earlier of the date of determination of such pricing information or the date of first use of the offering circular after qualification.[501] Further, these proposed provisions would require offering circulars that contain substantive changes in information previously provided in the last offering circular (other than information omitted in reliance on proposed Rule 253(b)) to be filed within five business days after the date such offering circular is first used after qualification.[502] Offering circular supplements that are not filed within the required time frames provided by the proposed rules would be required to be filed as soon as practicable after the discovery of the failure to file.[503]

b. Comments on Proposed Rules

Commenters were generally supportive of the proposed modernization of Regulation A's offering process, in general, and the provisions for continuous or delayed

499 *See* proposed Rule 253(g).

500 *See* proposed Rule 251(d)(3)(i)(F) and note to proposed Rule 253(b).

501 *See* proposed Rule 253(g).

502 *See* proposed Rule 253(g)(2).

503 *See* proposed Rule 253(g)(4).

offerings, in particular.[504] Two commenters, however, recommended allowing for at the market offerings under Regulation A.[505] Additionally, one commenter recommended allowing for at the market offerings in non-penny stocks on established trading markets.[506] Another commenter recommended allowing for at the market offerings in securities that qualify for the actively-traded securities exceptions in Rules 101 and 102 of Regulation M.[507] This commenter suggested that the offering amount could be determined by using the calculation set forth in Securities Act Rule 457(c)[508] as of a specified date within five business days of qualification of the offering statement.

c. Final Rules

We believe the proposed rules sufficiently update existing rules, while providing issuers with adequate flexibility with respect to, and additional guidance on, the permissible scope of continuous or delayed Regulation A offerings and offering circular supplements. We are adopting these rules as proposed.

The final rules add Rule 251(d)(3) to Regulation A, without changes from the proposed rule. This provision is similar to Rule 415, but its scope is limited to

504 *See, e.g.*, ABA BLS Letter; KVCF Letter; OTC Markets Letter; Paul Hastings Letter..

505 OTC Markets Letter; Paul Hastings Letter.

506 OTC Markets Letter. This commenter also recommended that securities offered under Regulation A that are not penny stocks and that trade on an established public market should be treated as having a "ready market" and thus be considered eligible for margin purposes, which the commenter believed would increase the value of securities and their liquidity.

507 Paul Hastings Letter. Regulation M was adopted by the Commission in 1996 and is intended to prevent potentially manipulative practices by underwriters, issuers, selling securityholders, and other participants in a securities offering. *See* Rel. No. 38067 (December 20, 1996) [62 FR 520].

508 Rule 457(c) specifies that Securities Act registration fees for securities offered on the basis of fluctuating market prices shall be calculated as follows: either the average of the high and low prices reported in the consolidated reporting system (for last sale reported over-the-counter securities) or the average of the bid and asked price (for other over-the-counter securities) as of a specified date within 5 business days prior to the date of filing the offering statement.

permissible Regulation A offerings.[509] In this regard, the final rules for Regulation A will continue to allow for certain traditional shelf offerings to promote flexibility, efficiency, and to reduce unnecessary offerings costs.[510] The final rules will condition the ability of an issuer to sell securities in a continuous offering on being current in its annual and semiannual report filing, if required under Rule 257(b), at the time of sale.[511] As we indicated in the Proposing Release, we believe this additional condition will not impose incremental costs on issuers, which are in any case required to update their offering statement and to file such ongoing reports, and will promote parity of information in the secondary markets.

As proposed, the final rules provide for the following types of continuous or delayed offerings:

- securities offered or sold by or on behalf of a person other than the issuer or its subsidiary or a person of which the issuer is a subsidiary;
- securities offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;
- securities issued upon the exercise of outstanding options, warrants, or rights;
- securities issued upon conversion of other outstanding securities;
- securities pledged as collateral; or

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509 Rule 251(d)(3).

510 *See* Rel. No. 33-6499, at IV.A. ("[T]he procedural flexibility afforded by the Rule enables a registrant to time its offering to avail itself of the most advantageous market conditions . . . registrants are able to obtain lower interest rates on debt and lower dividend rates on preferred stock, thereby benefiting their existing shareholders.").

511 This condition only applies to continuous offerings under Rule 251(d)(3)(i)(F).

- securities that are part of an offering which commences within two calendar days after the qualification date, will be offered on a continuous basis, may continue to be offered for a period in excess of 30 days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the initial qualification date.[512]

Notwithstanding the suggestions of commenters regarding at the market offerings, we continue to believe that such offerings are not appropriate for Regulation A offerings, particularly at the outset of the adoption of today's amendments to the existing rules. While it is possible that a market in Regulation A securities may develop that is capable of supporting primary and secondary at the market offerings, rather than permit such offerings at the outset, we believe that any determination as to whether the exemption would be an appropriate method for such offerings should occur in the future. Further, an offering sold at fluctuating market prices may not be appropriate within the context of an exemption that is contingent upon not exceeding a maximum offering size.

Under the final rules, as proposed, changes in the information contained in the offering statement will no longer necessarily trigger an obligation to amend.[513] Offering circulars for continuous or delayed Regulation A offerings will continue to be required to be updated, and the offering statements to which they relate requalified annually to include updated financial statements, and otherwise as necessary to reflect facts or events arising after qualification which, in the aggregate, represent a fundamental change in the

[512] *Id.*

[513] Rule 252(f)(2).

information set forth in the offering statement.[514] In addition to post-qualification amendments to the offering statement that must be qualified, the final rules also will allow issuers to use offering circular supplements in certain situations.[515] Further, issuers in continuous offerings will be permitted to qualify additional securities in reliance on Regulation A by a post-qualification amendment.[516]

The final rules will, as proposed, permit offering circular supplements to be used for final pricing information, where the offering statement is qualified on the basis of a bona fide price range estimate.[517] Additionally, the final rules permit offering circulars to omit information with respect to the underwriting syndicate analogous to the provisions for registered offerings under Rule 430A.[518] However, the final rules do not allow an issuer to omit the volume of securities (the number of equity securities or aggregate principal amount of debt securities) to be offered.[519] The final rules also permit, as proposed, offering circular supplements to reflect a decrease in the volume of, or to change the price range of, the securities offered in reliance on a qualified offering statement under Regulation A, so long as the decrease in the volume of securities offered or change in the price range would not materially change the disclosure contained in the

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514 *Id.*

515 Rule 253(g).

516 Rule 251(d)(3)(i)(F) and note to Rule 253(b).

517 Rule 253(b)(2). The bona fide price range estimate may not exceed $2 for offerings where the upper end of the range is $10 or less and 20% if the upper end of the price range is over $10.

518 Rule 253(b) (also permitting the omission of underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date, so long as certain conditions are met).

519 Rule 253(b)(4).

offering statement at qualification.[520] Notwithstanding this provision, any decrease in the volume of securities offered and any deviation from the low or high end of the price range may be reflected in the offering circular supplement filed with the Commission if, in the aggregate, the decrease in volume and/or change in price represent no more than a 20% change from the maximum aggregate offering price calculable using the information in the qualified offering statement.[521] Under no circumstances, however, would an issuer be able to amend its offering statement or rely on the provisions for offering circular supplements where the maximum aggregate offering price resulting from any changes in the price of the securities would exceed the offering amount limitation set forth in Rule 251(a) or if the increase in aggregate offering price would result in a Tier 1 offering becoming a Tier 2 offering.[522]

We are also adopting as proposed provisions similar to Rule 424 that require issuers omitting certain pricing and price-related information from an offering statement at the time of qualification, in reliance on Rule 253(b), to file such information as an offering circular supplement no later than two business days following the earlier of the date of determination of such pricing information or the date of first use of the offering circular after qualification.[523] These provisions require offering circulars that contain substantive changes (other than information omitted in reliance on Rule 253(b)) in information previously provided in the last offering circular to be filed within five

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[520] *See* note to Rule 253(b).

[521] *Id.*

[522] *Id.*

[523] Rule 253(g)(1).

business days after the date such offering circular is first used after qualification.[524] Offering circular supplements that are not filed within the required time frames provided by the rules are required to be filed as soon as practicable after the discovery of the failure to file.[525]

5. Qualification

Under existing Regulation A, an offering statement is generally only qualified by order of the Commission in a manner similar to a registration statement being declared effective.[526] In such instances, the issuer includes a delaying notation on the cover of the Form 1-A stating that the offering statement shall only be qualified by order of the Commission.[527] In order to remove a delaying notation, an issuer must file an amendment to the offering statement indicating that the offering statement will become qualified on the 20th calendar day after filing.[528] An offering statement that does not include a delaying notation will be qualified without Commission action on the 20th calendar day after filing.[529]

We proposed to alter the qualification process of existing Regulation A. As proposed, an offering statement could only be qualified by order of the Commission, and the process associated with the delaying notation would be eliminated. A few

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524 Rule 253(g)(2).

525 Rule 253(g)(4).

526 17 CFR 230.252(g)(2) (2014).

527 *Id.*

528 17 CFR 230.252(g)(3) (2014).

529 17 CFR 230.252(g)(1) (2014).

commenters generally supported the proposed elimination of qualification without Commission action.[530] No commenters opposed this aspect of the proposal.

We are adopting, substantially as proposed, final rules that require Commission action before a Regulation A offering statement may be qualified. The final rules modify the proposed rules by permitting the offering statements to be declared qualified by a "notice of qualification" issued by the Division of Corporation Finance, pursuant to delegated authority, rather than requiring the Commission itself to issue an order.[531] The notice of qualification is analogous to a notice of effectiveness in registered offerings.[532] We are therefore amending the Commission's organization rules, as they relate to the delegated authority of the Director of the Division of Corporation Finance, to permit the Division to issue qualification orders pursuant to Regulation A.[533] The final rules also eliminate the risk that an issuer may exclude a delaying notation either in error or in an effort to become qualified automatically without review and comment by the Commission staff. Given the electronic filing processes we are adopting,[534] the scaled disclosure requirements for Tier 1 and Tier 2 offerings,[535] and the preemption of state securities law registration and qualification requirements for Tier 2 offerings,[536] we

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530 CFA Letter; CFA Institute Letter; MCS Letter.

531 *See* Rule 252(e).

532 *See* 17 CFR 200.30-1(a)(5) (The Director of the Division of Corporation Finance has the delegated authority to declare registration statements to be effective within shorter periods of time than 20 days after filing, consistent with Section 8(a) of the Securities Act (15 U.S.C. 77h).

533 Rule 30-1(b)(2)-(4).

534 *See* discussion in Section II.C.1. above.

535 *See* discussion in Section II.C.3.b. above.

536 *See* discussion in Section II.H.3. below.

believe it is appropriate to ensure that the Commission staff has the opportunity to review and comment on an offering statement before it becomes qualified.

D. Solicitation of Interest (Testing the Waters)

1. Proposed Rules

Under Securities Act Section 3(b)(2)(E), issuers may test the waters for interest in an offering—without restriction as to the types of investors solicited—before filing an offering statement on such terms and conditions as the Commission prescribes. We proposed to permit issuers to use testing the waters solicitation materials both before and after the offering statement is filed, subject to issuer compliance with the rules on filing of solicitation materials and disclaimers.[537] As we noted in the Proposing Release, the investor protections with respect to solicitation materials in existing Regulation A would remain in place as these materials remain subject to the antifraud and other civil liability provisions of the federal securities laws.[538] As proposed, testing the waters materials used by an issuer or its intermediaries after publicly filing an offering statement would be required to include a current preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained. We further proposed to require issuers to publicly file their offering statements not later than 21 calendar days before qualification so that any solicitation made in the

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537 This timing is similar to the "testing the waters" permitted for emerging growth companies under new Section 5(d) of the Securities Act, added by the JOBS Act, which can also be conducted both before and after filing of a registration statement. Under Section 5(d), no legending or disclaimers are required, but testing the waters is limited to potential investors that are "qualified institutional buyers" or institutional "accredited investors."

538 The Commission's antifraud liability provisions in Section 17 of the Securities Act, 15 U.S.C. 77q, apply to any person who commits fraud in connection with the offer or sale of securities. Section 3(b)(2)(D) of the Securities Act, 15 U.S.C. 77c(b)(2)(D), states that the civil liability provisions of Section 12(a)(2) apply to any person offering or selling securities under Regulation A. *See also* Rel. No. 33-6924, at fn. 48.

21 calendar days before the earliest date of potential sales of securities would be conducted using the most recent version of the preliminary offering circular. The proposed rules would amend the requirements for submission or filing of solicitation materials, so that such material would be submitted or filed as an exhibit when the offering statement is either submitted for non-public review or filed (and updated for substantive changes in such material after the initial non-public submission or filing) but would no longer be required to be submitted at or before the time of first use.

As proposed, Rule 255(b) would require all soliciting materials to bear certain legends or disclaimers.[539] Further, we did not propose to limit testing the waters to QIBs and institutional accredited investors (as is currently the case with testing the waters by emerging growth companies under Securities Act Section 5(d)).

2. Comments on Proposed Rules

Most commenters generally supported the proposed amendments to the testing the waters provisions.[540] Several commenters, however, recommended requiring the filing of testing the waters materials prior to first use.[541] These commenters suggested that the antifraud and other civil liability provisions of the federal securities laws are not an adequate substitute for the investor protections afforded by an advance filing requirement for solicitation materials. They further suggested that their concerns about the proposed testing the waters provisions are compounded by an access equals delivery model of final

539 Proposed Rule 255(b). As proposed, Rule 255(b) would largely follow similar provisions in the context of registered offerings. *See* Rule 134(d), 17 CFR 230.134(d) (requiring a disclaimer for solicitations of interest in registered offerings).

540 BIO Letter; Letter from Daniel McElroy, DuMoulin Black LLP, April 1, 2014 ("DuMoulin Letter"); Ladd Letter 2; Paul Hastings Letter; Richardson Patel Letter.

541 Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

offering circular delivery. One commenter recommended allowing states to have immediate access to all testing the waters materials filed with the Commission.[542] Another commenter recommended making the filing of testing the waters materials a condition to the exemption,[543] while a third commenter specifically opposed that recommendation.[544]

Two commenters recommended ensuring that any testing the waters materials that are filed with the Commission be kept confidential, at least until the offering statement is qualified.[545] One commenter recommended removing any requirement to file testing the waters materials publicly,[546] while another commenter recommended not requiring testing the waters materials to be filed for Tier 2 offerings.[547] One commenter supported the use of legends on testing the waters materials or, in lieu of legends, restricting testing the waters to certain types of investors, such as QIBs and accredited investors.[548]

Several commenters suggested that the Commission provide market participants with communication safe harbors from Section 12(a)(2) liability for regular business communications by a Regulation A issuer.[549]

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542 Ladd Letter 2.

543 MCS Letter.

544 BIO Letter.

545 Heritage Letter; Ladd Letter 2.

546 BIO Letter.

547 MoFo Letter.

548 CFA Institute Letter.

549 ABA BLS Letter; Canaccord Letter; CFIRA Letter 1; CFIRA Letter 2; MoFo Letter; Public Startup Co. Letter 6; WR Hambrecht + Co Letter. *See also* discussion of Section 12(a)(2) liability in Proposing Release, Section II.B.7.

3. Final Rules

We are adopting testing the waters provisions in the final rules as proposed. Under the final rules, issuers will be permitted to test the waters with all potential investors and use solicitation materials both before and after the offering statement is filed, subject to issuer compliance with the rules on filing and disclaimers.[550]

The final rules require, as proposed, that testing the waters materials used by an issuer or its intermediaries after the issuer publicly files an offering statement be accompanied by a current preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained.[551] This requirement may be satisfied by providing the URL where the preliminary offering circular or the offering statement may be obtained. Solicitation materials will remain subject to the antifraud and other civil liability provisions of the federal securities laws.[552] Further, the final rules require issuers and intermediaries that use testing the waters materials after publicly filing the offering statement to update and redistribute such material in a substantially similar manner as such materials were originally distributed to the extent that either the material itself or the preliminary offering circular attached thereafter becomes inadequate or inaccurate in any material respect.[553]

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550 Rule 255. For a discussion of the use of solicitation materials as it relates to (i) the doctrine of integration, *see* Section II.B.5.c. above and Rule 255(e), and (ii) the application of state securities laws, *see* Section II.H.3. below.

551 Rule 255(b)(4).

552 *See* fn. 538 above.

553 Issuers would not, however, be required to update and redistribute solicitation materials to the extent that: (i) any such changes occur only with respect to the preliminary offering circular, (ii) no similar changes are required in the solicitation materials previously relied upon, and (iii) such materials included (when originally distributed) a URL where the preliminary offering circular or

As discussed in Section II.C.2. above, first-time issuers that are eligible for, and elect to, non-publicly submit draft offering statements are required to publicly file their offering statements not later than 21 calendar days before qualification so that any solicitation of interest made in the 21 calendar days before the earliest date of potential sales of securities by such issuers will be conducted while potential investors have access to the most recent version of the preliminary offering circular. Additionally, in light of the preemption of state securities laws registration requirements in the final rules for Tier 2 offerings, the 21 calendar day requirement will enable state securities regulators to require such issuers to file such materials with them for a minimum of 21 calendar days before any potential sales to investors in their respective states.[554]

As proposed, the final rules require that issuers submit or file solicitation materials as an exhibit when the offering statement is either submitted for non-public review or filed (and update for substantive changes in such material after the initial non-public submission or filing). However, issuers are no longer required to submit solicitation materials at or before the time of first use.[555] The treatment of solicitation materials in Regulation A offerings is generally consistent with the Commission staff's treatment of solicitation materials used by emerging growth companies under Securities Act Section 5(d), with two exceptions that we believe will provide investors in Regulation A offerings with additional protections:

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the offering statement may be obtained and that URL continues to link to the most recent version of the preliminary offering circular. *See* Rule 255(d).

554 *See* fn. 277 above.

555 Rule 255.

- solicitation materials used in Regulation A offerings are required to be included with the offering statement;[556] and
- solicitation materials used by Regulation A issuers that file an offering statement with the Commission will be publicly available as a matter of course.

Contrary to the views of commenters that suggested we keep solicitation materials confidential, or not require such materials to be filed (either publicly or at all), we believe the submission and filing requirements for solicitation materials are important elements of the final rules for the use of solicitation materials.[557] We believe that issuers should be accountable for the content of solicitation materials and that such information must be consistent with the information contained in the offering circular. We believe that making these materials publicly available as an exhibit to the offering statement, and thereby subjecting them to staff review and comment and scrutiny by the public, will help ensure that issuers use solicitation materials with appropriate caution. However, for the reasons discussed in Section II.F. below, we do not believe that the filing of such materials should be a condition to relying on the Regulation A exemption.

We are adopting as proposed the required legends for solicitation materials. The legends provide that sales made pursuant to Regulation A are contingent upon the qualification of the offering statement.[558] Additionally, to provide greater flexibility when using solicitation materials, the final rules eliminate, as proposed, the requirement in existing Regulation A for testing the waters materials to identify the issuer's chief executive officer, business, and products. Solicitation materials used before qualification

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556 *See* Item 17 (Exhibits), Part III of Form 1-A.

557 BIO Letter; Heritage Letter; Ladd Letter 2; MoFo Letter.

558 *See* Rule 255(a).

will, therefore, be required to bear a legend or disclaimer indicating that: (1) no money or other consideration is being solicited, and if sent, will not be accepted; (2) no sales will be made or commitments to purchase accepted until the offering statement is qualified; and (3) a prospective purchaser's indication of interest is non-binding.[559] While the expansion of use of solicitation materials after filing may result in investors receiving more sales literature in marketed offerings, in such circumstances, potential investors will also be afforded more time with the preliminary offering circular before making an investment decision because, as noted above, testing the waters materials used by an issuer or its intermediaries after the issuer publicly files an offering statement must be accompanied by a current preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained.[560]

We believe the approach to solicitation materials that we are adopting today is consistent with existing Regulation A that allows issuers to test the waters and will make the use of solicitation materials more beneficial for issuers and investors. For issuers, the final rules will generally reduce compliance burdens and entirely eliminate the filing requirement for issuers that, after testing the waters, decide not to proceed with an offering. With respect to investors, we note that the final rules contain significant safeguards that should help mitigate the concerns expressed by some commenters that not requiring testing the waters materials to be submitted or filed with the Commission

559 *See* Rule 255(b).

560 *Cf.* The Regulation of Securities Offerings, Rel. No. 33-7606A, at 78 (Nov. 17, 1998) [63 FR 67174] (discussing the importance of providing a preliminary prospectus in conjunction with the distribution of sales materials).

before first use will result in a reduction in investor protections.[561] These include the requirements to make the most recent preliminary offering circular available with solicitation materials after filing, to redistribute solicitation materials after filing to the extent that either the material itself or the preliminary offering circular attached thereafter becomes inadequate or inaccurate in any material respect, to deliver the preliminary offering circular at least 48 hours in advance of sale if the issuer is not subject to a Tier 2 reporting obligation, to deliver the final offering circular (or a notice of the final offering circular) no later than two business days after sale in all instances, and the minimum 21 calendar day filing requirement for issuers that non-publicly submit draft offering statements as well as the continued application of the antifraud provisions of the federal securities laws. Additionally, state securities regulators have the ability under the final rules to require issuers to file with them any materials required to be filed with the Commission.[562] From an investor protection standpoint, we also note that sales under Regulation A may occur only in connection with a qualified offering statement that is filed with the Commission and that is subject to review by the staff.

Lastly, to address the concerns of commenters regarding an issuers' ability to conduct routine communications with customers and suppliers at or near the time of a contemplated Regulation A offering,[563] we are confirming, consistent with Rule 169's existing exemption from Sections 2(a)(10) and 5(c) of the Securities Act for regularly

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561 *See* fn. 541 above.

562 *See also* fn. 277 above and discussion in Section II.H. below. Where states elect to require issuers to file such information with them, their respective securities regulators will, for example, have access to solicitation materials relied upon by first-time issuers that non-publicly submit draft offering statements for a minimum of 21 calendar days before the first date of any potential sales.

563 *See* fn. 549 above

released factual business communications,[564] that we do not believe such communications constitute solicitation of interest materials under Regulation A. Ultimately, whether or not a communication is limited to factual business information depends on the facts and circumstances, but issuers may generally look to the provisions of Rule 169 for guidance in making this determination in the Regulation A context. More generally, we note that factual business information means information about the issuer, its business, financial condition, products, services, or advertisement of such products or services.[565] Factual business information generally does not include such things as predictions, projections, forecasts, or opinions with respect to valuation of a security.[566] The approach we are taking today with respect to factual business information is consistent with the Commission's stated position on such communications for registered offerings and clarifies its application to Regulation A solicitation of interest materials.

E. Ongoing Reporting

Section 3(b)(2) of the Securities Act requires issuers to provide annual audited financial information on an ongoing basis and expressly provides that the Commission may consider whether additional ongoing reporting should be required. Specifically, Section 3(b)(4) grants the Commission authority to require issuers "to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of

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564 17 CFR 230.169.

565 *See* Rel. No. 33-5180 (Aug. 20, 1971) (Guidelines for Release of Information by Issuers Whose Securities are in Registration).

566 *Id.*

investor funds, and other appropriate matters, and also may provide for the suspension and termination of such a requirement with respect to that issuer."

As we noted in the Proposing Release, we are mindful that a one-size-fits-all ongoing reporting regime may not be suitable for all types of entities and investors.[567] In the final rules for Regulation A, we have endeavored to achieve an appropriate balance between the costs and benefits associated with the provision of ongoing information about issuers of Regulation A securities to investors in such securities and any market that develops.

1. Continuing Disclosure Obligations

a. Proposed Rules for Continuing Disclosure Obligations

Regulation A currently requires issuers to file a Form 2-A with the Commission to report sales and the termination of sales made under Regulation A every six months after qualification and within 30 calendar days after the termination, completion, or final sale of securities in the offering.[568] We proposed to rescind Form 2-A, but to continue to require Regulation A issuers to file with the Commission electronically on EDGAR after the termination or completion of the offering the information generally disclosed in Form 2-A.[569] As proposed, issuers conducting Tier 1 offerings would be required to provide this information on Part I of proposed Form 1-Z not later than 30 calendar days

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567 *See* Proposing Release, at Section II.E.

568 *See* 17 CFR 230.257 (2014); *see also* 17 CFR 239.91 (Form 2-A).

569 We did not propose to continue to require issuers to disclose the use of proceeds currently disclosed in Form 2-A, as issuers would already have to disclose this information in Part II of proposed Form 1-A and changes in the use of proceeds after qualification not previously disclosed may require issuers to file a post-qualification amendment or offering circular supplement to update such disclosure. *See* discussion of continuous or delayed offerings and offering circular supplements in Section II.C.4. above.

after termination or completion of the offering,[570] while issuers conducting Tier 2 offerings have the flexibility to provide this information on either Part I of Form 1-Z at the time of filing an exit report or proposed Form 1-K as part of their annual report, whichever is filed first.[571]

As proposed, Tier 2 issuers would be subject to a Regulation A ongoing reporting regime that would require, in addition to annual reports and summary information about a recently completed offering, semiannual reports on proposed Form 1-SA, current event reports on proposed Form 1-U, and, when eligible and electing to do so, notice to the Commission of the suspension of ongoing reporting obligations on Part II of proposed Form 1-Z. All of these reports would be filed electronically on EDGAR.

b. Comments on the Proposed Rules

We received both general comments and specific comments on the proposed forms. These comments are discussed in turn below.

General Comments

Commenters generally approved of the continuing disclosure obligations for Tier 2 offerings.[572] One commenter noted favorably that professional fees, other costs, and the time burden associated with the proposed rules would likely be substantially lower for Regulation A issuers than for issuers subject to Exchange Act reporting.[573]

570 Proposed Form 1-Z (exit report) is discussed in Section II.E.4. below.

571 Proposed Rule 257(a), (b)(1).

572 ABA BLS Letter; Campbell Letter; Canaccord Letter; CFA Letter; McCarter & English Letter; NASAA Letter 2; Letter from Jason Coombs, Co-Founder and CEO, Public Startup Company, Inc., March 26, 2014 ("Public Startup Co. Letter 5"); US Alliance Corp. Letter; WDFI Letter.

573 US Alliance Corp. Letter.

Another commenter remarked that the proposed ongoing reporting regime strikes an appropriate balance between the benefits of disclosure and costs to issuers.[574]

Other commenters expressed general support, but also recommended changes to the semiannual reporting requirement or the content of Form 1-U.[575] One commenter supported the general policy that it should not be easier or harder to exit the Regulation A reporting system than it would be to exit the Exchange Act reporting system.[576] Several commenters recommended including an ongoing disclosure requirement for Tier 1 issuers, including disclosure at a level lower than what was proposed for Tier 2,[577] ongoing disclosure with yearly audited financials,[578] or some unspecified continuous disclosure obligation.[579] Another commenter recommended extending continuing disclosure obligations into Tier 1, but further suggested that the Commission replace any requirement to provide audited financial statements with an affidavit from management attesting to the accuracy of the financial statements.[580] A few commenters generally recommended reducing the disclosure burden on Tier 2 issuers.[581] One of these commenters recommended making continuing disclosure requirements contingent upon factors other than offering size, such as whether the issuer has taken steps to foster a

574 McCarter & English Letter.

575 ABA BLS Letter; Canaccord Letter; NASAA Letter 2; WDFI Letter.

576 ABA BLS Letter (raising the issue particularly with respect to "very small issuers" under Tier 2).

577 Guzik Letter 1 (suggesting that Tier 1 ongoing disclosure requirements could parallel Tier 2's requirements but without the requirement for semiannual reports).

578 Ladd Letter 2.

579 SVB Financial Letter.

580 Public Startup Co. Letter 5.

581 Heritage Letter; IPA Letter (providing estimated costs of compliance for offering statement and periodic reports).

market in its securities.[582] This commenter also recommended allowing issuers to either avoid ongoing reporting or to file only financial statements and a management letter regarding operations and results if, shortly after commencing the offering upon qualification, issuers have less than 300 record holders. Another commenter recommended allowing Canadian companies to rely on Rule 12g3-2(b) to avoid having to file ongoing reports under Regulation A.[583] As an alternative, this commenter recommended allowing Canadian companies to furnish reports under cover of Form 6-K rather than using the Regulation A reports. One commenter recommended that, to the extent that the final rules allow foreign private issuers to use Regulation A, such issuers should be permitted to follow the ongoing reporting rules applicable to them in the Exchange Act context in lieu of Regulation A ongoing reporting requirements,[584] while another commenter specifically opposed this suggestion.[585] Another commenter recommended requiring officers, directors, and controlling shareholders of companies that offer securities under Regulation A to make ongoing disclosure of transactions in company securities, similar to reporting on Forms 3, 4, and 5 and Schedules 13D, 13G, and 13F in the registered context.[586]

<u>Comments on Form 1-K</u>

One commenter recommended revising proposed Form 1-K to expressly not require the disclosure of an issuer's plan of operations, as described in Item 9(c) of Part II

[582] Heritage Letter.

[583] DuMoulin Letter.

[584] McCarter & English Letter (noting Exchange Act Form 20-F, 40-F, Form 6-K, and ongoing home country reports).

[585] Andreessen/Cowen Letter.

[586] OTC Markets Letter.

of Form 1-A.[587] This commenter further recommended clarifying whether a Tier 2 issuer is required to comply with Rules 3-10, 3-16, and 8-04 of Regulation S-X in Form 1-K, in light of the reference to segmented data in Item 7(b) to Part F/S of proposed Form 1-A.[588] This same commenter recommended that the Commission clarify whether a Tier 2 issuer is required to comply with Rule 8-04 of Regulation S-X in proposed Form 1-K, particularly with respect to probable acquisitions.[589]

Comments on Form 1-SA

Several commenters recommended requiring or permitting quarterly reporting rather than semiannual reporting on proposed Form 1-SA.[590] One of these commenters stated that quarterly reporting is standard in the United States and is not overly burdensome.[591] Two other commenters stated that quarterly reporting was necessary for investor protection and to reduce the risk of insider trading.[592] Other commenters noted that quarterly reporting might be preferred by market participants but supported a semiannual requirement.[593]

One commenter agreed with our proposal not to require Tier 2 issuers to have their Form 1-SA financial statements reviewed by an independent accountant, particularly with respect to smaller issuers.[594] Another commenter recommended either

587 E&Y Letter (noting the Commission's intent to follow this approach, as mentioned in the Proposing Release at fn. 397).

588 *Id.*

589 *Id.*

590 E&Y Letter; Massachusetts Letter 2; NASAA Letter 2; OTC Markets Letter; WDFI Letter.

591 OTC Markets Letter.

592 Massachusetts Letter 2; WDFI Letter.

593 B. Riley Letter; Milken Institute Letter.

594 ABA BLS Letter. As proposed, such reviews would not be required for any Form 1-SA filing.

requiring the financial statements in Form 1-SA to be reviewed by an independent accountant or requiring issuers to disclose on Form 1-SA that the financial statements were not subject to review.[595] Yet another commenter recommended that there be no requirement to provide Rule 3-16 of Regulation S-X financial statements or summarized financial information in semiannual reports (to align with requirements for existing registrants that are not required to include this in Form 10-Q).[596] This commenter also recommended clarifying if the financial statements in Form 1-SA can be presented using a condensed format consistent with Rule 8-03(a) of Regulation S-X and if additional disclosure requirements of Rule 8-03(b) are applicable.[597] This same commenter recommended removing Item 3(d) of Form 1-SA, because neither this statement nor a statement of changes in stockholders' equity is an existing requirement on Form 10-Q.[598]

Comments on Form 1-U

Commenters made a number of suggestions regarding the current report requirements. Some commenters recommended eliminating the requirement to file Form 1-U for the smallest issuers, based on a measure such as asset size or market capitalization.[599] Other commenters recommended extending the proposed filing requirement from four business days after the triggering event to fifteen business days after such event.[600] Several commenters recommended changing or clarifying the

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595 KPMG Letter.

596 E&Y Letter.

597 *Id.*

598 *Id.*

599 ABA BLS Letter; Milken Institute Letter.

600 ABA BLS Letter; E&Y Letter; Milken Institute Letter.

"fundamental change" standard in Item 1 of proposed Form 1-U.[601] One of these commenters expressed concerns about whether this item will be consistently interpreted and whether the use of the term "fundamental change," in light of the use of the same term in Item 512 of Regulation S-K, would cause additional confusion.[602] This commenter further recommended that, for contracts involving business acquisitions, the measurement of significance in this item should be limited to the investment test and the numerical threshold should be increased to at least 50% to be more consistent with the stated disclosure objective. Three commenters recommended moving to a materiality standard so as to be consistent with the standards in the anti-fraud provisions of federal securities laws, suggesting that this would help avoid confusion.[603] One commenter recommended allowing (but not requiring) Tier 1 issuers to report material information on Form 1-U, including the financial statements of significant acquired businesses.[604]

Other commenters suggested changes to the substance of what would need to be reported on Form 1-U. One commenter generally recommended cross-referencing existing disclosure requirements when a proposed disclosure standard is meant to be the same.[605] For example, this commenter suggested that Form 1-U include a cross-reference to Form 8-K when disclosure requirements are meant to be the same. One commenter recommended permitting companies to disclose: (1) a change in accountants in the next periodic filing instead of reporting it on Form 1-U if the change does not involve a

601 E&Y Letter; Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

602 E&Y Letter. For description of Item 512, see fn. 486 above.

603 Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

604 E&Y Letter. Two commenters made a similar recommendation without specifying which form should be used for that purpose. *See* ABA BLS Letter; Canaccord Letter.

605 PwC Letter.

disagreement or reportable event (as defined in Item 304 of Regulation S-K); and (2) sales of equity securities in the next periodic filing if the price was not below that of previous primary offerings.[606] Two of these commenters recommended eliminating the requirement to report unregistered sales of securities on Form 1-U, or to raise the reporting threshold to only cover offerings that represent at least 10% of the issuer's pre-transaction outstanding shares.[607]

c. Final Rules for Continuing Disclosure Obligations

We are adopting rules for continuing disclosure obligations under Regulation A generally as proposed, with certain technical modifications and clarifications. The final rules eliminate Form 2-A and in its place require the disclosure of similar information pursuant to Part I of Form 1-Z for Tier 1 issuers and, depending on when the issuer's offering is terminated or completed, in either Form 1-K or Part I of Form 1-Z for Tier 2 issuers. As proposed, the respective disclosure requirements in Part I of Forms 1-K and 1-Z will include the date the offering was qualified and commenced, the amount of securities qualified, the amount of securities sold in the offering, the price of the securities, the portions of the offering that were sold on behalf of the issuer and any selling securityholders, any fees associated with the offering, and the net proceeds to the issuer.[608] We believe that summary information and data about an issuer and its Regulation A offering is most valuable when obtained after the offering is completed or

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606 E&Y Letter.

607 ABA BLS Letter; MoFo Letter.

608 *See* Part I of Form 1-K *and* Part I of Form 1-Z. For clarification purposes, we have changed the references in Part I in these forms from "number of securities" to "amount of securities." These changes should avoid confusion when reporting debt offerings where a quantifiable number of securities is not being offered. In such cases, issuers will be able to report the aggregate sales of securities in the offering.

terminated.[609] Therefore, as proposed, issuers will only be required to disclose such information after the termination or completion of the offering.

As noted in the Proposing Release, we are concerned that uniform ongoing reporting requirements for all issuers of Regulation A securities could disproportionately affect issuers in smaller offerings. For that reason, the final rules do not require any ongoing reporting for issuers conducting Tier 1 offerings, other than the disclosure of the summary information discussed above.[610] Issuers in smaller offerings will, however, have the option to conduct a Tier 2 offering and subject themselves to ongoing reporting and other Tier 2 requirements.[611]

The final rules for ongoing reporting for Tier 2 issuers are being adopted as proposed, except where noted below, and will require issuers to file annual reports on Form 1-K,[612] file semiannual reports on Form 1-SA,[613] file current event reports on Form 1-U,[614] and provide notice to the Commission of the suspension of their ongoing reporting obligations on Part II of Form 1-Z.[615] All reports for Tier 1 and Tier 2 offerings are required to be filed electronically on EDGAR.[616]

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609 Additionally, in continuous offerings, issuers are required to file post-qualification amendments with the Commission every twelve months to the extent that sales are ongoing at that time. *See* Rule 252(f)(2)(i).

610 *See* Rule 257(a).

611 An issuer offering up to $20 million in a Tier 2 offering would, in addition to providing ongoing reports to the Commission on an annual and semiannual basis, with interim current event updates, be required to file audited financial statements in the offering statement, just as issuers in larger Tier 2 offerings are required to do. *See* Section II.C.3.b(2)(c). above.

612 Rule 257(b)(1).

613 Rule 257(b)(3).

614 Rule 257(b)(4).

615 Rule 257(d)(2).

616 Subject, in certain cases, to the hardship exemptions set forth in Rules 201 and 202 of Regulation S-T. 17 CFR 232.201-202.

As discussed above, commenters suggested that the Commission consider various potential changes to the proposed ongoing reporting requirements for Tier 2 issuers, including: extending ongoing reporting to Tier 1 offerings with some modifications; increasing the ongoing reporting requirements for Tier 2 issuers to include analogs to Exchange Act Forms 3, 4, and 5 and beneficial ownership reporting on Schedules 13D, 13G and 13F; basing the ongoing reporting requirements on characteristics of the issuer, such as whether the issuer has taken steps to foster a secondary market; or providing different requirements for Canadian companies or foreign private issuers. Another commenter suggested that we allow issuers to either avoid ongoing reporting or to file only financial statements and a management letter regarding operations and results if, shortly after commencing the offering upon qualification, issuers have less than 300 record holders.[617]

We do not, however, believe that the changes suggested by commenters described above are advisable at this time. Instead, we believe the approach to ongoing reporting adopted in the final rules is preferable and will support a regular flow of information about issuers conducting Tier 2 offerings, which will benefit investors in these larger offerings and also help foster the development of a secondary market in such securities, while balancing the compliance burden that would be imposed on smaller issuers. We do not believe that requiring ongoing reporting for Tier 1 issuers, other than the requirement to file a Form 1-Z upon completion or termination of the offering, is necessary for Tier 1 offerings. We believe issuers in Tier 1 offerings will be small companies whose businesses revolve around products, services, and a customer base that will likely be

617 Heritage Letter.

more local in nature than issuers in Tier 2 offerings.[618] Further, we believe Tier 1 offerings will be conducted by issuers that are unlikely to seek the creation of a secondary trading market in their securities.[619] In light of this, we do not believe that it is necessary to require ongoing reporting for Tier 1 issuers. Consistent with our experience under existing Regulation A, we do not believe that a lack of ongoing reporting for issuers in Tier 1 offerings will adversely affect investors that base purchasing decisions on the narrative and financial statement disclosure requirements included in the offering statement and, with respect to continuous offerings lasting for more than one year, updated annually by post-qualification amendment thereafter. Further, notwithstanding the suggestions of some commenters,[620] we believe that adopting different ongoing reporting requirements for Canadian issuers[621] would not be consistent with our goal to adopt a uniform reporting standard for Tier 2 issuers that provides investors with certainty as to the amount of information they can expect to receive from an issuer in a Tier 2 offering on an ongoing basis. We believe that the final rules will provide investors and potential investors with the information they need to make investment decisions and facilitate capital formation for smaller companies.

We are therefore adopting the following ongoing reporting requirements for Tier 2 offerings:

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618 *See* fn. 830 in Section II.H.3. below.

619 *See* discussion of the nature of offerings in Section II.H.3. below.

620 DuMoulin Letter; *see also* McCarter & English Letter.

621 Commenters also suggested that their proposed ongoing reporting for Canadian issuers apply to foreign private issuers. As noted above in Section II.B.1.c., however, non-Canadian foreign issuers are not eligible under Regulation A.

(1) Annual Reports on Form 1-K

As proposed and adopted, Form 1-K will consist of two parts: Part I (Notification) and Part II (Information to be included in the report). The contents of and requirements for Part I and Part II are, with the exception of technical amendments to the forms, amendments that are necessary to reflect corresponding changes to the required audit standards of financial statements filed under Part F/S of Form 1-A, and additional guidance designed to streamline disclosure, adopted without changes from the proposed rules.

(a) Part I (Notification)

As adopted, Part I of Form 1-K will be an online XML-based fillable form that will include certain basic information about the issuer, prepopulated on the basis of information previously disclosed in Part I of Form 1-A, which can be updated by the issuer at the time of filing. Additionally, if at the time of filing the Form 1-K an issuer has terminated or completed a qualified Regulation A offering, the issuer will be required to provide certain updated summary information about itself and such offering in Part I, including the date the offering was qualified and commenced, the amount of securities qualified, the amount of securities sold in the offering, the price of the securities, the portions of the offering that were sold on behalf of the issuer and any selling securityholders, any fees associated with the offering, and the net proceeds to the issuer.

As proposed and adopted, issuers will only be required to fill out the XML-based portion of Part I of Form 1-K that relates to the summary information about a terminated or completed offering once per offering. An issuer that elects to terminate its ongoing reporting obligation under Tier 2 of Regulation A after terminating or completing an offering, in a fiscal year other than the fiscal year in which the offering statement was qualified, but before reporting the required summary information on Form 1-K, will be required to file the summary offering information in Part I of Form 1-K by filing a Form 1-Z (exit report) that includes such information.[622]

The summary information disclosed will facilitate analysis of Regulation A offerings by the Commission, other regulators, third-party data providers, and market participants and thereby enable the Commission and others to evaluate the use and effectiveness of Regulation A as a capital formation tool.[623] The fillable form will enable issuers to provide the required information in a convenient medium and capture relevant data about the recently terminated or completed Regulation A offering. The required disclosure will be publicly available on EDGAR. Consistent with Part I of Form 1-A, the issuer will not be required to obtain specialty software to file Part I of Form 1-K on EDGAR.

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622 General Instruction (3) to Form 1-Z.

623 *See also* discussion in Section II.E.4. below.

(b) Part II (Information to be included in the report)

As with Part II of Form 1-A, the final rules require that the issuer submit Part II of Form 1-K electronically as a text file attachment containing the body of the disclosure document and financial statements, formatted to be compatible with the EDGAR filing system. Part II will require issuers to disclose information about themselves and their business based on the financial statement and narrative disclosure requirements of Form 1-A.[624]

As adopted, Item 2 to Part II of Form 1-K (Management's Discussion and Analysis of Financial Condition and Results of Operation) requires issuers, by cross-reference to the requirements of Form 1-A, to provide information for the two most recently completed fiscal years. As suggested by one commenter,[625] we are clarifying that the Form 1-K cross-reference to the requirements of Item 9 to Part II of Form 1-A does not require issuers to include the additional MD&A disclosure required in Item 9(c) for issuers that have not received revenue from operations during each of the three fiscal years immediately before the filing of the offering statement (or since inception, whichever is shorter).[626]

Additionally, we are revising the financial statement requirements in Item 7 to Part II of Form 1-K. As proposed, Form 1-K directed issuers to the financial statement requirements of Part F/S of Form 1-A. We are revising this portion of the form so as to include the financial statement requirements directly in Item 7 to Part II of Form 1-K. We believe this change to Item 7 will make it easier for issuers to comply by clarifying,

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624 Part II of Form 1-K.

625 E&Y Letter.

626 *See* Item 2 to Part II of Form 1-K.

as one commenter recommended,[627] the specific portions of Regulation S-X relating to financial statements for entities other than the issuer that are required in Form 1-K. Additionally, since Tier 2 issuers are now permitted to file financial statements that are audited in accordance with either U.S. GAAS or the standards of the PCAOB, a corresponding change has been made to the financial statement requirements of Item 7 of Form 1-K.[628] As proposed, the auditor of financial statements would need to be independent under Rule 2-01 of Regulation S-X and must comply with the other requirements of Article 2 of Regulation S-X, but need not be PCAOB-registered. Further, in comparison to the proposed rules, Item 7(a) no longer requires issuers to provide a list of the financial statements included in Form 1-K at the beginning of the financial statement section. We eliminated this requirement in the final rules because we do not believe that there is a need for a separate list of the financial statements at the beginning of this section, when the financial statements themselves will be labeled.

Form 1-K will permit issuers to incorporate by reference certain information previously filed on EDGAR, but will require issuers to include a hyperlink to such material on EDGAR.[629] In a change from the proposed rules, the final rules do not limit the availability of incorporation by reference to information previously filed pursuant to Regulation A. We believe that this change will facilitate the provision of required information to investors, while taking a consistent approach to information previously provided to the Commission and publicly available on EDGAR. Additionally, to avoid

627 E&Y Letter.

628 *See* discussion in Section II.C.3.b(2)(c). above.

629 General Instruction D. to Form 1-K. The hyperlink to EDGAR need only be active at the time of filing of the Form 1-K. *Cf.* Securities Act Rule 411(c) and Exchange Act Rule 12b-32.

unnecessary repetition of disclosure items, Form 1-K encourages issuers to cross-reference items within the form, where applicable.[630] Further, in order to avoid incorporation by reference to stale information without requiring the latest version of the document to be filed, Form 1-K indicates that, if any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.[631] Form 1-K will cover:

- Business operations of the issuer for the prior three fiscal years (or, if in existence for less than three years, since inception);
- Transactions with related persons, promoters, and certain control persons;
- Beneficial ownership of voting securities by executive officers, directors, and 10% owners;
- Identities of directors, executive officers, and significant employees, with a description of their business experience and involvement in certain legal proceedings;
- Executive compensation data for the most recent fiscal year for the three highest paid executive officers or directors;
- MD&A of the issuer's liquidity, capital resources, and results of operations covering the two most recently completed fiscal years; and

630 *Id.* Issuers may, for example, add a cross-reference to disclosure in the financial statements. We have clarified, however, that like with Form 1-A, they may not add a cross-reference within the financial statements themselves to disclosures elsewhere.

631 *Id.*

- Two years of audited financial statements.[632]

We anticipate that issuers will generally be able to use the offering materials as a basis to prepare their ongoing disclosure.

As adopted in the final rules, Form 1-K includes requirements for financial statements prepared on the same basis, and subject to the same requirements as to audit standards and auditor independence, as the financial statements required in the Regulation A offering circular for Tier 2 offerings.[633] Form 1-K must be filed within 120 calendar days after the issuer's fiscal year end.[634] A manually signed copy of the Form 1-K must be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[635] Issuers will be required to produce the manually signed copy to the Commission, upon request.[636] Any amendments to the form must comply with the requirements of the applicable items and be filed under cover of Form 1-K/A.[637]

(2) Semiannual Reports on Form 1-SA

We are adopting final rules for semiannual interim reporting for Regulation A issuers generally as proposed, with technical amendments and additional guidance designed to streamline the disclosure requirements for Tier 2 issuers and harmonize them with the requirements of issuers subject to an ongoing reporting obligation under the

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632 Part II of Form 1-K.

633 *See* Item 7 (Financial Statements), Part II of Form 1-K.

634 *See* General Instruction A.(2), Form 1-K.

635 *See* General Instruction C., Form 1-K.

636 *Id.*

637 *See* Rule 257(c) (also requiring the signature on behalf of an authorized representative of the issuer and the inclusion of any specified certifications).

Exchange Act.[638] As proposed, we continue to believe that a semiannual, rather than a quarterly, reporting requirement strikes an appropriate balance between the need to provide information to the market and the cost of compliance for smaller issuers, especially given the further flexibility provided to issuers in Form 1-U to provide quarterly information if they elect to do so.[639] Issuers will be required to provide semiannual reports on Form 1-SA that, much like reports on Form 10-Q, consist primarily of financial statements and MD&A.[640] Unlike Form 10-Q, however, Form 1-SA does not require disclosure about quantitative and qualitative market risk, controls and procedures, updates to risk factors, or defaults on senior securities.[641] We do not believe such disclosure is necessary for ongoing reports under Regulation A, as we believe such disclosure is not applicable to, or appropriately tailored for, the types of issuers likely to conduct Regulation A offerings.

Consistent with the technical, specialized suggestions of several commenters,[642] we are including provisions in Form 1-SA that will help issuers comply with the form requirements, eliminate potential confusion over such requirements, and streamline and harmonize disclosure to make the requirements for Tier 2 issuers no more onerous than, and consistent with, the ongoing disclosures required of smaller reporting companies under the Exchange Act. Specifically, the final rules:

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638 Rule 257(b)(3); Form 1-SA.

639 Consistent with the suggestions of commenters, we are clarifying that issuers seeking to voluntarily report information to the market on a more frequent basis may do so under the final rules for current reporting on Form 1-U. *See* discussion in Section II.E.1.c(3). below; *see also* discussion in Section II.E.2.c.below regarding the provision of ongoing reports as it applies to Securities Act Rule 144.

640 *See* Part I (Financial Information) of Form 10-Q, 17 CFR 249.308a.

641 *See* Item 3 and Item 4 of Part I of Form 10-Q.

642 *See*, *e.g.*, E&Y Letter; KPMG letter.

- Add clarifying language to Item 1 (Management Discussion and Analysis of Financial Condition and Results of Operations) of Form 1-SA to indicate that compliance with this disclosure requirement only applies to the interim financial statements required by Item 3 to Form 1-SA and that, similar to our clarification of Form 1-K's requirements, issuers are not required to include the additional MD&A disclosure required by Item 9(c) of Form 1-A;[643]
- Update the financial statement disclosure requirements of Form 1-SA to more clearly delineate the requirements for compliance with Item 3 of Form 1-SA;
- Provide that the financial statements that must be included pursuant to Item 3 may be condensed, in addition to being unaudited, and that the financial statements are not required to be reviewed;
- Amend the final form to note that additional guidance on the presentation of financial statements and footnotes and other disclosures can be found in Rule 8-03 of Regulation S-X;[644]
- Revise the requirements of Item 3(e) of Form 1-SA to match the disclosure language contained in Rule 3-10 of Regulation S-X for smaller reporting companies;
- Delete the requirement in Item 3(d) of proposed Form 1-SA to present interim statements of changes in financial position for the period between the end of the preceding fiscal year and the end of the interim period covered by this report, and

643 *See* Section II.F.1.c.(1)(b) above for a discussion of this clarification in Form 1-K.

644 Tier 2 issuers are required under Part F/S of Form 1-A to provide financial statements that comply with Article 8 of Regulation S-X.

for the corresponding period of the preceding fiscal year, as this is not required of issuers under Rule 8-03 of Regulation S-X; and

- Make the ongoing reporting requirements under Item 3 of Form 1-SA more consistent with what is required of issuers subject to an ongoing reporting obligation under the Exchange Act, consistent with the suggestion of one commenter,[645] by eliminating the line item requirements of Item 3(f) and (g), as Rule 3-16 and Rule 4-10 of Regulation S-X generally do not require the disclosure of such information other than in registration statements and annual reports.

As adopted, Form 1-SA will require disclosure of updates otherwise reportable on Form 1-U. The final rules permit issuers to incorporate by reference in Form 1-SA certain information previously filed on EDGAR, but must include a hyperlink to such material on EDGAR.[646] In a change from the proposed rules, the final rules do not limit the availability of incorporation by reference to information previously filed pursuant to Regulation A. We believe that this change will continue to facilitate the provision of required information to investors, while taking a consistent approach to information previously provided to the Commission and publicly available on EDGAR. Additionally, in a change from the proposed form that seeks to avoid unnecessary repetition of disclosure items, Form 1-SA encourages issuers to cross-reference items within the form,

645 E&Y Letter.

646 General Instruction D. to Form 1-SA. The hyperlink to EDGAR need only be active at the time of filing of the Form 1-SA. *Cf.* Securities Act Rule 411(c) and Exchange Act Rule 12b-32.

where applicable.[647] Further, in order to avoid incorporation by reference to stale information without requiring the latest version of the document to be filed, Form 1-SA indicates that, if any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.[648]

Form 1-SA must be filed within 90 calendar days after the end of the first six months of the issuer's fiscal year.[649] The first such obligation to file will commence immediately following the most recent fiscal year for which full financial statements were included in the offering statement, or, if the offering statement included financial statements for the first six months of the fiscal year following the most recent full fiscal year, for the first six months of the following fiscal year.[650] As proposed, a manually signed copy of the Form 1-SA must be executed by the issuer and related signatories before or at the time of filing, retained by the issuer for a period of five years, and produced by the issuer to the Commission, upon request.[651] The final rules require, as

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647 *Id.* Issuers may, for example, add a cross-reference to disclosure in the financial statements. We have clarified, however, that like with Form 1-A, they may not add a cross-reference within the financial statements themselves to disclosures elsewhere.

648 *Id.*

649 *See* General Instruction A.(2), Form 1-SA.

650 For example, where an offering statement is filed in October 2015 and includes full financial statements for the fiscal years ended December 31, 2014 and December 31, 2013 and interim financial statements for the six months ended June 30, 2015 and June 30, 2014 and is qualified in December 2015, the Form 1-SA will not be required until within 90 days following the first six months of the following fiscal year (*i.e.*, within 90 days following June 30, 2016).

If, however, the offering statement is filed in March 2015 and qualified in June of 2015 than the first Form 1-SA would cover the six months ended June 30, 2015 and June 30, 2014 and would not be required to be filed until within 90 days following June 30, 2015.

651 *See* General Instruction C. to Form 1-SA.

proposed, any amendments to the form to comply with the requirements of the applicable items and be filed under cover of Form 1-SA/A.[652]

(3) Current Reports on Form 1-U

In addition to the annual report on Form 1-K and semiannual report on Form 1-SA, the final rules require issuers to submit current reports on Form 1-U. The final rules are being adopted largely as proposed with one change and some technical amendments and additional guidance designed to ease compliance with the final rules and eliminate potential confusion as to the scope and applicability of the disclosure requirements. The final rules require issuers to submit a report on Form 1-U when it experiences one (or more) of the following events:

- Fundamental changes;[653]
- Bankruptcy or receivership;
- Material modification to the rights of securityholders;
- Changes in the issuer's certifying accountant;
- Non-reliance on previous financial statements or a related audit report or completed interim review;
- Changes in control of the issuer;

652 *See* Rule 257(c).

653 As discussed below, disclosure pursuant to this requirement is limited to the entry into or termination of material definitive agreements resulting in fundamental changes in the nature of an issuer's business. More generally, a fundamental change in the nature of an issuer's business includes major and substantial changes in the issuer's business or plan of operations or changes reasonably expected to result in such changes, such as significant acquisitions or dispositions, or the entry into, or termination of, a material definitive agreement that has or will result in major and substantial changes to the nature of an issuer's business or plan of operations.

- Departure of the principal executive officer, principal financial officer, or principal accounting officer; and
- Unregistered sales of 10% or more of outstanding equity securities.

Additionally, as proposed, Item 9 of final Form 1-U contains provisions for disclosing other events not directly required of issuers in the form. As noted above in the context of suggestions by commenters to require or permit quarterly reporting by issuers,[654] issuers that elect to provide relevant information to the market on, for example, a quarterly basis may do so pursuant to Item 9 (Other Events) of Form 1-U.[655]

Notwithstanding the view of some commenters,[656] we believe that Form 1-U should be required of all Tier 2 issuers, including smaller issuers. We believe that, on balance, the benefit of requiring a uniform base level of disclosure to investors of current event reporting for all issuers in Tier 2 offerings outweighs any potential additional compliance cost to smaller issuers. Additionally, given the inclusion of only the most significant events in the list of disclosable current events on Form 1-U, we do not anticipate that issuers, particularly smaller issuers, will on average be required to file many reports in this regard.

In a change from the proposed rules, and consistent with the suggestions of commenters,[657] the final rules increase the threshold below which an issuer need not report unregistered sales of equity securities pursuant to Item 8 of Form 1-U from 5% to

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654 *See* fn. 639 and 604 above.

655 An issuer seeking to, for example, report information that satisfies, and on a frequency that accords with, the requirements of Exchange Act Rule 15c2-11(a)(5) and (g) or Securities Act Rule 144A(d)(4) may do so pursuant to Item 9 of Form 1-U.

656 ABA BLS Letter; Milken Institute Letter.

657 ABA Letter; MoFo Letter.

10% of the number of shares outstanding of the class of equity securities sold. We believe that this increase in the threshold below which an issuer would not be required to report such sales remains consistent with our general approach to the final rules for Form 1-U—namely, that Form 1-U should reflect the most significant or substantial events that an issuer may experience in the interim period between the filing of the required periodic reports.

We are not amending Item 1 of Form 1-U to alter the use of the term "fundamental change," as suggested by some commenters.[658] We are, however, revising Instruction 2 to Item 1 to make clear that the transactions described therein are deemed to be "fundamental changes" solely for purposes of Item 1 of Form 1-U and should not be read to influence the definition of that term in other contexts.[659] Item 1 of Form 1-U is meant to require issuers to disclose material definitive agreements, including agreements to acquire other entities, which result or would reasonably be expected to result in fundamental changes to the nature of the issuer's business or plan of operations. As Instruction 2 to Item 1 indicates, certain transactions are deemed to involve fundamental changes, and disclosure of these transactions, as prescribed by Item 1 is required. Consistent with the suggestion of one commenter,[660] we are narrowing from the proposed rules the applicability of Instruction 2(a) so that an acquisition transaction will only result in a fundamental change for these purposes if the purchase price, as defined by U.S. GAAP and IFRS, exceeds 50% of the total consolidated assets of the issuer as of the end

658 *See* E&Y Letter; *see also* ABA BLS Letter; Canaccord Letter.

659 Item 1(d) to Form 1-U.

660 E&Y Letter.

of the most recently completed fiscal year.[661] We believe that this is consistent with our general goal of only requiring disclosure of significant and substantial matters that may affect an issuer's business or plan of operations. We believe that this requirement is appropriately tailored for the types of issuers likely to conduct Tier 2 offerings by providing them with important flexibility as to the determination of a "fundamental change," while providing clear guidance that certain transactions will always trigger disclosure under Item 1.

On a related point, we continue to believe, despite the suggestions of some commenters,[662] that a fundamental change standard for some of the disclosure requirements in Form 1-U is a more appropriately tailored standard for Tier 2 issuers than a broader materiality standard. A fundamental (as opposed to a material) change to the nature of an issuer's business includes major and substantial changes to the issuer's business or plan of operations or changes reasonably expected to result in such changes.[663] The final rules reflect our belief that, on balance, Tier 2 issuers should only be required make disclosures in Form 1-U that reflect major and substantial changes to business plans or operations, as opposed to material events that are otherwise reportable in their periodic reports. Moreover, we do not believe that a fundamental change standard will cause confusion or raise concerns as to the applicability of other standards applicable in the anti-fraud provisions of the federal securities laws.

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661 Instruction(s) 2(b)-(c) to Item 1 of Form 1-U are adopted, as proposed.

662 E&Y Letter; Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

663 *See* Instruction 2(a) to Item 1 for the circumstances when an acquisition transaction would be deemed to trigger a fundamental change for purposes of Form 1-U.

Additionally, we note that Item 6 of Form 1-K and Item 2 of Form 1-SA permit issuers to disclose any information required to be disclosed under Form 1-U, but not so reported. For example, if an event occurs that would, under normal circumstances, require an issuer to file a Form 1-U within four business days, but such issuer is due to file either its annual or semiannual report within that period, then the issuer may instead report such information in its periodic report.

Finally, contrary to the suggestions of some commenters,[664] we continue to believe that the requirement to report unregistered sales of securities in Item 8 of Form 1-U will provide investors with valuable current information as to significant capital raising events by the issuer and should be disclosed in a timely manner to the market. We therefore retain this disclosure requirement in the final rules.[665]

As adopted, Form 1-U must be filed within four business days after the occurrence of any of the triggering events, and, where applicable, will permit issuers to incorporate by reference certain information previously filed on EDGAR.[666] Notwithstanding the suggestions of some commenters,[667] we believe that requiring issuers to file the form within four business days, as opposed to fifteen business days, is appropriate in an ongoing reporting regime that otherwise only requires issuers to provide annual and semiannual reports. Further, we are concerned that extending the filing deadline for Form 1-U reports would make the reporting of disclosable events no longer

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664 ABA BLS Letter; MoFo Letter.

665 Item 8 to Form 1-U. We have also clarified in Item 8(b) that only periodic reports that contain disclosure regarding unregistered sales of equity securities will reset the five percent reporting threshold for unregistered sales of securities, rather than any periodic report.

666 General Instruction D. to Form 1-U. The hyperlink to EDGAR need only be active at the time of filing of the Form 1-U. *Cf.* Securities Act Rule 411(c) and Exchange Act Rule 12b-32.

667 ABA BLS Letter; E&Y Letter; Milken Institute Letter.

"current." We are therefore adopting the timing requirements, as proposed. Additionally, in a change from the proposed rules, the final rules do not limit the availability of incorporation by reference to information previously filed pursuant to Regulation A. We believe that this change will continue to facilitate the provision of required information to investors, while taking a consistent approach to information previously provided to the Commission and publicly available on EDGAR.

Additionally, consistent with the changes made to Form 1-K and Form 1-SA and suggestions of at least one commenter,[668] Form 1-U encourages issuers to cross-reference items within the form, where applicable.[669] Further, in order to avoid incorporation by reference to stale information without requiring the latest version of the document to be filed, Form 1-U indicates that, if any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.[670] A manually signed copy of the Form 1-U must be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[671] Issuers are required to produce the manually signed copy to the Commission, upon request.[672] Any amendments to the Form 1-U must comply with the requirements of the applicable items, and be filed under cover of Form 1-U/A.[673]

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668 PwC Letter.

669 General Instruction D. to Form 1-U. We have clarified, however, that like with Form 1-A, they may not add a cross-reference within any financial statements that may be included to disclosures elsewhere.

670 *Id.*

671 *See* General Instruction C to proposed Form 1-U.

672 *Id.*

673 Rule 257(c).

(4) Special Financial Reports on Form 1-K and Form 1-SA

We did not receive any comment on the proposed provisions for special financial reports and are adopting them as proposed with one minor clarifying change. This report serves to close lengthy gaps in financial reporting between the financial statements included in Form 1-A and the issuer's first periodic report due after qualification of the offering statement. Where applicable, issuers conducting Tier 2 offerings must provide special financial reports analogous to those required under Exchange Act Rule 15d-2.[674] The special financial report requires audited financial statements for the issuer's most recent fiscal year (or for the life of the issuer if less than a full fiscal year) to be filed not later than 120 calendar days after qualification of the offering statement if the offering statement does not include such financial statements.[675] The special financial report requires semiannual financial statements for the first six months of the issuer's fiscal year, which may be unaudited, to be filed 90 calendar days after qualification of the offering statement if the offering statement does not include such financial statements and the offering statement was qualified in the second half of the issuer's current fiscal year.[676] The special financial report must be filed under cover of Form 1-K if it includes audited year end financial statements and under cover of Form 1-SA if it includes semiannual financial statements for the first six months of the issuer's fiscal year.[677] The financial statement and auditing requirements must follow the requirements of those

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674 17 CFR 240.15d-2.

675 Rule 257(b)(2)(ii). As adopted, we are revising Rule 257(b)(2)(ii) to reference the fiscal year or other period specified in Rule 257(b)(2)(i)(A), in order to avoid potential confusion about which most recent fiscal year is covered.

676 *Id.*

677 *Id.*

forms, and the issuer must indicate on the front page of the applicable form that only financial statements are included.[678]

(5) Reporting by Successor Issuers

We did not receive any comment on reporting by successor issuers, and we are adopting the proposed rules without change. Where in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets, or otherwise, securities of an issuer that is not subject to the reporting requirements of Regulation A are issued to the holders of any class of securities of an issuer that is subject to ongoing reporting under Tier 2, the issuer succeeding to that class of securities must continue to file the reports required for Tier 2 offerings on the same basis as would have been required of the original Tier 2 issuer.[679] The successor issuer may suspend or terminate its reporting obligations on the same basis as the original issuer under Rule 257(d).[680]

2. Exchange Act Rule 15c2-11 and Other Implications of Ongoing Reporting under Regulation A

Exchange Act Rule 15c2-11 governs broker-dealers' publication of quotations for securities in a quotation medium other than a national securities exchange.[681] The Commission adopted Rule 15c2-11 in 1971 to prevent fraudulent and manipulative trading schemes that had arisen in connection with the distribution and trading of certain unregistered securities.[682] The rule prohibits broker-dealers from publishing quotations

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678 *See* General Instruction A.(3) to Form 1-K and General Instruction A.(3) to Form 1-SA.

679 *See* Rule 257(b)(5).

680 *See* Section II.E.4. below for a discussion of the suspension or termination of disclosure obligations.

681 17 CFR 240.15c2-11.

682 *See* Rel. No. 34-39670 (Feb. 17, 1998) (Publication or Submission of Quotations Without Specified Information) (describing Rel. No. 34-9310 (Sept. 13, 1971) [36 FR 18641]). *See* 17

(or submitting quotations for publication) in a "quotation medium" for covered over-the-counter securities without first reviewing basic information about the issuer, subject to certain exceptions.[683] A broker-dealer also must have a reasonable basis for believing that the issuer information is accurate in all material respects and that it was obtained from a reliable source.[684]

A broker-dealer can satisfy its obligations under Rule 15c2-11 if it has reviewed and maintained in its records certain specified information. The particular information that is required by the rule varies depending on the nature of the issuer and includes, among other things:

- for an issuer that has filed a registration statement under the Securities Act, a copy of the prospectus;
- for an issuer that has filed an offering statement under the Securities Act pursuant to Regulation A, a copy of the offering circular; or
- for an issuer subject to ongoing reporting under Sections 13 or 15(d) of the Exchange Act, the issuer's most recent annual report and any quarterly or current reports filed thereafter.[685]

CFR 240.15c2-11(e)(1) (defining quotation medium as any "interdealer quotation system" or any publication or electronic communications network or other device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell).

683 17 CFR 240.15c2-11(a); *See also* Rel. No. 34-29094 (April 17, 1991) [56 FR 19148].

684 *See* 17 CFR 240.15c2-11 (Preliminary Note).

685 A broker-dealer can also satisfy its review requirements under Rule 15c2-11 by reviewing certain information published pursuant to a Rule 12g3-2(b) exemption for foreign private issuers that claim the registration exemption or information specified in Rule 15c2-11(a)(5) for non-reporting issuers.

a. Proposed Rules

As proposed, the ongoing reports for Tier 2 offerings under Regulation A, which would update the narrative and financial statement disclosures previously provided in Form 1-A on an annual and semiannual basis, with additional provisions for current reporting, would satisfy a broker-dealer's obligations under Rule 15c2-11 to review and maintain records of basic information about an issuer and its securities. In this regard, we proposed to amend Rule 15c2-11 to permit an issuer's ongoing reports filed in a Tier 2 offering under Regulation A to satisfy a broker-dealer's obligations to review specified information about an issuer and its security before publishing a quotation for a security (or submitting a quotation for publication) in a quotation medium.[686]

We also solicited comment on other potential effects that Tier 2 ongoing reporting under Regulation A could have under other provisions of the federal securities laws, such as whether timely ongoing Regulation A reporting under Tier 2 should constitute "adequate current public information" for purposes of paragraph (c) of Rule 144.[687] Under this provision, issuers are required to make available adequate current public information about themselves, which, for issuers not subject to Exchange Act reporting, must include certain information described in Exchange Act Rule 15c2-11(a)(5).[688] We also solicited comment on whether ongoing Regulation A reporting for Tier 2 offerings

686 In addition, we proposed a technical amendment to Rule 15c2-11 to amend subsection (d)(2)(i) of the rule to update the outdated reference to "Schedule H of the By-Laws of the National Association of Securities Dealers, Inc." which is now known as the "Financial Industry Regulatory Authority, Inc." and to reflect the correct rule reference.

687 17 CFR 230.144(c).

688 17 CFR 230.144(c)(2); *see also* 17 CFR 230.15c2-11(a), (g).

should satisfy the information requirements of paragraph (d)(4) of Rule 144A.[689] Under that provision, holders of Rule 144A securities must have the right to obtain from the issuer, upon request, a very brief statement of the nature of the issuer's business and the products and services it offers, the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for each of the two preceding fiscal years, which information must be "reasonably current."[690]

b. Comments on Proposed Rules

All commenters that addressed Rule 15c2-11 supported amending the rule in the manner proposed.[691] Some commenters recommended further amending Rule 15c2-11(g) to provide that an issuer that is current in its Tier 2 obligations would be deemed to have "reasonably current" financial information, even if its most current balance sheet is as of a date up to nine months old and it has not provided other updated information.[692] Most commenters also recommended amending Rule 144(c) to allow for ongoing reporting under Tier 2 to constitute "adequate current public information."[693] Other commenters recommended amending Rule 144A(d)(4) to allow for ongoing reporting under Tier 2 to satisfy the "reasonably current information" requirements of that rule.[694] Although the proposal did not solicit comment on Rule 144(i), one commenter recommended

689 17 CFR 230.144A(d)(4).

690 *Id.*

691 ABA BLS Letter; Canaccord Letter; CFIRA Letter 1; KVCF Letter; Milken Institute Letter; MoFo Letter; Paul Hastings Letter; Public Startup Co. Letter 1; REISA Letter; WR Hambrecht + Co Letter.

692 ABA BLS Letter; Canaccord Letter; Milken Institute Letter; MoFo Letter.

693 ABA BLS Letter; Canaccord Letter; CFIRA Letter 1; McCarter & English Letter; Paul Hastings Letter; KVCF Letter; Milken Institute Letter; Richardson Patel Letter; REISA Letter; WR Hambrecht + Co Letter.

694 ABA BLS Letter; Canaccord Letter; Milken Institute Letter; MoFo Letter.

amending this rule to allow former shell companies to rely on Rule 144 if they have been current in their ongoing reporting under Regulation A for a certain period of time and without having to file a Form 10.[695] One commenter also supported allowing use of the Rule 144 safe harbor for former shell companies that were not previously registered under the Exchange Act and that are now selling securities under Regulation A.[696] Another commenter requested that the Commission limit the prohibitions on reliance on Rule 144 only to Exchange Act registered issuers.[697]

c. Final Rules

We are adopting final rules for Regulation A that, as proposed, amend Exchange Act Rule 15c2-11(a) so that an issuer's ongoing reports filed under Tier 2 will satisfy the specified information about an issuer and its security that a broker-dealer must review before publishing a quotation for a security (or submitting a quotation for publication) in a quotation medium. In addition, we are adopting, as proposed, a technical amendment to Rule 15c2-11 to amend subsection (d)(2)(i) of the rule to update the outdated reference to "Schedule H of the By-Laws of the National Association of Securities Dealers, Inc." which is now known as the "Financial Industry Regulatory Authority, Inc." and to reflect the correct rule reference.

We are not following the suggestions of some commenters that we adopt provisions in the final rules so that Tier 2 ongoing reports will satisfy the current information requirements of Rule 144 and Rule 144A for the entirety of an issuer's fiscal

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695 McCarter & English Letter.

696 Public Startup Co. Letter 1.

697 Letter from Jason Coombs, Co-Founder and CEO, Public Startup Company, Inc., March 24, 2014 ("Public Startup Co. Letter 2").

year. While commenters were generally supportive, we do not believe that the frequency of the required Tier 2 ongoing reporting merits a broad determination that such reports will constitute "adequate public information" or "reasonably current information" on a year-round basis. On the contrary, quarterly reporting is an integral part of the resale safe harbors provided for in Rule 144 and Rule 144A that contemplate the provision of ongoing and continuous information.[698] While the semiannual reporting required under the final rules for Tier 2 offerings will result in issuers only having "reasonably current information" and "adequate current public information" for the portions of the year during which the financial statements of such issuers continue to satisfy the respective rules,[699] we note that issuers may voluntarily submit on Form 1-U quarterly financial statements or other information necessary to satisfy the respective rule requirements.[700] In such instances, and provided that the financial statements otherwise meet the financial statement requirements of Form 1-SA, such voluntarily provided quarterly information could satisfy the "reasonably current information" and "adequate current public information" requirements of Rule 144 and Rule 144A. An issuer that is therefore current in its semiannual reporting required under the rules and voluntarily provides quarterly financial statements on Form 1-U will have provided reasonably current and adequate current public information for the entirety of such year under Rule 144 and Rule 144A.

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698 *See, e.g.*, Rel. No. 33-6099 (Aug. 2, 1979) (Question 20). *See also* Section 13(a) of the Exchange Act, which contemplates, but does not prescribe, reasonably current information in the context of annual and quarterly reporting. 15 U.S.C. 78m(a).

699 *See* Securities Act Rule 144(c)(2); Securities Act Rule 144A(d)(4)(ii); Exchange Act Rule 15c2-11(a) and Rule 15c2-11(g).

700 *See* Item 9 of Form 1-U; *see also* Section II.E.1.c(3). and fn. 655 above.

3. Exchange Act Registration of Regulation A Securities

Under Section 15(d) of the Exchange Act, an issuer that has had a Securities Act registration statement declared effective must comply with the periodic reporting requirements of the Exchange Act.[701] Qualification of a Regulation A offering statement does not have the same effect. An issuer of Regulation A securities would not take on Exchange Act reporting obligations unless it separately registered a class of securities under Section 12 of the Exchange Act, or conducted a registered public offering.[702]

An issuer registering a class of securities under Section 12 of the Exchange Act must file either a Form 10[703] or Form 8-A[704] with the Commission. Form 10 is the general form for Exchange Act registration, while Form 8-A is a short-form registration statement. An issuer must use a Form 10 if, at the time it files its registration statement, it is not already subject to a Section 13 or Section 15(d) reporting obligation. An issuer may use Form 8-A if it is already subject to the provisions of either Section 13 or Section 15(d). Additionally, when an issuer that is not already subject to the provisions of either Section 13 or 15(d) plans to list its securities on a national securities exchange contemporaneously with the effectiveness of a Securities Act registration statement, the Commission staff will not object if that issuer files a Form 8-A in lieu of a Form 10 in

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701 While issuers with a Section 15(d) reporting obligation are required to file the same periodic reports as issuers that have registered a class of securities under Section 12, Section 15(d) reporting issuers are not subject to additional Exchange Act obligations (*e.g.*, proxy rules, short-swing profit rules, and beneficial ownership reporting) that apply to Exchange Act registrants.

702 *See also* Section II.B.6. above for a discussion of the conditional exemption from Section 12(g) adopted in the final rules today.

703 17 CFR 249.210. Foreign private issuers must file a Form 20-F, 17 CFR 249.220f, or, where available, a Form 8-A.

704 17 CFR 249.208a.

order to avoid having the issuer restate the contents of its Securities Act registration statement in its Exchange Act registration statement.[705]

a. Proposed Rules

As proposed, issuers conducting offerings under Regulation A that seek to list their securities on a national securities exchange or otherwise register a class of securities under the Exchange Act would be required to file a registration statement on Form 10. We solicited comment, however, on whether we should provide a simplified means for Regulation A issuers to register a class of securities under the Exchange Act, for example, by permitting such issuers to file a Form 8-A rather than a Form 10 in conjunction with, or following, the qualification of a Regulation A offering statement on Form 1-A.

We also invited comment on ways to facilitate secondary market trading in the securities of Regulation A issuers, such as by encouraging the development of "venture exchanges" or other trading venues that are focused on attracting such issuers.

b. Comments on Proposed Rules

Many commenters recommended that Regulation A issuers be allowed to use Form 8-A to register a class of securities under the Exchange Act in Tier 2 offerings.[706] Some of these commenters limited their recommendation to when the issuer follows the requirements of Part I of Form S-1 in its offering circular.[707] Separately, three

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705 *See* Rel. No. 34-38850 (Sept. 2, 1997) [62 FR 39755], at 39757 ("[A]n issuer registering an initial public offering will be permitted to use Form 8-A even though it will not be subject to reporting until after the effectiveness of that Securities Act registration statement.").

706 ABA BLS Letter; Canaccord Letter; CFIRA Letter 1; CFIRA Letter 2; Fallbrook Technologies Letter; Frutkin Law Letter; McCarter & English Letter; Milken Institute Letter; MoFo Letter; OTC Markets Letter; Paul Hastings Letter; Richardson Patel Letter; WR Hambrecht + Co Letter.

707 ABA BLS Letter; CFIRA Letter 1; WR Hambrecht + Co Letter.

commenters recommended allowing issuers to use a "super" Form 8-A that would require issuers to include any disclosure that is required in a Form 10, but is not included in the chosen offering circular format under Form 1-A.[708] Several commenters suggested allowing issuers to use a Form 10 that would go effective immediately as an alternative to filing a Form 8-A.[709] This process could be used to register securities under the Exchange Act when a simultaneous exchange listing was not contemplated. Other commenters recommended limiting the use of Form 8-A to situations contemporaneous with qualification of an offering statement,[710] within 12 months of qualification,[711] or after a brief time period after an offering statement is qualified.[712] Separately, two commenters recommended that Regulation A issuers that become Exchange Act reporting companies be considered "emerging growth companies."[713] One commenter recommended allowing issuers to use Form 8-A but to continue using Regulation A reports until its non-affiliate market capitalization reached $250 million.[714]

Two commenters encouraged the Commission to foster the development of venture exchanges on which Regulation A securities could be traded,[715] while another commenter largely opposed the creation of venture exchanges.[716]

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708 Canaccord Letter; Milken Institute Letter; MoFo Letter.

709 ABA BLS Letter; Canaccord Letter; MoFo Letter.

710 Milken Institute Letter.

711 Frutkin Law Letter; Richardson Patel Letter.

712 McCarter & English Letter.

713 ABA BLS Letter; MoFo Letter.

714 Paul Hastings Letter.

715 Heritage Letter; SBIA Letter.

716 OTC Markets Letter.

c. Final Rules

In the final rules, and consistent with the views of many commenters,[717] we are simplifying Exchange Act registration in connection with Regulation A offerings conducted pursuant to Tier 2 so that issuers wishing to register a class of Regulation A securities under the Exchange Act may do so by filing a Form 8-A in conjunction with the qualification of a Form 1-A. Only issuers that follow Part I of Form S-1 or the Form S-11 disclosure model in the offering circular will be permitted to use Form 8-A.[718] An issuer registering a class of securities under the Exchange Act concurrently with the qualification of a Regulation A offering statement will become an Exchange Act reporting company upon effectiveness of the Form 8-A and, if applicable, its obligation to file ongoing reports under Regulation A will be suspended for the duration of the resulting reporting obligation under Section 13 of the Exchange Act.[719] While some commenters suggested that we permit issuers to rely on the Form 8-A to register a class of securities for up to 12 months following the qualification of an offering statement, we believe limiting short form registration to situations in which an offering statement is being concurrently qualified will help ensure that the disclosures incorporated by reference into the Form 8-A, including financial statements contained in the offering statement are current.[720] The final rules would not, however, prevent an issuer from

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717 *See* fn. 706 above.

718 *See* Form 8-A, General Instructions A(c).

719 As discussed more fully in in Section II.E.4. below, a Tier 2 issuer may terminate its Regulation A ongoing disclosure obligation when it is no longer subject to the ongoing reporting requirements of Section 13 of the Exchange Act. *See also* Rule 257(e).

720 In order to ensure that registration on Form 8-A is limited to a concurrently qualified Regulation A offering statement, the amendments to Form 8-A expressly limit the use of the form to instances where the filing of the Form 8-A and, where applicable, the receipt by the Commission of

registering a class of securities under the Exchange Act on Form 8-A concurrent with the re-qualification of a previously qualified offering statement.

We recognize that Exchange Act reporting requires more comprehensive ongoing reporting than the Regulation A disclosure regime, which is why facilitating issuers' entrance into the Exchange Act reporting system on Form 8-A concurrent with the qualification of a Regulation A offering statement will benefit investors. At a minimum, issuers pursuing this route to exchange listing must meet listing standards of, and be certified by, the exchange before the Form 8-A will be declared effective. In order to be approved for listing on an exchange, issuers generally must meet certain size, financial, minimum securities distribution (or liquidity), and corporate governance criteria.[721] Additionally, in order to maintain listing on an exchange, issuers must maintain certain qualitative and quantitative continued listing standards.[722] Therefore, in addition to the provision of ongoing Exchange Act reports, investors will benefit from the issuer's satisfaction of the exchange's initial and ongoing listing standards, and may benefit from greater liquidity for their shares as a result.

As suggested by commenters, we believe that our accommodation should be limited to instances where an issuer provides disclosure in Part II of Form 1-A that follows Part I of Form S-1 or Form S-11, instead of the Offering Circular format. While

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certification from the national securities exchange listed on the form occur within five calendar days after the qualification of the Regulation A offering statement.

721 *See, e.g.*, Initial Listing Guide for the NASDQAQ Stock Market, *available at*: https://listingcenter.nasdaq.com/assets/initialguide.pdf; U.S. Listing Standards for the New York Stock Exchange (NYSE), *available at*: https://www.nyse.com/publicdocs/nyse/listing/NYSE%20_Initial_Listing_Standards_Summary.pdf.

722 *See, e.g.*, Continued Listing Guide for the NASDQAQ Stock Market, *available at*: https://listingcenter.nasdaq.com/assets/continuedguide.pdf; Continued Listing Standards for the New York Stock Exchange (NYSE), *available at*: https://www.nyse.com/get-started/reference.

all formats require extensive disclosure that, with the exception of item numbering, is similar in many respects, we believe that an issuer entering Exchange Act reporting should provide disclosure in a manner that is generally consistent with the requirements of issuers entering the Exchange Act reporting regime through registered offerings.[723] In this regard, we note that issuers qualifying an offering statement that follows Part I of Form S-1 or Form S-11 will, however, be required to follow the financial statement requirements of Part F/S of Form 1-A. For purposes of concurrent Exchange Act registration, the financial statements included in Form 1-A must be audited in accordance with the standards of the PCAOB by a PCAOB-registered auditor that is independent pursuant to Article 2 of Regulation S-X.[724] After effectiveness of the Form 8-A, they will be subject to Exchange Act reporting and compliance with the financial statement requirements of Exchange Act reporting companies.

Consistent with the suggestion of commenters,[725] we agree that issuers entering Exchange Act reporting under a qualified Regulation A offering statement and Form 8-A will be considered "emerging growth companies" to the extent the issuers otherwise qualify for such status. Issuers should base status determinations on the definition of an emerging growth company as it appears in the Securities Act and the Exchange Act.[726]

As noted above, the Proposing Release sought comment on whether we should consider encouraging the development of venture exchanges or other trading venues to

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723 *See* Section II.C.3.b(2)(c). above for a description of the financial statement requirements.

724 *See* General Instruction A.(a) to Form 8-A.

725 ABA BLS Letter; MoFo Letter.

726 Under Section 2(a)(19) of the Securities Act, an "emerging growth company" is defined as, among other things, an issuer that had total annual gross revenues of less than $1 billion during its most recently completed fiscal year. 15 U.S.C. 77b(a)(19). *See also* Section 3(a)(80) of the Exchange Act (which repeats the same definition). 15 U.S.C. 78c(a)(80).

facilitate the secondary market trading of Regulation A securities. We are considering venture exchanges as a way to provide liquidity for smaller issuers, and are contemplating their use for Regulation A securities as part of that consideration.

4. Exit Report on Form 1-Z

a. Proposed Rules

(1) Summary Information on Terminated or Completed Offerings

As discussed in Section II.E.1. above, we proposed to rescind Form 2-A but to continue to require Regulation A issuers to file the information generally disclosed in Form 2-A with the Commission electronically on EDGAR. Consistent with the related portion of proposed Form 1-K,[727] we proposed to convert the Form 2-A information into an online XML-based fillable form with indicator boxes or buttons and text boxes to be filed electronically with the Commission as Part I of proposed Form 1-Z (exit report). Issuers conducting Tier 1 offerings would be required to provide this information on Form 1-Z not later 30 calendar days after termination or completion of the offering, while issuers conducting Tier 2 offerings would be required to provide this information on Form 1-Z at the time of filing the exit report, if not previously provided on Form 1-K as part of their annual report.[728] As proposed, the summary offering information disclosed on Form 1-Z would be publicly available on EDGAR (but not otherwise required to be distributed to investors) and would include the date the offering was qualified and commenced, the number of securities qualified, the number of securities sold in the

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727 *See also* discussion in Section II.C.1. (Electronic Filing; Delivery Requirements) and Section II.C.3.a. (Part I (Notification)) above.

728 *See* Section II.E.1. above for a discussion of the requirements for proposed Form 1-K.

offering, the price of the securities, any fees associated with the offering, and the net proceeds to the issuer.

(2) Termination or Suspension of Tier 2 Disclosure Obligations

We further proposed to permit a Tier 2 issuer that has filed all ongoing reports required by Regulation A for the shorter of (1) the period since the issuer became subject to such reporting obligation or (2) its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z to immediately suspend its ongoing reporting obligation under Regulation A at any time after completing reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers or sales made in reliance on a qualified offering statement are not ongoing.[729] In such circumstances, an issuer's obligation to continue to file ongoing reports in a Tier 2 offering under Regulation A would be suspended immediately upon the filing of a notice with the Commission on Part II of proposed Form 1-Z. A manually signed copy of the Form 1-Z would have to be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[730] Issuers would be required to produce the manually signed copy to the Commission, upon request.[731]

We further proposed that issuers' obligations to file ongoing reports in a Tier 2 offering under Regulation A would be automatically suspended upon registration of a class of securities under Section 12 of the Exchange Act or effectiveness of a registration

729 *See* proposed Rule 257(d)(2).

730 *See* Instruction to proposed Form 1-Z.

731 *Id.*

statement under the Securities Act, such that Exchange Act reporting obligations would always supersede ongoing reporting obligations under Regulation A. If an issuer terminates or suspends its reporting obligations under the Exchange Act and the issuer is eligible to suspend its Regulation A reporting obligation by filing a Form 1-Z at that time, the ongoing reporting obligations would terminate automatically and no Form 1-Z filing would be required to terminate the issuer's Regulation A reporting obligation. If the issuer is not eligible to file a Form 1-Z at that time, it would need to recommence its Regulation A reporting with a report covering any financial period not completely covered by an effective registration statement or filed Exchange Act report.[732]

b. Final Rules

(1) Summary Information on Terminated or Completed Offerings

The single commenter on this issue approved of the proposed requirement to file summary information after the termination or completion of a Regulation A offering under both tiers.[733] We are adopting this requirement without changes.

(2) Termination or Suspension of Tier 2 Disclosure Obligations

We are adopting, with a change from the proposal, final rules that will permit issuers that conduct a Tier 2 offering to terminate or suspend their ongoing reporting obligations on a basis similar to the provisions that allow issuers to suspend their ongoing

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732 *See* proposed Rule 257(d)(1) and (e).

733 CFA Institute Letter.

reporting obligations under Section 13 and Section 15(d) of the Exchange Act.[734] As proposed, the final rules permit a Tier 2 issuer that has filed all reports required by Regulation A for the shorter of: (1) the period since the issuer became subject to such reporting obligation, or (2) its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z to immediately suspend its ongoing reporting obligation under Regulation A at any time after completing reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers or sales made in reliance on a qualified Tier 2 offering statement are not ongoing.[735] In a change from the proposal, in order to be consistent with Title VI of the JOBS Act, the final rules permit banks or bank holding companies[736] to immediately suspend their ongoing reporting obligation under Regulation A at any time after completing reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 1,200 persons, instead of 300 persons, and offers or sales made in reliance on a qualified Tier 2 offering statement are not ongoing.[737] As proposed, an issuer's obligation to continue to file

734 *See* Exchange Act Section 15(d), 15 U.S.C. 78*o*(d); Exchange Act Rule 12h-3, 17 CFR 240.12h-3.

735 Rule 257(d)(2).

736 The Commission recently proposed changes to its rules regarding Exchange Act registration to implement Title V and Title VI of the JOBS Act. *See* Rel. No. 33-9693 (Dec. 18, 2014) [79 FR 78343]. These proposed changes would, among other things, apply the registration thresholds applicable to banks and bank holding companies, as set forth in Section 12(g) of the Exchange Act, to savings and loan holding companies. Should we adopt this provision in the final rules for Section 12(g), we would anticipate making a corresponding change to the termination provisions of Rule 257(d).

737 Rule 257(d)(2). The final rules, as they apply to the number of record holders of other types of issuers, are adopted without changes from the proposal. Although Rule 257(d)(2) relies on the definition of "held of record" in Rule 12g5-1, issuers seeking to terminate or suspend their Tier 2

ongoing reports in a Tier 2 offering under Regulation A will be suspended immediately upon the filing of a notice to the Commission on Part II of proposed Form 1-Z.[738] As proposed, a manually signed copy of the Form 1-Z must be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[739] Issuers must produce the manually signed copy to the Commission, upon request.[740]

We otherwise adopt the proposed rules for the termination or suspension of a Tier 2 ongoing reporting obligation as proposed and without changes.

F. Insignificant Deviations from a Term, Condition or Requirement

We did not propose any changes to the existing insignificant deviation provisions of Rule 260. Rule 260 provides that certain insignificant deviations from a term, condition or requirement of Regulation A will not result in the issuer's loss of the exemption from registration under Section 5 of the Securities Act.[741] The provisions of Regulation A regarding issuer eligibility, offering limits, offers, and continuous or delayed offerings of Regulation A are deemed to be significant to the offering as a whole, and any deviations from these provisions result in the issuer's loss of the exemption.

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ongoing disclosure obligations are specifically excluded from relying on the amendment to such definition, which exclude securities issued in Tier 2 offerings. *See* Rule 12g5-1(a)(7) and Section II.B.6 above.

738 *Id.* In this regard, we have clarified that the Commission may only deny a Form 1-Z filing if the issuer is ineligible to use the form. *See* Rule 257(d)

739 *See* Instruction to Form 1-Z.

740 *Id.*

741 17 CFR 230.260.

One commenter generally supported the concept of allowing for insignificant deviations from the rules without the loss of the exemption.[742] This commenter recommended that the Commission give notice of violations and allow companies to have an opportunity to cure any such violation. The commenter also recommended imposing lesser sanctions, such as fines, if less significant violations could not be cured. Another commenter recommended including deviations from the prohibitions on the timing of sales and the amounts sold to investors on the list of matters deemed significant in proposed Rule 260, noting that, in its view, it would be difficult for issuers to show a good faith and reasonable attempt was made to comply with the requirements of Rule 251(d)(2).[743] This commenter noted that issuers, investors and state regulators need clear boundaries to know what actions will disqualify an offering from exemption and thus, with respect to the proposed provisions for Tier 2 offerings, would result in a loss of state preemption.

The final rules maintain the existing provisions for insignificant deviations, as proposed. Under the final rules, a failure to comply with a term, condition or requirement of Regulation A will not result in the loss of the exemption for any offer or sale to a particular individual or entity, if the person relying on the exemption establishes that:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity;

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with the offering limitations, issuer eligibility

[742] Heritage Letter.

[743] MCS Letter.

criteria, or requirements for offers or continuous or delayed offerings will be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Regulation A.[744]

We believe that provisions for insignificant deviations serve an important function by allowing for certain errors that can occur in the offering process, while clearly delineating those provisions from which an issuer may not deviate. We believe the current provisions provide assurances to investors that issuers will not be able to deviate from certain fundamental requirements in the rules and avoid undue hardship that could befall issuers for inadvertent errors, such as loss of the exemption and, with respect to Tier 2 offerings, the loss of preemption of state securities law registration and qualification requirements. We are not expanding the list of provisions from which an issuer may not deviate. We note that whether a deviation from the requirements would be significant to the offering as a whole would depend on the facts and circumstances related to the offering and the deviation. We also note that in certain situations, such as in the event of pre-qualification sales, it may be difficult for issuers to establish a good faith attempt at compliance. In such circumstances, an issuer would not be able to rely on the provision.

G. Bad Actor Disqualification

1. Proposed Rules

Under Securities Act Section 3(b)(2)(G)(ii), the Commission has discretion to issue rules disqualifying certain felons and other 'bad actors' from using amended

[744] Rule 260.

Regulation A. Such rules, if adopted, must be "substantially similar" to those adopted to implement Section 926 of the Dodd-Frank Act, which requires the Commission to adopt disqualification rules for securities offerings under Rule 506 of Regulation D. The Commission adopted the disqualification provisions required by Section 926 in Rule 506(d) together with a related disclosure requirement in Rule 506(e) on July 10, 2013.[745]

We proposed amendments to Regulation A's bad actor disqualification provisions that would make those provisions substantially similar to those adopted under Rule 506 of Regulation D. We also sought comment on the proposed disqualification rules and the categories of persons and types of events covered by the proposed rules. Additionally, we sought comment more broadly on the interpretation of the phrase "voting equity securities," as it appears in "any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power," a category of covered persons in Rule 506(d) and the proposed disqualification provisions for Regulation A as well as our proposed rules for securities-based crowdfunding transactions.

2. Comments on Proposed Rules

In general, commenters did not oppose the proposed amendments to Regulation A's bad actor disqualification rules. Some commenters expressly supported the proposed rules.[746] Some commenters, however, recommended changes to particular

[745] Rel. No. 33-9414 (July 10, 2013) [78 FR 44729]. The Commission proposed rules substantially similar to those adopted pursuant to Section 926 of the Dodd-Frank Act in the Proposing Release for securities-based crowdfunding transactions under Title III of the JOBS Act. *See* Rel. No. 33-9470, at 284.

[746] *See, e.g.*, KVCF Letter; MCS Letter;

provisions of the proposal. One commenter recommended revising the look-back periods for disqualifying events to run from the time of sale, not from the time of filing of the offering statement as proposed.[747] Another commenter recommended adding final orders of Canadian provincial regulators to the list of disqualifying events.[748] This commenter noted that some Canadian provinces have information publicly posted on their websites that would facilitate the bad actor diligence process. One commenter recommended that the Commission develop an online bad actor database.[749] Another commenter supported bad actor provisions as extensive as those under Rule 506(d).[750] Finally, one commenter recommended defining voting equity securities for purposes of the bad actor disqualifications provisions using the definition in Rule 12b-2 of the Exchange Act.[751]

3. Final Rules

We are adopting bad actor disqualification provisions for Regulation A, substantially as proposed with the exception of one change to further align the final rules for Regulation A with similar provisions in Rule 506(d). The covered persons and triggering events in the final rules for Regulation A are substantially the same as the covered persons and triggering events included in Rule 506(d).[752] The covered persons include managing members of limited liability companies; compensated solicitors of investors; underwriters; executive officers and other officers participating in the offering;

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747 KVCF Letter.

748 Karr Tuttle Letter.

749 Ladd Letter 2.

750 MCS Letter.

751 ABA BLS Letter (suggesting "voting securities" be deemed securities the holders of which are presently entitled to vote for the election of directors (or the equivalent)).

752 17 CFR 230.506(d).

and beneficial owners of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power.[753] Consistent with the bad actor disqualification rules under Rule 506(d), the final rules also include two new disqualification triggers not previously present in Regulation A: (1) final orders and bars of certain state and other federal regulators,[754] and (2) Commission cease-and-desist orders relating to violations of scienter-based anti-fraud provisions of the federal securities laws or Section 5 of the Securities Act.[755] In order to clarify the scope of the term "final order" as it appears in Rule 262, we are including a definition of that term in Regulation A that is consistent with the term as it appears in Rule 501(g) of Regulation D. As adopted, a "final order" shall mean a written directive or declaratory statement issued by a federal or state agency described in Rule 262(a)(3) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.[756] We believe that creating a uniform set of bad actor triggering events should simplify due diligence, particularly for issuers that may engage in different types of exempt offerings. For this reason, consistent with the disqualification provisions of Rule 506(d), the final rules do not include final orders of Canadian provincial regulators in the list of disqualifying events.

The final disqualification rules in Regulation A also specify that an order must bar the covered person at the time of filing of the offering statement, as opposed to the requirement in Rule 506(d) that the order must bar the covered person at the time of the

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753 Rule 262(a).

754 Rule 262(a)(3).

755 Rule 262(a)(5).

756 Rule 261(d).

relevant sale.[757] This clarification accords with the current provisions of Rule 262 and is appropriate for Regulation A because there is no filing requirement before the time of first sale in Rule 506.[758] We are further adopting a reasonable care exception to the disqualification provisions on a basis consistent with Rule 506(d).[759] Under the final rules, an issuer will not lose the benefit of the Regulation A exemption if it is able to show that it did not know, and in the exercise of reasonable care could not have known, of the existence of a disqualification.[760] As proposed, and consistent with the provisions of existing Regulation A, the final rules permit issuers that are disqualified from relying on the exemption to request a waiver of disqualification from the Commission.[761]

In the Proposing Release, we solicited comment on the interpretation of the phrase "voting equity securities," as it appears in "any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power," a category of covered persons in Rule 506(d) and proposed Rule 262 as well as our proposed rules for securities-based crowdfunding transactions. Consistent with the views of at least one commenter,[762] we have reconsidered our initial views on the interpretation of "voting equity securities." We believe that it is appropriate to refine our initial interpretation,[763] as it applies to our bad actor disqualification rules,[764] and create a

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757 Rule 506(d), 17 CFR 230.506(d).

758 Under Rule 503 of Regulation D, issuers must file a notice of sales on Form D no later than 15 calendar days after the first sale of securities. 17 CFR 230.503(a).

759 *See* Rule 262(b)(4).

760 *Id.*

761 Rule 262(b)(2).

762 ABA BLS Letter.

763 When we adopted Rule 506(d), we did not define "voting equity securities," but rather indicated that our initial intention would be to consider securities as voting equity securities if "securityholders have or share the ability, either currently or on a contingent basis, to control or

"bright-line" standard that is consistent with the definition of the term "voting securities" in Rule 405 of the Securities Act.[765] In this regard, we believe that such a term should include only those voting equity securities which, by their terms, currently entitle the holder to vote for the election of directors. In other words, we believe the term should be read to denote securities having a right to vote that are presently exercisable. Additionally, while the ability to control or significantly influence the management or policies of the issuer may be derived in part from the power to vote for the election of directors, in order to dispel any uncertainty as to the scope of our interpretation, we believe the term "voting equity securities" should be interpreted based on the present right to vote for the election of directors, irrespective of the existence of control or significant influence.

Under the final rules, offerings that would have been disqualified from reliance on Regulation A under Rule 262 as in effect before today's amendments will continue to be disqualified. Triggering events that were not previously included in the bad actor rules for Regulation A and that pre-date effectiveness of the final rules will not cause disqualification, but instead must be disclosed on a basis consistent with Rule 506(e). Specifically, issuers will be required to indicate in Part I of Form 1-A that none of the persons described in Rule 262 are disqualified and, where applicable, that disclosure of

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significantly influence the management and policies of the issuer through the exercise of a voting right." *See* SEC Rel. No. 33-9414 (July 10, 2013) [78 FR 44729], text accompanying fn. 62. In light of concerns that our initial interpretation may be overbroad and that a "bright line" test may be more workable and would facilitate compliance, as we indicated in the Proposing Release, we are reconsidering our initial views. *See* Proposing Release, at Section II.G.

764 In addition to Regulation A, this interpretive position would apply to Rule 505 and Rule 506 of Regulation D.

765 In Securities Act Rule 405, the term voting securities means securities the holders of which are presently entitled to vote for the election of directors. 17 CFR 230.405.

triggering events that would have triggered disqualification, but occurred before the effective date of the Regulation A amendments, will be provided in Part II of Form 1-A.[766]

We believe that the final rules are appropriate in light of the Section 3(b)(2)(G)(ii) mandate, the benefits of creating a more uniform set of standards for all exemptions that include bad actor disqualification, and the required disclosure in the offering circular of persons subject to events that would have triggered disqualification, but occurred before the effective date of the final rules.

H. Relationship with State Securities Law

1. Proposed Rules

Although Section 401(b) of the JOBS Act does not exempt offerings made under Section 3(b)(2) and the related rules from state law registration and qualification requirements, it added Section 18(b)(4)(D) to the Securities Act.[767] That provision states that Section 3(b)(2) securities are covered securities for purposes of Section 18 if they are "offered or sold on a national securities exchange" or "offered or sold to a qualified purchaser, as defined by the Commission pursuant to [Section 18(b)(3)] with respect to that purchase or sale." Section 18(b)(3) provides that "the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors."

766 As discussed in Section II.C.3.a. above, Part I of Form 1-A focuses, in part, on issuer eligibility, and requires issuers to make an eligibility determination at the outset of filling out Form 1-A.

767 Section 18 of the Securities Act generally provides for exemption from state law registration and qualification requirements for certain categories of securities, defined as "covered securities." *See* Section 18(c), 15 U.S.C. 77r(c). State securities regulators retain authority to impose certain filing and fee requirements and general antifraud enforcement authority with respect to covered securities. *See* Section 18(c), 15 U.S.C. 77r(c).

Commenters in the pre-proposal stage suggested that the cost of state securities law compliance, which they identified as an obstacle to the use of Regulation A, would discourage market participants from using the new exemption. In addition, the GAO, as required by Section 402 of the JOBS Act, conducted a study on the impact of state securities laws registration and qualification requirements on offerings conducted under Regulation A and found that state securities laws were among several central factors that may have contributed to the lack of use of Regulation A.[768]

In light of the issues raised by commenters and in the GAO Report, as well the substantial investor protections included in the proposed rules to amend Regulation A and implement Title IV of the JOBS Act, we proposed to define the term "qualified purchaser" in a Regulation A offering to consist of: (1) all offerees in a Regulation A offering and (2) all purchasers in a Tier 2 offering.[769] We indicated in the Proposing Release that we believed this approach would protect offerees and purchasers in Regulation A securities, while streamlining compliance and reducing transaction costs.

We proposed to preempt state securities laws registration and qualification requirements with respect to all offerees in a Regulation A offering, in order to allow issuers relying on Regulation A to communicate with potential investors about their offerings using the internet, social media, and other means of widespread communication, without concern that such communications might trigger registration requirements under state law.[770] We further proposed to preempt state securities laws registration and

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768 *See* fn. 90 above.

769 Proposed Rule 256.

770 We understand that some state securities regulators do not require the registration of broadly advertised offerings such as internet offerings, if the advertisement indicates, directly or indirectly,

qualification requirements with respect to all purchasers in a Tier 2 offering to help make Regulation A a more workable means of capital formation. We also noted our belief that the substantial investor protections embedded in the proposed rules, including issuer eligibility conditions, limitations on investment, disclosure requirements, qualification process, and ongoing reporting requirements of Tier 2, in combination, could address potential concerns that may arise as a result of preemption.

Under the proposed rules, state securities regulators would retain their authority to:

- require the filing of any document filed with the Commission and the payment of filing fees;
- investigate and bring enforcement actions against fraudulent securities transactions and unlawful conduct by broker-dealers in such offerings; and
- enforce the filing and fee requirements by suspending the offer or sale of securities within a given state for the failure to file or pay the appropriate fee.[771]

As noted in the Proposing Release, it was our preliminary view that the additional requirements for Tier 2 offerings would meaningfully bolster the protections otherwise embedded in Regulation A and therefore a different treatment than Tier 1 offerings is appropriate.

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that the offering is not available to residents of that state. *See, e.g.*, Washington State Dep't of Financial Institutions, Securities Act Policy Statement – 16, *available at*: http://dfi.wa.gov/sd/securitiespolicy.htm#ps-16; *see also* NASAA Reports ¶ 7,040 (regarding NASAA resolution, dated January 7, 1996, which encourages states to take appropriate steps to exempt from securities registration offers of securities over the Internet).

771 Section 18(c) (Preservation of Authority) of the Securities Act, 15 U.S.C. 77r(c).

2. Comments on Proposed Rules

The preemption of state securities law registration and qualification requirements contemplated in the proposed "qualified purchaser" definition received an extensive amount of public commentary. Commenters were sharply divided on the need for state securities law preemption in Regulation A.

Many commenters objected to the preemption of state securities law registration and qualification requirements.[772] The views of these commenters were based on the following arguments:

- A "qualified purchaser" means a purchaser with specialized skill, experience or knowledge.[773]

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772 Letter from A. Heath Abshure, Arkansas Securities Commissioner, February 20, 2014 ("ASD Letter"); CFA Letter; CFA Institute Letter; Letter from Rep. Stephen F. Lynch, et al, U.S. House of Representatives, June 3, 2014 ("Congressional Letter 2"); Letter from Sen. Barbara Boxer, et al, U.S. Senate, Aug. 1, 2014 ("Congressional Letter 4"); Cornell Clinic Letter; Groundfloor Letter (suggesting that the Commission should at least evaluate NASAA's coordinated review program for 12 months); Karr Tuttle Letter (acknowledging that state preemption may still be necessary for states not participating in NASAA's new coordinated review program); Letter from William F. Galvin, Secretary, Commonwealth of Massachusetts, December 18, 2013 ("Massachusetts Letter 1"); Massachusetts Letter 2; MCS Letter; Letter from Andrea Seidt, President, et al., North American Securities Administrators Association (NASAA), February 19, 2014 ("NASAA Letter 1"); NASAA Letter 2; Letter from William Beatty, President, North American Securities Administrators Association (NASAA), February 11, 2015 ("NASAA Letter 3"); Letter from Jack E. Herstein, Assistant Director, Nebraska Department of Banking and Finance, February 10, 2014 ("NDBF Letter"); Letter from Chad Johnson, Bureau Chief, Investor Protection Bureau, New York State Attorney General's Office, New York, May 7, 2014 ("NYIPB Letter"); Letter from Irving L. Faught, Administrator, Oklahoma Department of Securities, March 24, 2014 ("ODS Letter"); Letter from Damaris Mendoza-Román, Assistant Commissioner, Office of the Commissioner of Financial Institutions, Puerto Rico, March 5, 2014 ("PRCFI Letter"); Letter from Hon. Jesse White, Illinois Secretary of State, et al., March 4, 2014 ("Secretaries of State Letter"); Letter from Lindsay M. Scherber, May 8, 2014 ("Scherber Letter"); Letter from Janet M. Tavakoli, President, Tavakoli Structured Finance, Inc., February 24, 2014 ("Tavakoli Letter"); Letter from John Morgan, Securities Commissioner, Texas State Securities Board, March 21, 2014 ("TSSB Letter"); WDFI Letter.

773 *See, e.g.*, ASD Letter; CFA Letter; Congressional Letter 4; Cornell Clinic Letter; Massachusetts Letter 1; NASAA Letter 2; ODS Letter; PRCFI Letter; WDFI Letter.

- The qualifications of the purchaser are key, not the nature of the issuer or the offering. Thus, the proposed definition of "qualified purchaser" is contrary to the plain meaning of this term.[774]

- The legislative history of the National Securities Markets Improvement Act of 1996 (NSMIA)[775] suggests that definitions of "qualified purchaser" must include an investor sophistication test.[776] The Commission made similar statements on the "qualified purchaser" definition in a 2001 Proposing Release.[777]

- Congress considered preemption in the context of a provision to preempt offerings conducted through a broker-dealer in an early draft of Title IV of the JOBS Act, but then purposefully excluded such broad preemption from the final statute.[778]

- The Commission's cost-benefit analysis of preemption was inadequate because it largely ignored investor protections, the benefits of state regulation, perceived resource constraints at the Commission, and preemption's impact on investor confidence in the markets.[779]

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774 *See, e.g.*, CFA Letter; Massachusetts Letter 1; NASAA Letter 2; PRCFI Letter; Tavakoli Letter; WDFI Letter.

775 Pub. L. 104-290, 110 Stat. 3416 (Oct. 11, 1996).

776 *See, e.g.*, ASD Letter; Karr Tuttle Letter; Congressional Letter 4; Massachusetts Letter 1; Massachusetts Letter 2; NASAA Letter 1; NASAA Letter 2; NDBF Letter; NYIPB Letter; ODS Letter; PRCFI Letter; Secretaries of State Letter; Tavakoli Letter; WDFI Letter.

777 Rel. No. 33-8041 (Dec. 27, 2001) (the "2001 Proposing Release").

778 *See, e.g.*, ASD Letter; CFA Letter; Congressional Letter 2; Congressional Letter 4; Groundfloor Letter; Massachusetts Letter 1; Massachusetts Letter 2; NASAA Letter 2; NDBF Letter; NYIPB Letter; Secretaries of State Letter; Tavakoli Letter; WDFI Letter.

779 *See, e.g.*, CFA Letter; Groundfloor Letter; Massachusetts Letter 2; NASAA Letter 2; Scherber Letter; WDFI Letter.

- Although the GAO Report conducted under Section 402 of the JOBS Act cited compliance with state securities law review and qualification requirements as a factor in the lack of use of Regulation A, it also noted lengthy Commission reviews of Form 1-A filings.[780]
- States play a unique role in regulating securities offerings due to their localized knowledge and resources, which aid in detecting fraud and facilitating issuer compliance.[781]
- The investor protections included in the proposal do not act as an adequate substitute for state review and comment on offering statements.[782]
- The states have adopted and implemented a new coordinated review program, designed to address many of the perceived inefficiencies associated with state registration.[783]

Many other commenters expressed their support for preemption, as proposed.[784] These commenters made the following arguments:

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780 *See, e.g.*, CFA Letter; Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

781 *See, e.g.*, NASAA Letter 1; ODS Letter; PRCFI Letter; WDFI Letter.

782 *See, e.g.*, CFA Letter; CFA Institute Letter; MCS Letter; NASAA Letter 2; Scherber Letter; TSSB Letter; WDFI Letter.

783 *See, e.g.*, ASD Letter; CFA Institute Letter; Cornell Clinic Letter; Groundfloor Letter; Karr Tuttle Letter; Massachusetts Letter 1; Massachusetts Letter 2; NASAA Letter 1; NASAA Letter 2; NASAA Letter 3; NYIPB Letter; PRCFI Letter; Secretaries of State Letter; Tavakoli Letter; TSSB Letter; WDFI Letter.

784 ABA BLS Letter; Letter from Kendall Almerico, Crowdfunding Expert, Attorney and CEO, Fund Hub and ClickStartMe, February 11, 2014 ("Almerico Letter"); Andreessen/Cowen Letter; B. Riley Letter; BIO Letter; Campbell Letter; Canaccord Letter; CFIRA Letter 1; CFIRA Letter 2; Letter from Rep. David Schweikert, et al, U.S. House of Representatives, Sept. 25, 2014 ("Congressional Letter 3"); DuMoulin Letter (noting that Canadian issuers conducting simultaneous offerings in Canada would otherwise be subject to three levels of review); Letter from Stanley Keller, Edwards Wildman Palmer LLP, April 3, 2014 ("Edwards Wildman Letter") (recommending defining "qualified purchasers" as "accredited investors" if the proposed preemption is not adopted); Letter from Daniel Eng, CEO, March 20, 2014 ("Eng Letter");

- The proposed rules provide substantial investor protections to investors.[785]
- State securities law review of offering statements is a significant impediment to the use of Regulation A.[786]
- The Commission has the authority to preempt state qualification and review requirements.[787]
- States continue to have the authority to, among other things, bring anti-fraud enforcement actions and to review the publicly filed disclosure documents before sales occur.[788]

Fallbrook Technologies Letter; Gilman Law Letter; McCarter & English Letter; Guzik Letter 1 (*see also* Guzik Letter 2 (suggesting that if the proposed preemption is not adopted to consider adopting an accredited investor style definition for "qualified purchaser," but with a lower income or net worth test)); Letter from Todd Hart, Aug. 20, 2014 ("Hart Letter"); Heritage Letter; Letter from Charles Huynh, February 24, 2014 ("Huynh Letter"); IPA Letter; Kisel Letter; Letter from Akbert P. Kretz, Ph.D., Founder/Manager, Mentor, March 11, 2014 ("Kretz Letter"); KVCF Letter; Ladd Letters; Leading Biosciences Letter; Letter from Bruce E. Methven, Securities Law Attorney, March 23, 2014 ("Methven Letter"); Milken Institute Letter; MoFo Letter; Letter from Donald R. Hancock, CEO, Moloney Securities Co., Inc., February 20, 2014 ("Moloney Letter"); Letter from Jason Akel, President, New Food Ventures LLC, March 12, 2014 ("New Food Letter"); OTC Markets Letter; Letter from Jesse J. Palomino, February 25, 2014 ("Palomino Letter"); Paul Hastings Letter; Public Startup Co. Letters; REISA Letter; Richardson Patel Letter; SBIA Letter; Letter from Bradley L. Staples, MBA, University of Utah, February 21, 2014 ("Staples Letter"); Letter from Chris Sugai, February 21, 2014 ("Sugai Letter"); SVB Financial Letter; SVGS Letter; Letter from Ryan Hawxhurst, Founder and CEO of Unorthodocs Printing LLC, February 21, 2014 ("Unorthodocs Letter"); U.S. Chamber of Commerce Letter; Letter from Gregory S. Fryer, Esq., Partner, Verrill Dana LLP, July 15, 2014 ("Verrill Dana Letter 2"); Letter from John Warren, Esq., February 24, 2014 ("Warren Letter"); WR Hambrecht + Co Letter.

785 *See, e.g.*, ABA BLS Letter; Almerico Letter; B. Riley Letter; Campbell Letter; Canaccord Letter; CFIRA Letter 1; Congressional Letter 3; Edwards Wildman Letter; Fallbrook Technologies Letter; Gilman Law Letter; Guzik Letter 1; Guzik Letter 2; KVCF Letter; Leading Biosciences Letter; Milken Institute Letter; MoFo Letter; OTC Markets Letter; Paul Hastings Letter; Richardson Patel Letter; Verrill Dana Letter 2; WR Hambrecht + Co Letter.

786 *See, e.g.*, ABA BLS Letter; Almerico Letter; BIO Letter; Campbell Letter; Canaccord Letter; Congressional Letter 3; DuMoulin Letter; Edwards Wildman Letter; Fallbrook Technologies Letter; Gilman Law Letter; Guzik Letter 1; Guzik Letter 2; Kisel Letter; Kretz Letter; KVCF Letter; Ladd Letters; Leading Biosciences Letter; McCarter & English Letter; Milken Institute Letter; Moloney Letter; OTC Markets Letter; Paul Hastings Letter; REISA Letter; Richardson Patel Letter; SBIA Letter; Staples Letter; SVB Financial Letter; U.S. Chamber of Commerce Letter; Verrill Dana Letter 2.

787 *See, e.g.*, ABA BLS Letter; BIO Letter; Campbell Letter; Edwards Wildman Letter; Guzik Letter 1; Heritage Letter; IPA Letter; KVCF Letter; Public Startup Co. Letters; Richardson Patel Letter; U.S. Chamber of Commerce Letter; Verrill Dana Letter 2.

- NASAA's coordinated review program as implemented will remain inefficient due to internal conflict, the application of merit review standards and the program's inability to bind participants in the event of disagreements among the states.[789]

Many commenters that expressed general support for preemption, as proposed, also recommended applying it on an expanded basis.[790] Some commenters recommended preempting state regulation of secondary trading in Regulation A securities,[791] and some recommended preempting state regulation of Tier 1 offerings.[792]

Alternatively, several commenters recommended possibly eliminating the Commission's review of Regulation A offerings to varying extents.[793] Two commenters recommended eliminating the Commission's review of Tier 1 offerings.[794] One of these

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788 *See, e.g.*, Congressional Letter 3; Heritage Letter; KVCF Letter; Methven Letter; REISA Letter.

789 *See, e.g.*, ABA BLS Letter; BIO Letter; Canaccord Letter; Congressional Letter 3; Edwards Wildman Letter; Guzik Letter 2; KVCF Letter; Ladd Letters; Milken Institute Letter; Paul Hastings Letter; REISA Letter; Richardson Patel Letter; SVB Financial Letter; Verrill Dana Letter 2.

790 ABA BLS Letter; Campbell Letter; Congressional Letter 3; Guzik Letter 1; Hart Letter; Heritage Letter; IPA Letter; KVCF Letter; Ladd Letter 2; Milken Institute Letter; OTC Markets Letter; Paul Hastings Letter; Public Startup Co. Letter 1; SVB Financial Letter.

791 ABA BLS Letter; IPA Letter (recommending preempting for resales of all securities of a Tier 2 issuer that is current in Regulation A reporting); KVCF Letter; OTC Markets Letter (recommending preemption for at least Regulation A securities that are not penny stocks); Paul Hastings Letter; SVB Financial Letter.

792 Andreessen/Cowen Letter; Campbell Letter; Congressional Letter 3; Guzik Letter 1 (recommending preemption with audited financial statements and a substantially lighter disclosure regime compared to Tier 2); Heritage Letter; Ladd Letter 2 (recommending preemption if company adopts internal controls and meets continuing disclosure requirements, including yearly audited financials); Milken Institute Letter (recommending preemption if audited financial statements are included in the "initial filing"); Public Startup Co. Letter 1; SVB Financial Letter (recommending preemption with additional, unspecified disclosure obligations). *See* Section II.I. below for additional recommended changes to Tier 1.

793 Groundfloor Letter; Ladd Letter 2; Public Startup Co. Letter 5; Verrill Dana Letter 2.

794 Ladd Letter 2; Public Startup Co. Letter 5.

commenters recommended only doing this for offerings that are "local" in nature.[795] One commenter recommended having a single state review, in lieu of a review and qualification by the Commission, if the Commission's staff is unwilling to review Regulation A offerings "promptly with content-appropriate standards."[796] One commenter recommended completely eliminating the Commission's review if NASAA's coordinated review program promotes a "robust" Regulation A market.[797]

3. Final Rules

For the reasons discussed below, we are adopting the "qualified purchaser" definition in Regulation A, substantially as proposed. In the final rules, a "qualified purchaser" for purposes of Section 18(b)(4)(D)(ii) of the Securities Act includes any person to whom securities are offered or sold in a Tier 2 offering. Because of the requirements for all Tier 2 offerings, all purchasers in Tier 2 offerings persons must be either accredited investors or persons who limit their investment amount to no more than 10% of the greater of annual income or net worth (for natural persons), or 10% of the greater of annual revenue or net assets at fiscal year end (for non-natural persons).

To address commenter concerns and avoid potential confusion as to the application of the preemption provisions in Tier 1 offerings, the final definition of "qualified purchaser" does not include offerees in Tier 1 offerings. While the final rules permit Regulation A issuers to test the waters and make offers in the pre-qualification period at the federal level, in light of the concerns raised by state regulators about the

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795 Public Startup Co. Letter 5.

796 Verrill Dana Letter 2.

797 Groundfloor Letter.

proposed rule's expanded use of solicitation materials[798] and what we anticipate to be the generally more local nature of Tier 1 offerings,[799] we believe it is appropriate, in this context, for the states to retain oversight over how these offerings are conducted. Although we acknowledge that this could potentially inhibit the use of solicitation materials in certain Tier 1 offerings, for these smaller, more localized offerings, we think the states should be permitted to regulate the use of solicitation materials.

Given the sharply divided views of commenters on the "qualified purchaser" definition included in the Proposing Release, we want to clarify the scope of the Commission's authority under the Securities Act to define such a term and the effect the final qualified purchaser definition will have on the continued ability of the states to regulate offers and sales within their jurisdiction. We continue to believe that the substantial investor protections embedded in the final rules for Tier 2 offerings, including the requisite qualifications of the issuer, offering, and eventual purchasers, as well as the particular characteristics associated with this category of securities, support the limited preemption of state securities laws registration and qualification requirements adopted in the final rules.

a. NSMIA and the JOBS Act

As noted above, some commenters questioned the ability of the Commission to adopt a "qualified purchaser" definition that includes any person to whom securities are

798 Massachusetts Letter 2; NASAA Letter 2; WDFI Letter. These commenters suggested that the Commission require the filing of solicitation materials before the time of first use, as, in their view, the antifraud and other civil liability provisions of the federal securities laws are not an adequate substitute for the investor protections afforded by an advance filing requirement for solicitation materials, while also noting that problems with the use of solicitation materials are compounded by the provisions for access equals delivery of final offering circulars.

799 *See* Section II.H.3.d. below; *see also* fn. 830 below.

offered or sold in a Tier 2 offering.[800] These commenters suggested that a qualified purchaser definition under Section 18(b)(3) of the Securities Act must be based on attributes of the purchaser, not the nature of the issuer or offering. These commenters stated that broad preemption was contemplated in the legislative history of Title IV of the JOBS Act and expressly rejected by Congress.

Title I of the NSMIA, referred to as the "Capital Markets Efficiency Act of 1996" (the "Efficiency Act"),[801] was, as its name suggests, enacted to promote efficiency and capital formation in the financial markets.[802] The Efficiency Act realigned the respective responsibilities of federal and state securities regulators in the context of the dual system of securities offering registration that existed before enactment of the statute.[803] The Efficiency Act achieved this regulatory realignment by amending Section 18 of the Securities Act to provide for exemption from state law registration and qualification requirements for certain categories of securities, defined as "covered securities."

Section 18(b)(3) provides that "[a] security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule." Congress stated in Section 18(b)(3) that the Commission may "define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors." The JOBS Act[804]

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800 *See* fn. 772 above.

801 NSMIA, § 101 (Short Title).

802 H.R. Rep. No. 622, 104th Cong. 2d Sess. at 1 (1996) (House Report).

803 As enacted, NSMIA included five separate titles, each of which served a different purpose in the overarching statutory goal of improving national securities markets. *See* preamble and Section 1 to NSMIA.

804 The stated purpose of the JOBS Act is to "increase American job creation and economic growth by improving access to the public capital markets . . . ." *See* JOBS Act (Preamble).

amended Section 18 by adding to its list of "covered securities" transactions involving securities that are exempt from registration pursuant to a rule or regulation adopted pursuant to Section 3(b)(2) and that are "offered or sold to a qualified purchaser, as defined by the Commission pursuant to [Section 18(b)(3)] with respect to that purchase or sale."[805]

By its terms, Section 18(b)(3) provides the Commission with the express authority to adopt rules that define a "qualified purchaser." The provision does not prescribe specific criteria that the Commission must consider in determining, or the manner in which it must determine, a purchaser to be "qualified." Furthermore, Section 18(b)(3) states that the definition of qualified purchaser may be different for different categories of securities. This means that, rather than considering the characteristics of the purchaser in isolation, the Commission may adopt a qualified purchaser definition that is also tailored to reflect the characteristics of the particular type of issuer or transaction. Further, Section 18(b)(3) does not proscribe any particular terms or characteristics that the Commission must include in any rules defining qualified purchaser with respect to a given category of securities. What it does instead is require that any rules so adopted be consistent with the public interest and the protection of investors.

Unlike Section 18(b)(3), which provides for preemption with respect to offers or sales to qualified purchasers in any context, Section 18(b)(4)(D)(ii) provides for preemption specifically with respect to transactions exempt from registration pursuant to

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805 JOBS Act §401(b) (adding Section 18(b)(4)(D)(ii) to the Securities Act). Section 401(b) also included in the list of "covered securities" transactions involving Section 3(b)(2) securities that are offered or sold on a national securities exchange, *see* Section 18(b)(4)(D)(i). *See also* Title III of the JOBS Act, which added to the list of "covered securities" in Section 18(b)(4)(C) transactions involving securities issued pursuant to Section 4(a)(6).

Section 3(b)(2). As such, the preemption afforded under Section 18(b)(4)(D)(ii) necessarily encompasses the mandatory requirements for conducting an exempt offering pursuant to Section 3(b)(2). These include, among other things, that the civil liability provisions of Section 12(a)(2) must apply and that an issuer must file audited financial statements with the Commission annually.[806] Other potential requirements left to the discretion of the Commission include provisions for ongoing reporting, bad actor disqualification, and requirements for electronic filing of offering materials.[807]

We believe that the terms of Section 18(b)(3) and Section 18(b)(4)(D)(ii)—read in conjunction—provide the Commission with discretionary authority to adopt a "qualified purchaser" definition that reflects the particular characteristics of transactions exempt from registration pursuant to Section 3(b)(2). Thus, in determining who should be considered a qualified purchaser for purposes of the amendments to Regulation A, we have considered not only the mandatory features of Section 3(b)(2), but also many of the discretionary features contained in our final rules, such as the requirement that purchasers in Tier 2 offerings be limited to accredited investors or persons otherwise subject to specified investment limitations.

We recognize that a number of commenters disagreed with this approach.[808] Some stated that a "qualified purchaser" definition adopted by the Commission must at a minimum be based on attributes of the purchaser, such as a person's wealth, income, or sophistication,[809] and noted that the Commission had highlighted such factors in a 2001

806 15 U.S.C. 77c(b)(2)(D), (F).

807 *See* 15 U.S.C. 77c(b)(2)(G); 15 U.S.C. 77c(b)(4).

808 *See* fn. 772 above.

809 *See, e.g.*, NASAA Letter 2.

Proposing Release to define a "qualified purchaser" pursuant to Section 18(b)(3).[810] The 2001 Proposing Release, however, contemplated that state securities review and qualification requirements would be preempted in all categories of transactions to the extent that sales were made to "accredited investors." By contrast, our rules to implement Title IV of the JOBS Act provide for preemption in the more limited circumstances in which the requirements of Section 3(b)(2) and the rules adopted thereunder are satisfied.

In the 2001 Proposing Release, we noted that certain aspects of NSMIA's legislative history suggest that a qualified purchaser definition should include investors that are sophisticated and capable of protecting themselves. In addition, we asked questions about the proposed approach to the definition and whether other potential factors mentioned in the legislative history, such as the national character of an offering, could or should bear on potential qualified purchaser definitions adopted pursuant to Section 18(b)(3).[811]

We do not believe that the 2001 Proposing Release is inconsistent with the qualified purchaser definition for Regulation A that we are adopting today. The 2001 Proposing Release was not a Commission statement on the scope of all permissible definitions for a qualified purchaser adopted pursuant to Section 18(b)(3). Rather, it expressed a preliminary interpretive view of certain aspects of the legislative history of NSMIA in the context of a proposed rulemaking that would have equated "qualified

810 2001 Proposing Release. In this release, the Commission proposed to define a "qualified purchaser" to be an "accredited investor," as that term is defined under Rule 501(a) of Regulation D.

811 *See* 2001 Proposing Release, Section II.B. (for example, asking questions about the national character of offerings and the potential for eliminating redundancies and inefficiencies in the application of disparate state standards); *see also* House Report, at 31.

purchaser" with the definition of an "accredited investor" for sales by any category of issuer in any type of transaction.[812] While it may have been appropriate to focus on attributes of the purchaser when crafting a "qualified purchaser" definition that would have applied in a broad set of possible transactions, as in the 2001 Proposing Release, the definition being adopted today serves a different purpose because it applies only in Regulation A offerings. Indeed, Section 18(b)(3) contemplates that the term "qualified purchaser" can be defined "differently with respect to different categories of securities."

The enactment of the JOBS Act in 2012, and in particular its addition of Section 18(b)(4)(D)(ii) to the Securities Act has caused us to consider the definition of qualified purchaser specifically within the context of transactions under the new Section 3(b)(2) exemption. This is a new and different context in which to consider the definition of qualified purchaser than existed at the time of the 2001 Proposing Release. In this new context, we believe that the definition of qualified purchaser that we are adopting is appropriately tailored to these transactions because, as explained above, the requirements applicable to Tier 2 offerings include numerous provisions designed to protect investors, including, among other things, a requirement that all purchasers in these offerings be either accredited investors or persons who are subject to investment limitations.

We do not agree with the commenters who assert that broad state securities law preemption was expressly rejected by Congress in Title IV of the JOBS Act. The legislative record indicates that the only form of state securities law preemption directly

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812 *See* 2001 Proposing Release, Section I.C., II.B. The Commission did not adopt final rules based on the 2001 Proposing Release.

contemplated, but not adopted, in the drafting of Title IV of the JOBS Act was for offers and sales through a broker or dealer.[813]

b. Section 18 of the Securities Act and the Effect of Preemption on State Securities Laws

As discussed above, some commenters expressed concern about the effect preemption would have on the ability of state securities regulators to remain actively involved in Regulation A offerings.[814] We believe it is important to clarify the effect preemption will have on the ability of state securities regulators to continue to play a vital role in the supervision of Regulation A securities.

Under Section 18(a) of the Securities Act, no law, rule or regulation of any state requiring the registration or qualification of securities applies to a covered security or to a security that will be a covered security upon completion of the transaction.[815] Further, with respect to a covered security, no state law, rule or regulation shall prohibit, limit, or impose, among other things, any conditions upon the use of any offering document[816] that

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813 *See, e.g.*, Congressional Record Volume 157, Number 166 (Wednesday, Nov. 2, 2011), p. 7231 (Statement of Rep. Peters: "Finally, the gentleman [Rep. Schweikert (AZ)] has also worked with Democrats on the remaining issue of contention, and that was the preemption of State law. [Rep. Schweikert's] substitute amendment to H.R. 1070 removes the exemption from State level review that was previously provided to an issuer using a broker-dealer to distribute and [sic] issue.") *Cf.* H.R. Rep. No. 112-206, at 2 (2011).

814 *See, e.g.*, NASAA Letter 2, at 10.

815 15 U.S.C. 77r(a)(1).

816 Under Section 18(d), the term ''offering document'' has the same meaning given the term ''prospectus'' in first portion of section 2(a)(10) and includes a communication that is not deemed to offer a security pursuant to a rule of the Commission. For these purposes, the term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security.

is prepared by or on behalf of the issuer, or, based on the merits of such offering or issuer, upon the offer or sale of any covered security.[817]

While covered security status under Section 18 prohibits the states from requiring the registration or qualification of such securities, Section 18(c) preserves the power of the states in several important areas.[818] Under Section 18(c), the states retain:

- the jurisdiction to investigate and bring enforcement actions with respect to fraudulent securities transactions and unlawful conduct by broker-dealers;[819]
- the ability to require issuers to file with the states any document filed with the Commission, solely for notice purposes and the assessment of fees, together with a consent to service of process and any required fee;[820] and
- the power to enforce the filing and fee requirements by suspending the offer or sale of securities within a given state for the failure to file or pay the appropriate fee.[821]

As the name of the statute that added Section 18 to the Securities Act suggests, the preemption of state securities laws is about improving the "efficiency" of our capital markets by eliminating unnecessary, duplicative regulation of securities offerings at both

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817 15 U.S.C. 77r(a)(2)-(3).

818 15 U.S.C. 77r(c).

819 15 U.S.C. 77r(c)(1).

820 15 U.S.C. 77r(c)(2). For example, even though state securities law registration requirements are preempted in offerings pursuant to Rule 506 of Regulation D, 17 CFR 230.506, many states continue to require the filing of Form D notices and amendments, and most of them charge a filing fee. *See, e.g.*, https://www.efdnasaa.org; *cf.* 15 U.S.C. 77r(b)(4)(E).

821 15 U.S.C. 77r(c)(3).

the federal and state level.[822] It is not about eliminating investor protections or otherwise limiting the continued involvement of the states in such offerings.[823]

c. State Coordinated Review Program for Section 3(b)(2) Securities

Since the proposed rules to implement Title IV of the JOBS Act were issued in December 2013, NASAA has implemented a multi-state coordinated review program for Regulation A offerings, the goal of which is to reduce the state law disclosure and compliance obligations of Regulation A issuers.[824] Under the coordinated review program, issuers are required to file Regulation A offering materials with the states via electronic mail. The administrator of the coordinated review program must then select a lead disclosure examiner and, where applicable, a lead merit examiner, which are responsible for drafting and circulating comment letters to the participating jurisdictions, and for seeking resolution of those comments with the issuer and its counsel. As enacted, the program contemplates a twenty-one business day turnaround from the time of filing of an offering statement until the issuer receives comments from the states.[825] The coordinated review program's review protocol also modifies (or disapplies altogether) certain of NASAA statements of policy for offerings undergoing coordinated review.

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822 House Report, at 1.

823 *Id.*, at 16 (Noting the reason behind the legislation that eventually became NSMIA was a clear need for modernization and that "there continues to be a substantial degree of duplication between Federal and State securities regulation, and that this duplication tends to raise the cost of capital to American issuers of securities without providing commensurate protection to investors or our markets.").

824 A description of NASAA's coordinated review program can be found at: http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/regulation-a-offerings/. The Proposing Release also discusses this program, as it was contemplated and proposed at that time. *See* Proposing Release, at Section II.H.

825 An illustrated timeline for NASAA's multi-state coordinated review program is available at: http://www.nasaa.org/wp-content/uploads/2015/03/Coordinated-Review-Chart.pdf.

Where, however, an issuer elects to offer or sell Regulation A securities in at least one merit state, the coordinated review program may require the issuer to apply NASAA's statements of policy to the offering as a whole (*i.e.*, not solely for purposes of offers or sales within such merit review state(s)).

At the proposing stage, we indicated that a number of open questions remained about the then-proposed multi-state review program. In the intervening time, many questions have been answered, largely relating to the final adoption and implementation of the program by a vast majority of the states.[826] Other crucial questions, however, remain, such as whether the program will be able to address the concerns related to state securities law compliance identified by the GAO Report and commenters,[827] and whether the program can continue, as contemplated, in the face of numerous filings by issuers that seek to participate in the streamlined process. As of the date of this release, we are aware of three issuers that have elected to seek qualification at the state level pursuant to the protocols of the multi-state coordinated review program.[828] While the program, as contemplated in its enactment, could potentially reduce the state law disclosure and compliance obligations of issuers,[829] the limited experience of issuers with the program prevents us from being able to fully evaluate it at this time. We note that Tier 1 issuers

826 At this time, it is our understanding that 49 of NASAA's 53 constituent members have agreed to participate in the coordinated review program.

827 *See, e.g.*, GAO-12-839, at 14 (discussing the varying standards and degrees of stringency applied during the qualification and review process in merit review states); *see also*, *e.g.*, ABA BLS Letter, at 14.

828 *See, e.g.*, Groundfloor Letter (the first issuer to rely on NASAA's coordinate review program, with the exception of having to seek qualification outside of the coordinated review program in the state of Georgia).

829 *Id.* (suggesting that in its experience the benefits of NASAA's coordinated review program outweighed the approximately $50,000 cost of the average Regulation A offering); *see also* NASAA Letter 3.

may well benefit from the coordinated review program as it continues to develop. We remain concerned, however, that, even under the coordinated review program, state securities law registration and qualification requirements would be unnecessarily duplicative for, and impose unnecessary costs on, securities issued in Tier 2 offerings. In light of the recent efforts of state securities regulators to address concerns about the costs associated with state qualification of Regulation A offering statements, however, the ongoing implementation and development of the coordinated review program, particularly as it may operate within Tier 1 offerings, may provide additional data that will aid any future evaluation of whether such a program could effectively operate within the context of larger, more national Tier 2 offerings as an alternative to preemption.

d. Application of State Securities Law in Tier 1 and Tier 2 Offerings

As we noted in the Proposing Release, in light of the issues raised by commenters and in the GAO report, we remain concerned that costs associated with state securities law compliance, even under a coordinated review program, may deter issuers from using amended Regulation A, which could significantly limit the impact of the exemption as a tool for capital formation. In considering our approach to preemption in the final rules, particularly as we evaluate what is consistent with the public interest and the protection of investors, we have taken into account the amended Regulation A regime, including the distinctions between the two tiers and in particular the additional protections provided in Tier 2 beyond the requirements of Tier 1.

In addition to certain basic requirements that are applicable to both tiers, Tier 2 issuers will be subject to significant additional requirements, some arising directly from

Section 3(b)(2) and others that we have imposed through our discretionary authority under that section. For example, the financial statements that Tier 2 issuers include in their offering circulars are required to be audited, and Tier 2 issuers must file audited financial statements with the Commission annually. Tier 2 issuers also must provide ongoing reports on an annual and semiannual basis with additional requirements for interim current event updates, assuring a continuous flow of information to investors and the market. In addition, purchasers in Tier 2 offerings must be either accredited investors or subject to limitations in the amount they may invest in a single offering. Finally, as with Tier 1 offerings, Tier 2 offering statements will be filed electronically, reviewed and qualified by Commission staff, and the offerings are subject to both limitations on eligible issuers and "bad actor" disqualification provisions. In consideration of these requirements, as well as our view, as discussed in greater detail below, that Tier 2 offerings are more likely to be national rather than local in nature, we believe that preemption of state securities law registration and qualification requirements is appropriate for purchasers in these offerings.

We believe that the final rules for Regulation A create two different categories of securities for purposes of Section 18(b)(3). The requirements for Tier 1 issuers create a category of securities that is more local in character, while Tier 2 offerings involve a category of securities that is more national in character. In this regard, to the extent an issuer seeks to raise money through a public offering pursuant to Regulation A, the distinctions between the requirements for Tier 1 and Tier 2 will provide issuers with a meaningful choice at the outset between initial and ongoing offering costs and requirements.

Tier 1 issuers are not required to include audited financial statements in their offering statements, nor are they required—as contemplated by Section 3(b)(2)—to file audited financial statements with the Commission annually. They are further not subject to any ongoing reporting, beyond the requirements contained in Part I of Form 1-Z. While the final rules raise the offering limitation in Tier 1 to $20 million in a 12-month period, which we believe should increase the general utility of the tier, such offerings by virtue of the lower dollar amounts that can be raised in comparison to Tier 2 offerings, as well as the form filing requirements and the lack of ongoing reporting, will likely be conducted by a different set of issuers than those that conduct offerings pursuant to Tier 2. Specifically, we think that issuers conducting Tier 1 offerings are likely to be smaller companies whose businesses revolve around products, services, and a customer base that will more likely be located within a single state, region, or a small number of geographically dispersed states.[830] We believe that these issuers will typically not seek or, on the basis of their business models, be able to: (i) raise capital on a national scale; or (ii) create a secondary trading market in their Regulation A securities.

By contrast, we believe that the higher offering limitation for Tier 2 offerings, the higher costs associated with complying with the audited financial statement and ongoing reporting requirements, as well as the requirement to sell to "accredited investors" or otherwise limit the amount of securities sold to non-accredited investors, will necessitate that such offerings be offered and sold on a larger and more national scale. Additionally,

830 For example, issuers of securities in the seven offering statements qualified by the Commission pursuant to Regulation A in 2014 indicated, on average, that they were seeking qualification in approximately five states per offering. The financial statements provided by these issuers further indicated, on average, that issuers had approximately $1.2 million in assets. No issuer indicated assets greater than $3.6 million, while two issuers indicated assets of less than $20,000.

an issuer electing to conduct a Tier 2 offering would likely do so, or be required by its investors to do so, in order to provide ongoing reports in a manner that will facilitate, or otherwise result in, secondary trading on a national level. While issuers conducting Regulation A offerings for less than $20 million are free to choose between the requirements of either tier, we believe that the initial and ongoing costs and limitations associated with complying with Tier 2 will provide for the natural separation of offerings into the respective tiers with issuers in more local offerings electing to comply with the less onerous requirements of Tier 1.

As noted above, some of the basic requirements of the offering statement are applicable to both tiers, and issuers of securities pursuant to either tier will remain subject to the same review and comment process by the staff of the Division of Corporation Finance before qualification. On this basis, some commenters argued that the same reasons supporting the preemption of state securities law registration requirements for Tier 2 offerings suggests that the Commission should also extend preemption to Tier 1 offerings.[831]

The distinctions between the tiers in the final rules for purposes of the preemption of state securities law registration requirements are based only in part on the form distinctions and process requirements for issuers at the time of qualification at the federal level. The preemption of state securities law registration requirements in the final rules for Tier 2 offerings is additionally related to the inefficiencies of qualification at the state and federal level, the differing characteristics of Tier 1 and Tier 2 offerings, and the

[831] Andreessen/Cowen Letter; Campbell Letter; Guzik Letter 1; Heritage Letter; Ladd Letter 2; Milken Institute Letter; Public Startup Co. Letter 1; SVB Letter.

statutory purposes behind the enactment of the Efficiency Act that are served by deeming Tier 2 offerings to involve a covered class of securities.

While, as some commenters suggest, the review and qualification of Tier 1 offerings at the state level will involve inefficiencies to which Tier 2 issuers will not be subject, we believe that continued state involvement in Tier 1 offerings is consistent with the policy underlying the enactment of NSMIA that suggests that states should "generally retain their authority to regulate small, regional, or intrastate securities offerings."[832] As noted above, we believe that the implementation of NASAA's multi-state coordinated review program has the potential to ameliorate some of these inefficiencies. We will observe issuers' experience under the coordinated review program and amended Regulation A, and whether changes to the rule could be beneficial. We also believe that the requirements for Tier 2 offerings will advance "the development of national securities markets and eliminate the costs and burdens of duplicative and unnecessary regulation."[833] The absence of preemption in Tier 2 offerings would unnecessarily subject issuers in such offerings to a substantial degree of duplication between federal and state securities regulation in the qualification of offering statements, which would

[832] House Report, at 16. *See also* WDFI Letter, at 3 ("Given the relatively small size of these offerings and the low probability of attracting the attention of national broker-dealers to distribute them, these offerings are likely to be local in nature."). The Commission is exploring the possibility of establishing a program whereby a representative of NASAA, or of a state securities regulator, would be assigned to work at the Commission in the Division of Corporation Finance to assist the staff as it implements the final rules.

[833] House Report, at 16. While further preemption of state securities law regulation of the secondary trading of Regulation A securities issued in a Tier 2 offerings could, as some commenters suggest, further advance the development of a national securities market by easing the compliance obligations of investors that trade in the secondary markets, we believe that the approach to preemption of state securities laws adopted today is more appropriate at the outset and will afford the Commission time to subsequently review the development of, and consider potential changes to, the final rules for primary and secondary Regulation A markets.

raise the cost of capital to issuers without providing commensurate additional protection to investors or our markets.[834]

As noted above, under Section 18(c), the states retain authority to (1) investigate and bring enforcement actions with respect to fraudulent transactions, (2) require the filing of any documents filed with the Commission "solely for notice purposes and the assessment of any fee," and (3) enforce filing and fee requirements by suspending offerings within a given state. We see no reason why state securities regulators could not continue to rely on the multi-state coordinated review program as a mechanism to allow Tier 2 issuers to make notice filings of their offering statements with the states consistent with Section 18(c). In this regard, notice filings of offering statements of Tier 2 issuers would be available to the states for a period of time prior to the qualification of the offering.[835] For example, the final rules for Regulation A require an issuer that non-publicly submits its offering statement for review to the Commission to publicly file its offering statement and related documents with the Commission not less than 21 calendar days before qualification. At that time, the states would be permitted to require issuers to

834 *See id.*; *see also*, *e.g.*, ABA BLS Letter, at 13 (noting the challenges posed to smaller companies that arise when having to respond to both federal and state reviews and coordinating overlapping or potentially inconsistent comments and approvals); Groundfloor Letter (noting the existence of, and additional costs associated with, duplicative qualification requirements at the state and federal level, as well as potential complications between investment limitations at the federal level and state suitability standards).

835 *See, e.g.*, comment letters cited in fn. 788 above; *see also* Letter from A. Heath Abshure, President, NASAA, September 27, 2013 (comments on SEC. Rel. No. 33-9416 (Proposed Amendments to Regulation D, Form D and Rule 156 under the Securities Act)) (indicating that although "states are preempted from requiring registration of securities that are sold in compliance with Rule 506 . . . state regulators routinely review Form D filings to ensure that the offerings actually qualify for an exemption . . . and to look for "red flags" that may indicate a fraudulent offering. The absence of a Form D filing complicates our efforts to protect the investing public."). The concerns of the states, as they relate to Form D filings, would be addressed in the final rules for Regulation A that require the filing with the Commission of substantive offering materials, thereby triggering any notice filing requirements with the states, before sales can be made.

also make notice filings of such materials with them and to assess any filing fees under Section 18(c)(2).

I. Additional Considerations Related to Smaller Offerings

As we noted in the Proposing Release, a number of factors have influenced the use of Regulation A in the form it has taken since its last substantive update in 1992, including the process of filing the offering statement with the Commission, state securities law compliance, the types of investors businesses seek to attract, and the cost-effectiveness of Regulation A relative to other exemptions.[836] In developing the final rules we are adopting, we have attempted to create a more efficient and effective method to raise capital under Regulation A that incorporates important investor protections. We are also cognizant of how issuers seeking to raise relatively smaller amounts of capital could consider a range of possible approaches to capital raising.[837]

Under our proposal, offerings for up to $5 million conducted under Tier 1 would benefit from the proposed updates to Regulation A's filing and qualification processes, but the proposed amendments did not otherwise substantially alter the existing exemption for such offerings.[838] We were mindful of the possibility that additional changes to Tier 1 could expand its use by, and thus potentially benefit, issuers conducting smaller offerings. We therefore solicited comment on additional considerations with respect to

836 *See, e.g.*, Proposing Release, at Section I.C.; *see also* GAO Report.

837 These methods include, for example, Rules 504, 505 and 506 under Regulation D and Section 4(a)(6) of the Securities Act and any rules adopted thereunder. *See also* Proposing Release, at Section II.I.

838 Some commenters at the pre-proposal stage suggested that the Commission should largely preserve the requirements of the then-existing Regulation A in the final rules. *See* Proposing Release, at fn. 505.

Tier 1 and a potential intermediate tier for offerings incrementally larger than Tier 1 offerings and how such offerings would affect investor protection and capital formation.

Many commenters recommended making changes to proposed Tier 1 to make it a more viable option for small business capital formation.[839] Some of these commenters recommended preempting state regulation of Tier 1 offerings, as mentioned above.[840] Two commenters recommended raising the offering limit of Tier 1 to $10 million or more.[841] Several commenters recommended including an ongoing disclosure requirement for Tier 1 issuers, including disclosure at a level lower than what is required for Tier 2,[842] ongoing disclosure with yearly audited financials,[843] or some unspecified continuous disclosure obligation.[844] One commenter recommended lowering the Tier 1 disclosure obligations from the current proposed requirements, particularly for offerings of $2 million or less.[845] One commenter recommended expanding the offering limit for Tier 1 to $15 million and creating a new tier below Tier 1 with fewer disclosure requirements.[846]

839 Andreessen/Cowen Letter; BDO Letter; Letter from Kevin Bernard, Sept. 3, 2014 ("Bernard Letter"); Campbell Letter; CAQ Letter; Deloitte Letter; E&Y Letter; Guzik Letter 1; Heritage Letter; ICBA Letter; KPMG Letter; Ladd Letter 2; McGladrey Letter; Milken Institute Letter; Public Startup Co. Letter 1; SVB Financial Letter; Verrill Dana Letter 1; WR Hambrecht + Co Letter.

840 Andreessen/Cowen Letter; Bernard Letter; Campbell Letter; Guzik Letter 1; Heritage Letter; Ladd Letter 2; Milken Institute Letter; Public Startup Co. Letter 1; SVB Financial Letter.

841 Guzik Letter 1; ICBA Letter.

842 Guzik Letter 1 (suggesting that Tier 1 ongoing disclosure requirements could parallel Tier 2's requirements, but without the requirement for semiannual reports).

843 Ladd Letter 2.

844 SVB Financial Letter.

845 Campbell Letter.

846 Public Startup Co. Letter 1. As mentioned in the relevant sections above, this commenter recommended three tiers based on offering size. The first tier could potentially only require state review and would be "local" in nature. This tier would include some form of ongoing reporting with the states, but not audited financials. Instead directors and officers would have to certify under penalty of perjury that the financial statements were accurate. The second tier would only require audited financial statements if they were otherwise available, would preempt state review

Many commenters recommended changes to proposed Tier 1, but did not address preemption.[847] Several of these commenters made recommendations with respect to the financial statement and auditing requirements in Form 1-A.[848]

The final rules for Regulation A take into account some of the suggestions by commenters on ways to improve the requirements for smaller offerings, particularly in Tier 1. The comments we received did not reflect any consensus on the particular provisions in Tier 1 that were most in need of amendment. As noted above, we do not agree that preemption of state securities laws registration and qualification requirements is appropriate for Tier 1 offerings.[849] Further, while some commenters suggested that preemption of state securities laws may improve the attractiveness of Tier 1 offerings, they did so on the condition that other aspects of the tier should change accordingly, such as by requiring Tier 1 issuers to provide audited financial statements in the offering statement and possibly on an ongoing basis. For the reasons discussed in Section II.C.3.b(2)(c) above, however, we have not adopted such changes in Tier 1. Alternatively, some commenters suggested that the Commission adopt a third tier either expressly or through the flexible applicability of the proposed tier requirements. While a third tier may provide issuers with some additional flexibility for capital formation under Regulation A, this additional flexibility would also have potential costs. For example, a third tier may unnecessarily complicate compliance with Regulation A for smaller

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and would require periodic reporting. This tier might allow for more flexibility with respect to auditor independence. The third tier would require more reporting than currently proposed for Tier 2 and would appear to require PCAOB-registered auditors.

847 BDO Letter; CAQ Letter; Deloitte Letter; E&Y Letter; ICBA Letter; KPMG Letter; McGladrey Letter.

848 BDO Letter; CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter.

849 *See* Section II.H.3. above.

issuers, and could potentially confuse investors as to the type of Regulation A offering an issuer was undertaking and the type of information such investor could expect to receive as a result, thereby lessening the viability of the exemption as a whole. For this reason, we are not adopting a third or intermediate tier in Regulation A.

We are adopting certain changes in the final rules that are intended to make Tier 1 more useful for small business capital formation. As discussed above, in line with the suggestions of commenters, we have raised the offering limitation in Tier 1 to $20 million in a 12-month period, including no more than $6 million on behalf of selling securityholders that are affiliates of the issuer.[850] With respect to the offering circular narrative disclosure requirements,[851] we have adopted certain additional scaled disclosure requirements for Tier 1 that are intended to lessen the compliance obligations for issuers. For example, Tier 1 issuers will be required to disclose related party transactions at the thresholds in current Regulation A, as opposed to the lower thresholds in the proposed rules, and simplified executive compensation data. We are further providing issuers under both Tiers with the accommodation provided to emerging growth companies in Securities Act Section 7(a) to delay the implementation of new accounting standards to the extent such standards provide for delayed implementation by non-public business entities. Lastly, we have provided Tier 1 issuers with additional flexibility with respect to auditor independence standards. As originally proposed, an issuer electing to provide audited financial statements in a Tier 1 offering—even though audited financial statements would not generally be required—would have had to engage the services of an

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[850] *See* Section II.B.3.c. above.

[851] *See* Section II.C.3.b(1). above.

auditor that followed the independence standards outlined in Article 2 of Regulation S-X. Commenters suggested that we should permit auditors of the financial statements of Tier 1 issuers to alternatively follow the independence standards of the AICPA or Article 2 of Regulation S-X.[852] In the view of these comments, allowing auditors of Tier 1 issuer financial statements the option to follow the independence standards of the AICPA would permit more issuers to include financial statements that would be deemed audited under the requirements for Tier 1 in the first instance, thereby avoiding any fees associated with an issuer having their existing financial statements audited a second time under PCAOB standards. As noted above,[853] we agree with commenters that this accommodation may benefit smaller issuers in Tier 1 offerings who wish to file audited final statements for purposes of the offering statement and thus are adopting this suggestion.

In the light of the changes discussed above, we believe that the final rules we are adopting will provide Tier 1 issuers with a meaningful choice within Regulation A between the costs and benefits associated with compliance with the requirements for Tier 1 and Tier 2 and therefore do not believe that an intermediate or other tier is necessary at this time.

J. Transitional Guidance for Issuers Currently Conducting Regulation A Offerings

While Regulation A has been used infrequently in recent years, there are issuers that are currently conducting, or that have filed offering statements, under the preexisting

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852 BDO Letter; CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter.

853 *See* Section II.C.3.b(2)(c). above.

Regulation A rules. By way of transitional guidance, we are clarifying that issuers currently conducting sales of securities pursuant to a qualified Regulation A offering statement may continue to do so. Such offerings will be considered Tier 1 offerings after the effectiveness of the final rules. Qualified offering statements under the preexisting rules for Regulation A are, however, incompatible with the final requirements for Tier 2 offerings and, as discussed below, issuers that wish to transition to a Tier 2 offering will need to file a post-qualification amendment that satisfies the requirements for Tier 2.

Upon effectiveness of the final rules, issuers currently conducting Regulation A offerings under the preexisting rules must begin to comply with the final rules for Tier 1 offerings, including, for example, the requirement of electronic filing and the rules for post-qualification amendments, at the time of their next filing under Regulation A. Additionally, after effectiveness of the final rules, to the extent that issuers provided offering statements that were qualified using the Model A disclosure format of Part II of the Form 1-A, any subsequently required filing or amendment to such offering statement must be filed using a disclosure format that is permissible under the final rules for Tier 1 offerings. Model A will no longer be appropriate or permitted for post-qualification amendments of qualified offerings that pre-date effectiveness of the final rules. Lastly, an issuer that is offering securities pursuant to a qualified offering statement under the preexisting rules will, upon effectiveness of the final rules, no longer be required to file a Form 2-A, but instead be required to file a Form 1-Z with the Commission electronically upon completion or termination of the offering.

Issuers that are currently in the review process for the qualification of a Regulation A offering statement may continue to follow the preexisting rules for

Regulation A until the effective date of the final rules. On or after the effective date, such an issuer will be required to comply with the final rules, including the requirements for electronic filing and, where applicable, transitioning to a disclosure format that is approved for Regulation A offerings. The issuer may also elect to proceed at that time with its offering under the final requirements for either Tier 1 or Tier 2 offerings, provided it follows the requirements for the respective tiers.

Issuers in ongoing offerings that were qualified before effectiveness of the final rules that wish to transition to a Tier 2 offering may do so by filing a post-qualification amendment that satisfies all of the requirements for Tier 2. Such issuers will transition to the requirements for Tier 2 upon qualification of the post-qualification amendment. For purposes of calculating the maximum offering amount permissible under Rule 251(a), an issuer must reduce the maximum offering amount sought to be qualified under the final rules for the respective tiers by the amount which such issuer has sold during the previous 12-month period pursuant to the preexisting rules for Regulation A.

K. Technical and Conforming Amendments

The final rules for Regulation A amend existing Rules 251-263.[854] The amendments take into account changes to Regulation A associated with the addition of Section 3(b)(2) to the Securities Act, and the items detailed in this release.

As a result of the revisions to Regulation A, we are adopting conforming and technical amendments to Securities Act Rules 157(a),[855] 505(b)(2)(iii),[856] and Form 8-A.

854 17 CFR 230.251 through 230.263.

855 17 CFR 230.157(a).

856 17 CFR 230.505(b)(2)(iii).

Additionally, we are revising Item 101(a)[857] of Regulation S-T[858] to reflect the mandatory electronic filing of all issuer initial filing and ongoing reporting requirements under Regulation A. We are also revising Item 101(c)(6)[859] of Regulation S-T to remove the reference to paper filings in a Regulation A offering, and removing and reserving Item 101(b)(8)[860] of Regulation S-T dealing with the optional electronic filing of Form F-X by Canadian issuers.

III. ECONOMIC ANALYSIS

In this section, we analyze the expected economic effects of the final rules relative to the current baseline, which is the market situation in existence today, including current methods of raising up to $50 million in capital available to potential issuers. Our analysis considers the anticipated costs and benefits for market participants affected by the final rules as well as the impact of the final rules on efficiency, competition, and capital formation relative to the baseline. This includes the likely economic effects of the specific provisions of the final rules related to the scope of the exemption, the format and contents of the offering statement, solicitation of interest, ongoing reporting, insignificant deviations, bad actor disqualification, and relationship with state securities law.

The final rules to implement Section 401 of the JOBS Act and amend Regulation A seek to promote capital formation, efficiency and competition for small companies, and provide for meaningful investor protection. We are mindful of the costs imposed by, and the benefits to be obtained from, our rules. Securities Act

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857 17 CFR 232.101(a).

858 17 CFR 232.10 *et seq.*

859 17 CFR 232.101(c)(6).

860 17 CFR 232.101(b)(8).

Section 2(b)[861] and Exchange Act Section 3(f)[862] require us, when engaging in rulemaking that requires us 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. Exchange Act Section 23(a)(2)[863] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The final rules include provisions mandated by the statute as well as provisions that rely on our discretionary authority. As a result, while many of the costs and benefits of the final rules stem from the statutory mandate of Title IV of the JOBS Act, certain benefits and costs are affected by the discretion we exercise in connection with implementing this mandate. For purposes of this economic analysis, we address the benefits and costs resulting from the mandatory statutory provisions and our exercise of discretion together because the two types of benefits and costs are not readily separable. We also analyze the benefits and costs of significant alternatives to the final rules that were suggested by commenters and that we considered. Many of the benefits and costs discussed below are difficult to quantify when analyzing the likely effects of the final rules on efficiency, competition, and capital formation. For example, the extent to which the amendments to Regulation A will promote future reliance by issuers on this offering method, and the extent to which future use of Regulation A will affect the use of other

861 15 U.S.C. 77b(b).

862 15 U.S.C. 78c(f).

863 15 U.S.C. 78w(a)(2).

offering methods, is difficult to precisely estimate. Similarly, there is some uncertainty as to the effect of some of the provisions in the final rules on investor protection. Therefore, much of the discussion is qualitative in nature but, where possible, we attempted to quantify the potential costs and benefits of the final rules.

A. Broad Economic Considerations

One of the primary objectives of Section 401 was to expand the capital raising options available to smaller and emerging companies and thereby to promote capital formation within the larger economy.[864] With this objective in mind, and as background to our analysis of the likely costs and benefits of the final rule provisions, we consider the broader impact of amended Regulation A on capital formation. As discussed below, this will depend on whether issuers that currently raise capital elect to rely on amended Regulation A in place of other offering methods and whether issuers that have been unable to raise capital, or raise enough capital, avail themselves of amended Regulation A because it is preferable over other capital rising methods otherwise available to them. To the extent that amended Regulation A provides a method of raising capital for issuers that currently have no method of doing so, it could enhance the overall level of capital formation in the economy in addition to any redistributive effect that could arise from issuers changing their capital raising methods.

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864 Congress enacted Section 3(b)(2) against a background of public commentary suggesting that Regulation A, an exemption for small offerings originally adopted by the Commission in 1936 under the authority of Section 3(b) of the Securities Act, should be expanded and updated to make it more useful to small issuers. H.R. 1070 (Small Company Capital Formation Act of 2011) was introduced in April 2011. In its September 2011 report, the Committee on Financial Services noted: "H.R. 1070, the Small Company Capital Formation Act, raises the offering threshold for companies exempted from registration with the U.S. Securities and Exchange Commission (SEC) under Regulation A from $5 million--the threshold set in the early 1990s--to $50 million. Raising the offering threshold helps small companies gain access to capital markets without the costs and delays associated with the full-scale securities registration process..." *See* H.R. Rep. No. 112-206 (2011).

The impact of the final rules on an issuer's ability to raise capital will also depend on whether new investor capital is attracted to the Regulation A market, and on whether investors reallocate existing capital among various types of offerings. Investor demand for securities offered under amended Regulation A will depend on the expected risk, return and liquidity of the offered securities, and in particular, how these characteristics compare to what investors can obtain from securities in other exempt offerings and in registered offerings. Investor demand also will depend on whether Regulation A disclosure requirements are sufficient to enable investors to evaluate the aforementioned characteristics of Regulation A offerings.

To assess the likely impact of the final rules on capital formation, we consider the features of amended Regulation A that potentially could increase the use of Regulation A by new issuers and by issuers that already rely on private and registered offerings.

The amendments to Regulation A we are adopting remove certain burdens identified by commenters and others in existing Regulation A. Offerings relying on existing Regulation A must be qualified by the states and the Commission, which also requires a review and qualification process for issuers to access capital.[865] Amended Regulation A removes the requirement of state qualification for Tier 2 offerings, thereby eliminating the cost and other burdens of the duplicative review under existing Regulation A. Issuance costs may also be reduced, as a percentage of proceeds, by

865 *See* GAO Report. According to the GAO Report, the limited use of Regulation A appears to have been influenced by multiple factors, including "the type of investors businesses sought to attract, the process of filing the offering with SEC, state securities laws, and the cost-effectiveness of Regulation A relative to other SEC exemptions. For example, identifying and addressing individual state's securities registration requirements can be both costly and time-consuming for small businesses, according to research, an organization that advocates for small businesses, and securities attorneys that GAO interviewed. Additionally, another SEC exemption [Regulation D] is viewed by securities attorneys that GAO met with as more cost-effective for small businesses..."

increasing the maximum offering size from $5 million annually under existing Regulation A, to $20 million for Tier 1 offerings and to $50 million for Tier 2 offerings relying on amended Regulation A.

We believe that the potential use of amended Regulation A for Tier 2 offerings depends largely on how issuers perceive, the trade-off between the costs of qualification and ongoing disclosure requirements and the benefits to issuers from access to a broad investor base, expansion of the offering size, the preemption of state securities law registration requirements and the potential for enhanced secondary market liquidity.

With respect to Tier 1 offerings, the potential use of amended Regulation A depends largely on how issuers perceive the trade-off between state review and qualification requirements, limited disclosure requirements (with potentially greater information asymmetry between issuers and investors) and the $20 million maximum offering size.

We also recognize that the level of investor protection resulting from the final rules is an important consideration that could affect the ultimate use and success of amended Regulation A. For example, if preempting state review of Tier 2 offerings, or not requiring audited financials or ongoing disclosures in Tier 1 offerings, leads to undisclosed risks or misconduct in the offering process, then investors may be unwilling to participate in those types of Regulation A offerings. On the other hand, Commission staff review of the offerings and investment limitations for Tier 2 offerings may mitigate some of these concerns for certain investors.

Many of the potential issuers of securities under amended Regulation A may be small companies, particularly early-stage and high-growth companies, seeking capital through equity-based financing because they do not have sufficient collateral or the cash flows necessary to support the fixed repayment schedule of debt financing.[866] Currently, these companies often seek capital from institutional or accredited investors through offerings that are exempt from registration under the Securities Act or through registered public offerings. In the future, whether issuers opt to rely instead on Regulation A will depend on the perceived utility of the amended Regulation A exemption compared to: (i) other available exemptions from registration, and (ii) registered public offerings. Below we discuss each of these considerations in turn.

Some issuers may prefer to offer securities under amended Regulation A relative to using other offering methods exempt from registration because of potentially limiting features associated with the other exemptions. In particular, securities sold pursuant to the exemptions from registration under Regulation D,[867] which account for a significant amount of exempt offerings,[868] are generally subject to restrictions on resale or limits on participation by non-accredited investors in ways that can limit the ability to raise capital. In contrast to Rule 506 of Regulation D, companies relying on amended Regulation A can sell securities to an unlimited number of non-accredited investors,[869] and the securities will not be restricted securities for purposes of the federal securities laws, which will allow for a more diffuse investor base and potential liquidity benefits.

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866 *See* Berger, Allen N., and Gregory F. Udell, 1998, The economics of small business finance: The roles of private equity and debt markets in the financial growth cycle, Journal of Banking and Finance 22(6), pp. 613–673.

867 17 CFR 230.500 through 230.508.

868 *See* V. Ivanov, and S. Bauguess, 2013, Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012, *available at*: http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

869 Non-accredited investors in Tier 2 offerings will be subject to an investment limitation.

The use of amended Regulation A may also depend on whether companies considering seeking capital through an exempt offering believe that the benefits from access to a broader investor base under amended Regulation A offset the costs of qualification and, with respect to Tier 2 offerings, ongoing disclosure requirements. Other offering exemptions could remain attractive relative to amended Regulation A. For example, general solicitation is now permissible under Rule 506(c) of Regulation D. Issuers relying on Rule 506(c) to solicit offerings may now more easily reach institutional and accredited investors, making it less necessary for them to seek capital from a broader non-accredited investor base, especially if trading platforms aimed at accredited investors in privately placed securities continue to develop.[870]

Finally, the conditional exemption from registration of a class of securities under Section 12(g) available to some Tier 2 issuers may encourage them to pursue a Regulation A offering as a means to avoid the associated costs and requirements of Exchange Act registration and reporting.[871] This effect may be limited by the imposition of the conditions on the Section 12(g) exemption, in particular, the condition limiting the availability of the exemption to smaller companies that do not exceed certain thresholds for public float or, in the absence of float, revenues. Larger issuers of Regulation A securities or issuers using Regulation A to raise capital as part of a growth strategy, or seeking to increase liquidity through a broader investor base, may still be subject to a Section 12(g) registration requirement in the future.

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870 For example, "NASDAQ Private Market's affiliated marketplace is an electronic network of Member Broker-Dealers who provide accredited institutions and individual clients with access to the market. Companies use a private portal to enable approved parties to access certain information and transact in its securities." *See* NASDAQ Private Market overview, *available at*: https://www.nasdaqprivatemarket.com/market/overview.

871 *See* Section II.B.6.c.

The trade-offs between amended Regulation A and a registered offering are somewhat different. In a registered offering, issuers can offer the securities directly to all potential investors, without a limitation on the aggregate offering amount and with no resale restrictions. Moreover, securities issued through registered offerings often trade on national securities exchanges and can offer a degree of liquidity to investors that is generally not available for securities issued in private offerings. However, the issuance costs associated with small registered public offerings are generally a significant percentage of proceeds and issuers in registered offerings must bear the costs arising from ongoing disclosure requirements under the Exchange Act. These costs are perceived to be one of the determinants of the relatively low incidence of initial public offerings ("IPOs") over the past decade and may be a motivating factor for potential issuers to prefer offering securities under amended Regulation A.[872] Relative to registered public offerings, offerings under amended Regulation A will provide smaller issuers with access to sources of capital without necessarily imposing the full ongoing reporting requirements of the Exchange Act.

The use of amended Regulation A may depend on the extent to which companies considering a traditional IPO believe that amended Regulation A is a viable alternative. These potential issuers will need to assess whether the cost savings from reduced

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872 *See* IPO Task Force, Rebuilding the IPO On-Ramp (Oct. 20, 2011), *available at*: http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf ("IPO Task Force").

There are other possible explanations for the decline in IPOs, for example, macro-economic effects on investment opportunities in the economy and the cost of capital. *See* Lowry, M., 2003, Why does IPO volume fluctuate so much? Journal of Financial Economics 67(1), pp. 3–40. Another possible explanation is an increase in the benefits of being acquired by a larger entity relative to the benefits of operating as an independent firm. *See* Gao, X., J. Ritter, and Z. Zhu, 2013, Where have all the IPOs gone? Journal of Financial and Quantitative Analysis 48(6), pp. 1663–1692.

reporting requirements under amended Regulation A offset the potential reduction in secondary market liquidity compared to registered offerings that meet the listing requirements of national securities exchanges. In particular, securities listed on a national securities exchange are likely to benefit from increased liquidity as a result of greater access to potential investors and a lower level of information asymmetry due to more extensive reporting requirements. At present, only some securities issued under existing Regulation A trade over-the-counter, with the majority not known to trade in any secondary market.

The liquidity trade-off faced by issuers considering amended Regulation A relative to other exempt or registered offering methods may ultimately center on whether the ongoing reporting requirements of Tier 2 offerings can generate sufficient information for secondary markets to provide the intended liquidity benefits. Academic studies have found a close relationship between disclosure requirements and liquidity.[873] The disclosure requirements in the final rules seek to balance the burden of disclosure requirements on issuers and the demand of investors for information by offering issuers a capital raising option with lower compliance costs while still mandating relevant information about the issuer and the securities for the market.

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[873] For example, one study found improved liquidity at companies that chose to comply with Exchange Act reporting requirements in order to remain eligible for quotation on OTCBB. *See* Bushee, B., and C. Leuz, 2005, Economic consequences of SEC disclosure regulation: Evidence from the OTC bulletin board, Journal of Accounting and Economics 39(2), pp. 233–264.

Another study found significant decreases in liquidity for issuers that deregistered their securities, with the subsequent loss of liquidity attributed to decreased disclosure separate from the effect of delisting from a major exchange. This study also shows that some companies choose to deregister under Section 12(b) and trade on less liquid OTC markets instead of trading on national securities exchanges, indicating that, for such companies, the expected costs of reporting under the Exchange Act outweigh the expected liquidity benefits. *See* Leuz, C., A. Triantis, and T. Wang, 2008, Why do firms go dark? Causes and economic consequences of voluntary SEC deregistrations, Journal of Accounting and Economics 45(2-3), pp. 181–208.

Overall, amended Regulation A could increase the aggregate amount of capital raised in the economy if used by private issuers that have until now been limited in their ability to raise capital through other types of exempt offerings or by smaller private issuers that seek a public market for their securities but that are not sufficiently large to bear the fixed costs of being an Exchange Act reporting company. The impact of amended Regulation A on capital formation could also be redistributive in nature by encouraging issuers to shift from one method of capital raising to another. This potential outcome may have significant net positive effects on capital formation and allocative efficiency by providing issuers with access to capital at a lower cost than alternative capital raising methods and by providing investors with additional investment opportunities.

The net effect of the final rules on capital formation will depend on whether issuers that rely on amended Regulation A do so in addition to or instead of other methods of raising capital. The effect will also depend on whether investors find Regulation A disclosure requirements and investor protections to be sufficient to evaluate the expected return and risk of such offerings and to choose between offerings reliant on Regulation A, other exempt offerings and registered offerings. Due to a lack of data, we are not able to estimate the effects of the final rules on the potential rate of substitution between alternative methods of raising capital and amended Regulation A and the overall expansion, if any, in capital raising by potential issuers eligible for amended Regulation A.

B. Baseline

As we described in the Proposing Release, the baseline for our economic analysis of amended Regulation A is market conditions as they exist today, in which issuers seeking to raise capital through securities offerings must register the offer and sale of securities under the Securities Act unless they can rely on an exemption from registration under the federal securities laws.[874] The baseline discussion below also includes a description of investors in offerings of similar amounts and a discussion of the role of intermediaries that may be affected by the final rules.

1. Current Methods of Raising up to $50 Million of Capital

Issuers seeking to raise up to $50 million over a twelve-month period are expected to be affected directly by amended Regulation A. As we described in the Proposing Release, while there are a number of factors that companies consider when determining how to raise capital, one of the primary considerations is whether to issue securities through a registered public offering or through an offering that is exempt from Securities Act registration and ongoing Exchange Act reporting requirements. The choice of offering method may depend on the size of the issuer, the type of investors the issuer seeks to attract and the amount of new capital sought. Registered offerings entail considerable initial and ongoing costs that can weigh more heavily on smaller issuers, providing incentives to remain private and to raise capital outside of public markets.[875] To the extent that these issuance costs constrain small firms' access to capital, they may result in underinvestment in some value-generating projects and thus potentially less efficient allocation of capital to investment projects. This section describes the various

874 Other rules mandated by the JOBS Act have been proposed but not adopted by the Commission. The baseline does not account for potential changes that may result from future adoption of proposed rules.

875 *See* IPO Task Force.

currently available offering methods and the prevalence of their use.

a. Exempt Offerings

Currently, small issuers can raise capital by relying on an exemption from registration under the Securities Act, such as Section 3(a)(11),[876] Section 4(a)(2),[877] Regulation D,[878] and Regulation A. Each of these exemptions, however, has requirements that may limit its utility for issuers. For example, the exemption under Securities Act Section 3(a)(11) is limited to intrastate offerings, and Regulation D offerings may limit or prohibit participation by non-accredited investors. Additionally, offerings relying on existing Regulation A require preparation of offering materials and qualification of an offering statement by the Commission and may require qualification or registration in multiple states.[879] The table below summarizes the main features of each exemption.

Type of Offering	Offering Limit[880]	Solicitation	Issuer and Investor Requirements	Filing Requirement	Resale Restrictions	Blue Sky Law Preemption
Section 3(a)(11)	None	No limitations	All issuers and investors must be resident in state	None	Restricted in some cases[881]	No

876 Under Securities Act Section 3(a)(11), except as expressly provided, the provisions of the Securities Act (including Section 5 registration requirement) do not apply to a security that is "part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory." 15 U.S.C 77c(a)(3)(a)(11).

877 Securities Act Section 4(a)(2) provides that the provisions of Section 5 shall not apply to "transactions by an issuer not involving a public offering." 15 U.S.C. 77d(4)(a)(2).

878 Regulation D contains rules providing exemptions and safe harbors from the Securities Act's registration requirements, allowing some companies to offer and sell their securities without having to register the offering with the Commission. 17 CFR 230.504, 505, 506.

879 *See* Campbell, R., 2005, Regulation A: Small business' search for a moderate capital, Delaware Journal of Corporate Law 31(1), pp. 77–123. *See also* GAO Report.

880 Aggregate offering limit on securities sold within a twelve-month period.

881 Resale restrictions are determined by state securities laws, which typically restrict in-state resales for a one-year period.

Type of Offering	Offering Limit[887]	Solicitation	Issuer and Investor Requirements	Filing Requirement	Resale Restrictions	Blue Sky Law Preemption
Section 4(a)(2)	None	No general solicitation	Transactions by an issuer not involving any public offering[882]	None	Restricted securities	No
Regulation A[883]	$5 million with $1.5 million limit on secondary sales	Testing the waters permitted before filing	U.S. or Canadian issuers, excluding investment companies, blank-check companies, reporting companies, and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights	File testing the waters materials, Form 1-A, Form 2-A	No	No
Rule 504 Regulation D	$1 million	General solicitation permitted in some cases[884]	Excludes investment companies, blank-check companies, and Exchange Act reporting companies	File Form D[885]	Restricted in some cases[886]	No
Rule 505 Regulation D	$5 million	No general solicitation	Unlimited accredited investors and up to 35 non-accredited investors	File Form D[888]	Restricted securities	No
Rule 506 Regulation D	None	General solicitation permitted in some cases[889]	Unlimited accredited investors. Limitations on non-accredited investors[890]	File Form D[891]	Restricted securities	Yes

882 Section 4(a)(2) of the Securities Act provides a statutory exemption for "transactions by an issuer not involving any public offering." *See* SEC v. Ralston Purina Co., 346 U.S. 119 (1953) (holding that an offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering.")

883 This description is based on Regulation A before the adoption of the final rules today.

884 No general solicitation or advertising is permitted unless the offering is registered in a state requiring the use of a substantive disclosure document or sold under a state exemption for sales to accredited investors with general solicitation.

885 Filing is not a condition of the exemption.

886 Restricted unless the offering is registered in a state requiring the use of a substantive disclosure document or sold under a state exemption for sale to accredited investors.

887 Aggregate offering limit on securities sold within a twelve-month period.

888 Filing is not a condition of the exemption.

889 No general solicitation or advertising is permitted under Rule 506(b). General solicitation and general advertising permitted under Rule 506(c), provided all purchasers are accredited investors and the issuer takes reasonable steps to verify accredited investor status.

890 Under Rule 506(b), offerings may involve an unlimited number of accredited investors and up to 35 non-accredited investors. Under Rule 506(c), all purchasers must be accredited investors.

891 Filing is not a condition of the exemption.

While we do not have data on offerings relying on an exemption under Section 3(a)(11) or Section 4(a)(2), available data related to Regulation D and Regulation A filings allow us to gauge how frequently issuers currently use these exemptions when raising capital.

i. Regulation A Offerings

As we described in the Proposing Release, issuers rarely rely on existing Regulation A to raise capital. The chart below, from the GAO Report shows the number of filed and qualified Regulation A offerings in fiscal years 1992 to 2011.[892]

Data from GAO Report: Regulation A offerings filed and qualified, 1992-2011

In calendar years 2012 to 2014, 26 Regulation A offerings, excluding amendments, were qualified by the Commission.[893]

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892 For the purposes of this chart, a Regulation A offering is considered "filed" when the Commission receives a potential issuer's offering materials through Form 1-A. A Regulation A offering is considered qualified after the Commission staff has reviewed the offering materials and determined that all conditions have been met. Therefore, offerings that are filed and not qualified are either pending, withdrawn, or abandoned.

893 In cases in which an issuer made multiple Form 1-A filings over this time period, only the first qualified offering by that issuer was included in the number of qualified Regulation A offerings.

Section 402 of the JOBS Act required the GAO to study the impact of state securities laws on Regulation A offerings. The GAO examined: (1) trends in Regulation A filings, (2) differences in state registration of Regulation A filings, and (3) factors that may have affected the number of Regulation A filings. In its July 2012 report on Regulation A, the GAO cited four factors affecting the use of Regulation A offerings: (1) costs associated with compliance with state securities regulations, or blue sky laws; (2) the availability of alternative offering methods exempt from registration, such as Regulation D offerings; (3) costs associated with the Commission's filing and qualification process; and (4) the type of investors businesses sought to attract.

As identified by the GAO, compliance with state securities laws is one of the factors that impacts the use of existing Regulation A. The GAO did not provide an estimate of the compliance costs. For issuers seeking to offer securities in multiple states, differences in securities laws and applicable procedures across states may result in significant legal costs[894] and a time consuming process for issuers, which could adversely affect their efforts to raise capital in a timely and cost-effective manner. NASAA has recently initiated a Coordinated Review Program for Regulation A offerings.[895] Only a limited number of issuers have undergone state review through this process to date, so we are unable to conclude whether it may result in lower costs or a shorter amount of review time than was the case prior to its inception.

The estimate also excludes amendments filed on Form 1-A/A, including post-qualification amendments to earlier Form 1-A filings, as well as abandoned and withdrawn filings.

894 *See* discussion in Section III.I below.

895 A description of NASAA's coordinated review program can be found at: http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/regulation-a-offerings/. *See* discussion in Section III.I below.

The GAO also identified costs associated with the Commission's filing and qualification process for Regulation A offerings as another factor contributing to its limited current use. While existing Regulation A permits offerings to an unlimited number of non-accredited investors, the total offering amount must not exceed $5 million in a twelve-month period, limiting the opportunity to scale the fixed component of these costs as a percentage of proceeds.

As described above, a business that relies on Regulation A must file an offering statement with the Commission that must be qualified by Commission staff before the offering can proceed. From 2002 through 2011, Regulation A filings took an average of 228 days to qualify.[896] Average time to qualification exceeded 300 days in 2012-2014.[897] Factors that affect the time to qualification include the paper filing method, quality of the initial filing, time taken by the Commission staff, and time taken by the issuer to provide required information or address questions from previous correspondence with the Commission staff.

Our analysis of the Regulation A filings qualified between 2002 and 2014 shows that approximately half of the issuers operated in the financial industry and the majority of offerings involved equity securities. Offerings with affiliate sales were rare, likely due not only to the requirement of the existing Regulation A that the issuer have net income from continuing operations in the prior two years but also due to the perceptions that adverse selection concerns may limit investor demand in securities offerings with affiliate

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896 *See* GAO Report.

897 This estimate is generated by staff from the Commission's Division of Economic and Risk Analysis using Form 1-A filings and is determined as the difference between the filing date for the initial Form 1-A filing and the final disposition date for the final Form 1-A or 1-A/A filing through which the offering was qualified.

sales.[898]

ii. Regulation D Offerings

Based on the information available to us, it appears that the most common way to issue up to $50 million of securities is pursuant to an offering under a Regulation D exemption. Eligible issuers can rely on Rule 504 to raise up to $1 million within a twelve-month period, on Rule 505 to raise up to $5 million within a twelve-month period, and on Rule 506 to raise an unlimited amount of capital. In total, based on the analysis of offering amounts reported on Form D in calendar year 2014, Regulation D offerings accounted for over one trillion dollars. Most issuers choose to raise capital by relying on Rule 506, even when their offering size would have potentially permitted reliance on Rule 504 or Rule 505.[899] For example, in 2014, we identified 11,228 Regulation D offerings that would have been potentially eligible to be conducted under amended Regulation A. Of those, 10,671 offerings relied on Rule 506, 376 on Rule 504, and 181 on Rule 505. We summarize their characteristics in the table below.

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898 *See* Bettis, J., J. Coles, and M. Lemmon, 2000, Corporate policies restricting trading by insiders, Journal of Financial Economics 57, pp. 191–220 (discussing adverse selection issues and corporate policies restricting trading by insiders. *See also* Michaely, R., and W. Shaw, 1994, The pricing of initial public offerings: Tests of adverse-selection and signaling theories, Review of Financial Studies 7(2), pp. 279–319 (analyzing the role of adverse selection and the possibility of informed trading in IPOs).

899 This tendency could, in part, be attributed to two features of Rule 506: state securities law preemption and unlimited offering amount. *See also* GAO Report.

Regulation D offerings in 2014 by issuers that would be eligible to rely on amended Regulation A[900]

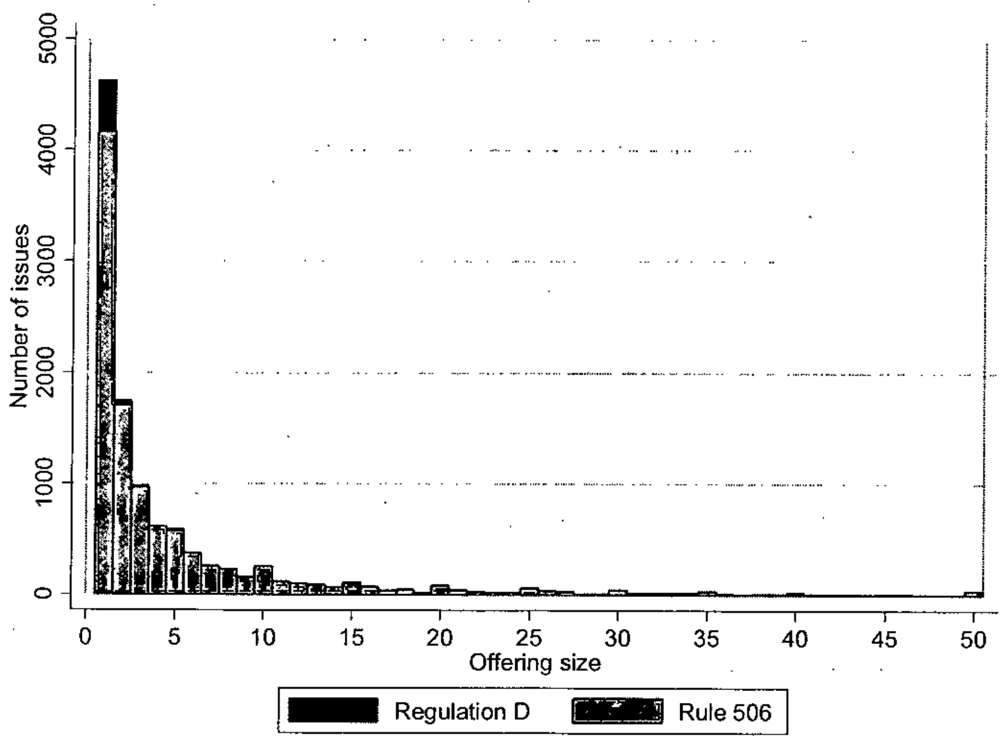
	Rule 504	Rule 505	Rule 506	
Offering size	≤$1M	≤$5M	≤$20M	$20-50M
Current Reg A Eligible	Yes	Yes	Up to $5M	No
Amended Reg A Eligible	Yes	Yes	Yes	Yes
Number of filings	376	181	10,071	600
Average offering amount ($ million)	0.4	1.4	3.2	31.6
Offerings with non-accredited investors	58%	31%	6%	2%
Median number of investors	3	7	6	9

As shown in the table above, approximately 95% of Regulation D offerings that would be eligible for amended Regulation A relied on Rule 506. A comparison of Rule 506 offerings over $20 million to those below $20 million shows that larger offerings generally had a higher number of investors and were less likely to have non-accredited investors.

Additional data on Regulation D offerings that would have been eligible for amended Regulation A exemption is provided in the graph below, which displays the offering size distribution of Rule 506 offerings and other Regulation D offerings that would have been potentially eligible for the amended Regulation A exemption in calendar year 2014. Approximately 95% of Regulation D offerings that would have been potentially eligible for amended Regulation A had offering amounts below $20 million.

900 Based on an analysis performed by staff in the Division of Economic and Risk Analysis of Form D filings submitted for calendar year 2014. The numbers exclude offerings by reporting companies, non-Canadian foreign issuers and pooled investment funds, as well as offerings of interests in claims on natural resources, which are not eligible for amended Regulation A. We do not have a scalable way of excluding blank check companies, which are also not eligible for amended Regulation A, from this sample, which leads to a higher estimate of the number of issuers that would be eligible to rely on amended Regulation A.

Distribution of offering size of Rule 506 offerings and other Regulation D offerings in 2014 by issuers that would be eligible to rely on amended Regulation A[901]



Approximately seventy percent of Regulation D issuers that would be eligible for amended Regulation A declined to disclose their revenue range in their Form D filings for 2014. Of the remaining 30%, 13% reported "no revenues." The portion of issuers with no revenues is noteworthy because it may be more difficult for issuers without regular cash flows to obtain debt financing (without collateral or a guarantee).

b. Registered Offerings

Issuers may seek to raise capital by registering the offer and sale of securities under the Securities Act. In calendar year 2014, using data from Thomson Reuters, we identified 75 IPOs and 246 seasoned equity offerings (SEOs) of up to $50 million by

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901 Based on an analysis performed by staff in the Division of Economic and Risk Analysis of Form D filings submitted for calendar year 2014.

issuers that would have been potentially eligible for amended Regulation A.[902]

There has been a general decline in the number of IPOs, particularly those undertaken by small firms, since the late 1990s.[903] One possible reason behind the relatively low number of IPOs under $50 million is that public offerings may be too costly to be a viable capital raising option for smaller issuers.[904] Fees paid to underwriters average 7% for IPOs, 5% for SEOs, and 1% for bond issuances.[905] Issuers conducting registered public offerings also incur Commission registration fees and FINRA filing fees, legal and accounting fees and expenses, transfer agent and registrar fees, costs associated with periodic reporting requirements and other regulatory requirements and various other fees.[906] Two surveys cited in the IPO Task Force report concluded that regulatory compliance costs of IPOs average $2.5 million initially,

902 The sample excludes offerings from non-Canadian foreign issuers, blank check companies, and investment companies, which would not be eligible to rely on amended Regulation A. Offerings with gross proceeds below $1,000 are excluded to minimize measurement error. Issuers of interests in claims on natural resources, which also would not be eligible for amended Regulation A, were not separately eliminated due to data constraints.

903 *See* IPO Task Force. However, a recent study notes that the decline in IPOs has been partly reversed in 2012–2014. *See* Dambra, M., L. Field, and M. Gustafson, 2014, The JOBS Act and IPO volume: Evidence that disclosure costs affect the IPO decision, Journal of Financial Economics (forthcoming), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459591.

904 Other potential reasons, such as macro-economic conditions, are discussed below.

905 *See* Chen, H., and J. Ritter, 2000, The seven percent solution, Journal of Finance 55(3), pp. 1105–1131; Abrahamson, M., T. Jenkinson, and H. Jones, 2011, Why don't U.S. issuers demand European fees for IPOs? Journal of Finance 66(6), pp. 2055–2082; Corwin, S., 2000, The determinants of underpricing for seasoned equity offers, Journal of Finance 58(5), pp. 2249–2279; Huang, R., and D. Zhang, 2011, Managing underwriters and the marketing of Seasoned Equity Offerings, Journal of Financial and Quantitative Analysis 46(1), pp. 141–170; Fang, L., 2005, Investment bank reputation and the price and quality of underwriting services, Journal of Finance 60(6), pp. 2729–2761.

906 According to the survey cited in the IPO Task Force report, 92% of the surveyed CEOs listed the "Administrative Burden of Public Reporting" as being one of the most significant challenges of an IPO. *See* IPO Task Force.

followed by an average ongoing cost of $1.5 million per year.[907]

Because of the fixed-cost nature of some of the compliance-related fees associated with public offerings, compliance-related fees as a percentage of offering proceeds tend to decline as offering size increases, as illustrated in the table below. Offerings below $50 million, and especially offerings below $20 million, incur significantly higher registration, legal and accounting-related fees, as a percentage of proceeds.

Certain non-underwriter IPO-related fees as a percentage of offering proceeds from 1992-2014.[908]

	Offering ≤$20M	Offering $20-$50M	Offering >$50M
SEC Registration Fees	0.11%	0.04%	0.03%
Blue Sky Fees	0.35%	0.05%	0.02%
Accounting Fees	1.38%	0.84%	0.56%
Legal Fees	2.32%	1.18%	0.81%

In addition to compliance costs, there are other possible explanations for the trends in IPOs. A decline in public offerings also could result from macro-economic

907 *See* IPO Task Force. However, some studies conclude that the decline in U.S. small-firm IPOs predated the adoption of the Sarbanes-Oxley Act. *See* Gao, X., J. Ritter, and Z. Zhu, 2013, Where have all the IPOs gone? Journal of Financial and Quantitative Analysis 48(6), pp. 1663–1692. *See also* Doidge, C., A. Karolyi, and R. Stulz, 2013, The U.S. left behind? Financial globalization and the rise of IPOs outside the U.S., Journal of Financial Economics 110(3), pp. 546–573.

908 Fee information is compiled from Thomson Reuters SDC data on IPOs for 1992–2014. The sample excludes offerings from non-Canadian foreign issuers, blank-check companies, and investment companies. Averages are computed based on observations with non-missing data (where a particular type of fees is separately reported). Offerings with gross proceeds below $1,000 are excluded to minimize measurement error.

The analysis includes legal, accounting, blue sky, and registration fees, to which we collectively refer as "compliance fees". Blue Sky Fees denotes fees and expenses related to compliance with state securities regulations. We note that Blue Sky fees associated with small registered offerings may over- or under-estimate similar expenses for Regulation A offerings of the same size.

effects on investment opportunities and the cost of capital[909] or an increase in the economies of scope from being acquired by a larger entity relative to the benefits of operating as an independent firm.[910]

Several other trade-offs may affect an issuer's willingness to pursue an IPO. According to the IPO Task Force survey, 88% of CEOs that had completed an IPO listed "Managing Public Communications Restrictions" as one of the most significant challenges brought on by becoming a reporting company.[911] Additionally, issuers in certain industries, such as high-technology sectors, may be sensitive to the costs of disclosure of proprietary information and may find private capital sources more attractive.[912] Access to capital may be especially time-sensitive for the types of issuers most likely to conduct small offerings, such as startups and small businesses, rendering these issuers unwilling to go through a potentially lengthy registration process. Directors and officers of small issuers also may not want to subject themselves to the increased liability and takeover threats that come with dispersed ownership.[913]

The cost and disclosure requirements of IPO's have been affected by the recent adoption of scaled reporting requirements for emerging growth companies (EGCs) under Title I of the JOBS Act, which can ease the compliance obligations of certain issuers in registered offerings. There is some evidence that Title I has contributed to an increase in

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909 *See* Lowry, M., 2003, Why does IPO volume fluctuate so much? Journal of Financial Economics 67(1), pp. 3–40.

910 *See* Gao, X., J. Ritter, and Z. Zhu, 2013, Where have all the IPOs gone? Journal of Financial and Quantitative Analysis 48(6), pp. 1663–1692.

911 *See* IPO Task Force.

912 *See* Verrecchia, R., 2001, Essays on disclosure, Journal of Accounting and Economics 32, pp. 97–180.

913 *See* Burkart, M., D. Gromb, and F. Panunzi, 2000, Agency conflicts in public and negotiated transfers of corporate control, Journal of Finance 55(2), pp. 647–677.

IPO volume in 2012–2014, particularly in industries with high proprietary disclosure costs, such as biotechnology and pharmaceuticals.[914] Some recent studies, however, suggest that the overall cost of going public for EGCs has not decreased whereas the indirect cost (*e.g.*, IPO underpricing) has increased.[915]

c. Private Debt Financing

Equity, including principal owner equity, accounts for a significant proportion of the total capital of a typical small business. Other sources of capital for small businesses include loans from commercial banks, finance companies and other financial institutions, and trade credit.[916]

Borrowing is relatively costly for many early-stage issuers as they may have low revenues, irregular cash-flow projections, insufficient assets to offer as collateral and high external monitoring costs.[917] For example, a small growth company, such as a technology or life sciences startup, without steady revenues or substantial tangible assets

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914 *See* Dambra, M., L. Field, and M. Gustafson, 2014, The JOBS Act and IPO volume: Evidence that disclosure costs affect the IPO decision, Journal of Financial Economics (forthcoming), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459591.

915 *See* Chaplinsky, S., K. Hanley, and S. K. Moon, 2014, The JOBS Act and the costs of going public, Working paper, *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492241; Barth, M., W. Landsman, and D. Taylor, 2014, The JOBS Act and information uncertainty in IPO firms, Working paper, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465927; Westfall, T.J., and T. C. Omer, 2014, The impact of emerging growth company status on initial public offering valuation and the associated auditor risk and effort, Working paper, *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512605.

916 *See* Berger, A., and G. Udell, 2006, Small business credit availability and relationship lending: The importance of bank organisational structure, Economic Journal 112(477), pp. 32–53. In this study, equity accounted for approximately half of the total capital, including approximately 31% (45% for the smallest firms—that is, those, with less than $1 million in revenues or less than twenty employees) attributed to the principal owner. The remainder came from debt financing, with about one quarter accounted for by loans from commercial banks, finance companies and other financial institutions, and another 16% comprised of trade credit. The study was conducted based on the 1993 edition of the Federal Reserve Board's Survey of Small Business Finances, which collects information on small businesses in the United States.

917 *See* Robb, A., and D. Robinson, 2014, The capital structure decisions of new firms, Review of Financial Studies 27(1), pp. 153–179.

is likely to have trouble obtaining a loan or a line of credit from a bank because it would have difficulty proving its ability to repay. Financial institutions generally require such small business borrowers to provide collateral or a guarantee by owners,[918] which some issuers may be unable or reluctant to provide.

2. Investors

There are currently no limitations on who can invest in existing Regulation A offerings. In considering the baseline for the amendments to Regulation A, we also examine the investors in other existing methods of raising up to $50 million in capital because the final rules we are adopting may impact an issuer's choice of offering method and the potential investor base of the offering. For example, as discussed above, while there are no limitations on the number of non-accredited investors that can invest in offerings made pursuant to Rule 504 of Regulation D and in registered public offerings, offerings made pursuant to Rule 505 and Rule 506(b) of Regulation D are limited to a maximum of 35 non-accredited investors. Issuers making offerings pursuant to Rule 506(c) of Regulation D must take reasonable steps to verify that investors are accredited investors.

While non-accredited investors can participate in Regulation D offerings, subject to limitations described above, data from Form D filings suggests that non-accredited investors are not significantly involved in Regulation D offerings of up to $50 million.

918 Approximately 92% of all small business debt to financial institutions is secured, and owners of the firm guarantee about 52% of that debt. *See* Berger, A., and G. Udell, 1995, Relationship lending and lines of credit in small firm finance, Journal of Business 68(3), pp. 351–381. Some studies of small business lending also document the creation of local captive markets with higher borrowing costs for small, opaque firms as a result of strategic use of soft information by local lenders. *See* Agarwal, Sumit, and Robert Hauswald, 2010, Distance and private information in lending, Review of Financial Studies 13(7), pp. 2757–2788.

Offerings involving non-accredited investors are typically smaller than those that do not involve non-accredited investors. In 2014, we estimate that approximately 152,641 investors participated in Regulation D offerings of less than $50 million by issuers that would be eligible for amended Regulation A.[919] Such offerings had an average of 13.6 investors per offering. Approximately 8% of such offerings involved one or more non-accredited investors.

The total number of households estimated to qualify as accredited investors is substantially larger than the total number of investors reported to have participated in an unregistered offering. As of 2013, we estimated that over 9 million U.S. households qualified as accredited investors based on the net worth standard alone, approximately 8 million U.S. households qualified as accredited investors based on the income standard alone, and approximately 12.4 million U.S. households qualified based on either the income standard or the net worth standard.[920]

3. Financial Intermediaries

Regulation A amendments may also affect financial intermediaries that may become involved in the placement and quotation of Regulation A securities. Currently, there is limited involvement of intermediaries in a Regulation A offering. However, financial intermediaries are used in certain of the other types of offerings, including registered offerings and certain exempt offerings. To the extent that the amendments to Regulation A that we are adopting today impact the number and the overall amount of

919 Based on an analysis by staff from the Commission's Division of Economic and Risk Analysis of initial Form D filings submitted during calendar year 2014. The estimated number of investors likely exceeds the actual number of Regulation D investors because investors could have participated in more than one offering.

920 These estimates are based on an analysis by staff from the Commission's Division of Economic and Risk Analysis, using the Federal Reserve Board's 2013 Survey of Consumer Finances.

capital raised in other types of offerings, financial intermediaries may be affected. For example, in registered offerings, underwriters are frequently used to identify potential investors and are primarily responsible for facilitating a successful distribution of the offered securities. While intermediaries are used less frequently in Regulation D offerings, they play a role in some offerings. We estimate that fewer than 10% of Regulation D offerings that would have been potentially eligible under amended Regulation A involved an intermediary (the estimate is based on information about sales compensation or sales compensation recipients reported in connection with the offering).[921]

C. Scope of Exemption

1. Eligible Issuers

Consistent with the restrictions in existing Regulation A, the final rules exclude non-Canadian foreign issuers, investment companies (including BDCs), Exchange Act reporting companies, blank check companies, and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights, from relying on the exemption.

The final rules also exclude two additional categories of issuers: (i) issuers that are or have been subject to a denial, suspension, or revocation order by the Commission pursuant to Section 12(j) of the Exchange Act within the five years immediately preceding the filing of the offering statement, and (ii) issuers that are required to, but that have not, filed with the Commission the ongoing reports required by the final rules

921 Based on an analysis performed by staff in the Division of Economic and Risk Analysis of Form D filings for calendar year 2014.

during the two years immediately preceding the filing of an offering statement.

Excluding issuers that have not complied with Regulation A's ongoing reporting requirements in the two-year period immediately preceding the filing of a new offering statement will incentivize issuers that intend to rely on amended Regulation A exemption in the future to comply with its ongoing reporting requirements. Similarly, excluding issuers that were subject to a denial, suspension, or revocation order by the Commission pursuant to Section 12(j) of the Exchange Act within the five years immediately preceding the filing of the offering statement will incentivize registrants to comply with their obligations under the Exchange Act, including their ongoing reporting obligations, and will prevent issuers with a history of non-compliance from relying on Regulation A after they terminate or suspend their Exchange Act reporting obligations. At the same time, neither of these exclusions should result in additional compliance costs for issuers because they do not impose any reporting or other requirements on issuers beyond those already mandated by existing regulations.

We recognize that excluding these additional categories of issuers would have an effect on capital formation as it could prevent Regulation A offerings by issuers who otherwise might have utilized the Regulation A exemption rather than other methods of capital raising. However, to the extent that the information contained in required past reports provides investors in follow-on offerings of Regulation A securities with a more complete picture of the issuer's business and financial condition and is relevant for current investment decisions, the exclusion of issuers that are not compliant with Regulation A's reporting requirements and issuers subject to an order by the Commission pursuant to Section 12(j) should therefore enhance investor protection and the informational efficiency of prices of Regulation A securities by allowing investors to make better informed investment decisions. Moreover, we believe that these additional issuer eligibility requirements will complement each other in facilitating compliance with our rules.

To the extent that more issuers use the amended Regulation A exemption, the final rules may promote competition among eligible issuers in the market for investor capital and in the market for goods and services. The final rules may also promote competition in the product market between small issuers and larger issuers.

As suggested by some commenters, we could have expanded the categories of eligible Regulation A issuers to include non-Canadian foreign issuers,[922] blank check companies,[923] BDCs,[924] and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights.[925] These alternatives could potentially enhance capital formation and competition.[926]

However, it may be potentially difficult and costly for investors, especially less sophisticated investors, to determine the valuation and risk of securities of non-Canadian foreign issuers, blank check companies and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights, so extending eligibility to such

922 *See* ABA SIL Letter; Andreessen/Cowen Letter; BDO Letter; McCarter & English Letter; OTC Markets Letter; Richardson Patel Letter; SVB Letter; SVGS Letter.

923 *See* Gilman Law Letter; IPA Letter; Richardson Patel Letter.

924 *See* ABA BLS Letter; CFIRA Letter 1; Commonwealth Fund Letters 1 and 2; KVCF Letter; Milken Institute Letter; MoFo Letter; REISA Letter; SBIA Letter; WR Hambrecht + Co Letter. Most of these commenters noted that BDCs serve an important function in facilitating small or emerging business capital formation or in providing a bridge from private to public markets.

925 *See* REISA Letter.

926 If eligibility under amended Regulation A had been extended to investment companies and BDCs, and such companies obtained a lower cost of capital and passed savings through to the companies in which they invest, the latter could also realize indirect capital formation benefits.

issuers may also decrease investor protection. To the extent that such information asymmetries are not fully mitigated by initial and ongoing Regulation A disclosure requirements, which are generally less extensive than the disclosure requirements for registered offerings, the prices of Regulation A securities of these issuers could be less informationally efficient. Along the same lines, we believe the specialized nature of capital formation and investment strategies at BDCs warrants disclosures that are more specialized than what is required by existing or amended Regulation A for a proper understanding of an investment in the securities of these types of issuers.

We also could have expanded the categories of eligible Regulation A issuers to include issuers that are subject to the ongoing reporting requirements of Section 13 or 15(d) of the Exchange Act ("reporting companies"), as suggested by some commenters.[927] Although reporting companies sometimes conduct offerings exempt from registration, we are unable to estimate the number of reporting companies that would use the amended Regulation A exemption if it were made available to them. We recognize that some reporting companies may have benefited from this alternative due to, for example, the lower costs of preparation of a Regulation A offering statement than a registration statement.[928] Additionally, some reporting companies whose securities are

927 Three commenters recommended allowing Exchange Act reporting companies that are current in their reporting obligations to conduct Tier 2 offerings. *See* Andreessen/Cowen Letter; BIO Letter; OTC Markets Letter. One of these three commenters limited its recommendation to companies with a non-affiliate float of less than $250 million. *See* BIO Letter. The other two commenters further commented that Exchange Act reporting should satisfy Regulation A reporting obligations if the Commission adopted their recommendation. *See* Andreessen/Cowen Letter and OTC Markets Letter.

928 According to one commenter, Form S-1 registration may be too costly for micro-cap companies, and the eligibility requirements of Form S-3 limit primary capital raising for issuers with a small public float. *See* Andreessen/Cowen Letter. But see earlier discussion of indirect costs of issuance for issuers using scaled disclosures in Section III.B.1.b.

not listed on a national securities exchange could potentially benefit from savings of time and dollar expenditures that may result from the state securities law preemption in Tier 2 offerings. However, because Exchange Act disclosure requirements for reporting companies are more extensive than those under amended Regulation A, reporting companies would not be able to derive the benefit of reduced ongoing reporting costs under amended Regulation A. Other commenters suggested imposing more restrictive issuer eligibility criteria, by excluding issuers that are not "operating companies"[929] or excluding shell companies and issuers of penny stock.[930] While these additional exclusions may create some investor protection benefits, such additional exclusions would be likely to limit capital formation and competition among small issuers, which are more likely to fall into the penny stock category, or some early-stage companies, which may not meet the definition of an "operating company." Overall, due to the implications of extending issuer eligibility before the Commission has the ability to assess the impact of the changes to Regulation A being adopted today, we believe that it is prudent to defer consideration of potential changes to the categories of eligible issuers until we have the opportunity to observe the use of the amended Regulation A exemption and assess any new market practices as they develop.

2. Eligible Securities

Consistent with the statute, the final rules apply to offerings of equity securities, debt securities, and securities convertible or exchangeable to equity interests, for

929 *See* CFIRA Letter 1 and WR Hambrecht + Co Letter.

930 *See* ABA BLS Letter and MoFo Letter.

example, warrants, including any guarantees of such securities.[931]

Similar to the proposal, the final rules exclude offerings of asset-backed securities ("ABS") from eligibility for Regulation A. As discussed above, we believe that ABS issuers are not the intended beneficiaries of the mandated expansion of Regulation A. ABS are subject to the provisions of Regulation AB and other rules specifically tailored to the offering process, disclosure and reporting requirements for such securities, and we do not believe that Regulation A's requirements are suitable for offerings of such securities. ABS are designed to pool the risk of already-issued loans and other financial assets and, in this respect, do not constitute new capital formation. We recognize that, in certain cases, permitting ABS offerings to be conducted under Regulation A could lower the cost of capital for underlying borrowers whose loans are eventually securitized by ABS issuers and therefore indirectly facilitate capital formation.[932] In practice, however, the vast majority of ABS offerings are much larger than the maximum allowable offering size under amended Regulation A.[933] As a result, we believe that excluding ABS offerings from eligibility for Regulation A likely will not have a significant adverse effect on capital formation.

3. Offering Limitations and Secondary Sales

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931 *See* discussion in Section II.B.2 above.

932 This indirect effect may result because, due to bank accounting standards and capital requirements, securitization allows originators to move assets off the balance sheet, freeing up capital for additional loans. The resulting increase in capital available for lending could lead to lower borrowing costs for all borrowers down the capital supply chain. *See* Pennacchi, G., 1995, Loan sales and the cost of bank capital, Journal of Finance 43(2), pp. 375–396; Carlstrom, C., and K. Samolyk, 1995, Loan sales as a response to market-based capital constraints, Journal of Banking and Finance 19(3), pp. 627–646.

933 Our analysis indicates that from 2011–2013, approximately 2.9% of ABS issuances were below $50 million. This estimate uses the AB Alert and CM Alert databases and includes only private label ABS deals.

a. Offering Limitations

As explained above, the final rules introduce two tiers of offerings compared with the baseline of one tier in existing Regulation A. The tiered approach in the final rules allows us to scale regulatory requirements based on offering size, to give issuers more flexibility in raising capital under Regulation A, and to provide appropriately tailored protections for investors in each tier. Issuers seeking to raise a larger amount of capital are, among other things, required to provide more extensive initial and ongoing disclosures, but are also able to take advantage of the larger maximum offering size in Tier 2 (up to $50 million in a twelve-month period). In light of this larger maximum offering size, the final rules impose additional disclosure requirements and other provisions to provide protection to investors in Tier 2 offerings. Issuers seeking a smaller amount of capital retain the advantage of more scaled disclosures required in Tier 1 offerings but must comply with a lower offering size limit.

We recognize that the cost associated with greater disclosure requirements for offerings made under Tier 2 in amounts up to $20 million may place Tier 2 issuers at a relative competitive disadvantage as compared to issuers seeking to raise an amount below $20 million in a Tier 1 offering. Such potential competitive effects are likely to be mitigated by the ability of issuers to evaluate the trade-off between the costs associated with more extensive disclosure requirements for Tier 2 offerings and the benefit of a potentially higher securities valuation stemming from a reduction in information asymmetry between issuers and investors due to the more extensive disclosure requirements for Tier 2 offerings.

In a change from the proposal, and in line with the suggestions of some commenters, the final rules raise the Tier 1 maximum offering size from $5 million to $20 million in a twelve-month period in order to provide smaller issuers with additional flexibility to meet their financing needs.[934] We expect the higher Tier 1 maximum offering size will facilitate capital formation under Regulation A for those issuers seeking to raise between $5 and $20 million in a twelve-month period. We expect the resulting capital formation benefits to be greater for smaller issuers for which the incremental costs of the Tier 2 disclosure regime—relative to the costs of complying with state registration—exceed the benefits of more extensive disclosure.

Compared to the baseline, the increase in the maximum offering size to $20 million for Tier 1 offerings and the creation of Tier 2 with the maximum offering size of $50 million will provide issuers with increased flexibility with regard to their offering size and should lower the burden of fixed costs associated with conducting Regulation A offerings as a percentage of proceeds.[935] This could make amended Regulation A more cost effective and attractive to issuers than existing Regulation A, resulting in potential favorable effects on capital formation and competition. The increase in the maximum offering size could also make Regulation A attractive to a broader range of issuers, including larger issuers. This could provide investors with a broader range of investment opportunities in the Regulation A market and potentially result in a more efficient allocation of investor capital.

The increased maximum offering size could also contribute to improved liquidity

934 Some commenters recommended raising the Tier 1 offering limitation to $10 million or more. *See* Guzik Letter 1 and ICBA Letter.

935 To the extent that issuers in Tier 2 offerings face additional costs due to revised disclosure requirements under amended Regulation A, issuance costs as a percentage of proceeds may remain unchanged or may increase.

for Regulation A securities, to the extent that larger issues may encourage greater breadth of equity ownership, assuming sufficient secondary market demand develops.[936] Improved liquidity would enable investors in Regulation A offerings to unwind their investments more easily and at a lower cost, thus making such investments more attractive to potential investors. On the other hand, if investor demand for securities offered under amended Regulation A is low, this could negatively affect security prices and liquidity.

If investor demand for Regulation A securities and information about issuers is sufficient, the increase in maximum offering size could also contribute to the development of intermediation services, such as market making, and to the coverage of Regulation A securities by analysts.[937] It is possible that an underwriting market may develop to provide Regulation A offering services, especially in larger Tier 2 offerings. The presence of these services could have a positive impact on investor participation and aftermarket liquidity of Regulation A securities, further increasing demand for such services. It is also possible, however, that investor demand for Regulation A securities will not expand sufficiently to make such services economically feasible.

Finally, the increase in the maximum offering size could result in increased

936 We recognize the possibility that, despite the absence of resale restrictions, even large Regulation A offerings with heavy investor participation may fail to attain sufficient liquidity due to a lack of secondary trading and a lack of breadth of institutional ownership, and thus may be associated with a higher cost of capital due to the illiquidity premium. In such a scenario, some issuers and investors may still benefit from having access to a type of offering that provides greater liquidity than Regulation D securities offerings although less liquidity than registered offerings of securities listed on major national exchanges.

937 Academic studies show that firm size is an important predictor of analyst coverage, so if larger issuers are attracted to the Regulation A market, they may be more likely to be covered by analysts than smaller issuers, all else equal. *See* Barth, M., R. Kasznik, and M. McNichols, 2001, Analyst coverage and intangible assets, Journal of Accounting Research 39(1), pp. 1–34.

competition among Regulation A issuers for investor capital. If the number of issuers seeking to raise larger amounts of capital pursuant to Regulation A increases more than the size of the accredited and non-accredited investor base, investors considering Regulation A securities will have more choice of investment opportunities in the Regulation A market, resulting in greater competition among issuers for prospective investors. Increased competition, in turn, could result in more efficient allocation of capital by investors. The intensity of competition among issuers for investor capital may not change, however, if issuers are able to attract additional numbers of accredited and non-accredited investors as the Regulation A market develops.

Alternatively, as suggested by some commenters, we could have increased the Tier 2 maximum offering size above $50 million, for example, to $75 or $100 million.[938] This alternative could result in benefits that are similar to the benefits of the increase in the maximum offering size contained in the final rules but of a potentially larger magnitude. However, there is reason to believe that the magnitude of the increase in such benefits may be limited. In particular, although Rule 506 does not limit maximum offering size, few Regulation D offerings by issuers that would be eligible for amended Regulation A exceeded $50 million.[939] To the extent that the current use of other types of

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938 *See* B. Riley Letter; Fallbrook Technologies Letter; OTC Markets Letter; Public Startup Co. Letter 1; Richardson Patel Letter.

939 Based on an analysis of Form D filings for 2014 by staff from Commission's Division of Economic and Risk Analysis, less than 3% of Regulation D offerings by issuers that would be eligible for amended Regulation A had offering size greater than $50 million.

We also considered the overall distribution of registered offerings (initial public offerings and seasoned equity offerings). The overall number of Regulation D offerings significantly exceeded the number of registered equity offerings, thus the combined distribution of registered and Regulation D offerings closely resembles the distribution of Regulation D offerings. In 2014, most (92.2%) of the offerings conducted in the form of registered equity offerings or Regulation D offerings had offer sizes up to $50 million. In 2014, offerings in the $50-$75 million range accounted for 1.0% of Regulation D offerings and approximately 10% of registered equity exempt offerings is indicative of future Regulation A offerings, the alternative of raising the Tier 2 offering size above $50 million may not lead to a significant increase in the number of issuers.

However, we recognize that historical use of Regulation D may not fully represent future potential use of Regulation A, particularly to the extent that the amended rules facilitate offerings by issuers that do not currently rely on other private offering exemptions and that are seeking a broader investor base and enhanced liquidity for their issued securities. In particular, amended Regulation A may attract issuers seeking a public ownership status, and for whom a likely alternative is a registered offering. An increase in the Tier 2 offering size above $50 million could result in some issuers shifting from conducting a registered offering to conducting a Tier 2 offering. As discussed earlier, amended Regulation A may facilitate offerings that would not otherwise be conducted given the cost of registered offerings. However, it is also possible that an increase in the Tier 2 offering size above $50 million will not result in a significant number of issuers shifting from conducting a registered offering to conducting a Tier 2 offering given that the relative cost savings from a Tier 2 offering compared to a registered offering may be lower for offerings in the $50 million to $75 million range than for those below $50 million.[940]

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offerings. Data on registered offerings was obtained from Thomson Reuters, as described in Section III.B.1.b.

940 The fixed costs of registered offerings represent a significantly higher portion of offering proceeds as offering sizes decrease. For instance, compliance related costs (registration, legal and accounting expenses and fees) increase from an average of an average of 1.7% for IPOs and 0.5% for SEOs in the $50-$75 million range to an average of 2.9% for IPOs and 1.6% for SEOs in the below $50 million range. Fee information is compiled from Thomson Reuters SDC data for 1992–2014, excluding offerings from non-Canadian foreign issuers, blank-check companies, and investment companies. Average compliance fees and expenses for this calculation are based on observations with non-missing data (where all four types of fees - legal, accounting, blue sky, and

An increased maximum offering size for Tier 1 offerings could increase the overall amount of securities being offered to the general public that are subject to less extensive initial disclosure requirements and not subject to ongoing disclosure requirements, which may reduce the ability of investors to make informed investment decisions. However, some issuers that conduct offerings that are eligible for Tier 1 may instead choose a Tier 2 offering, for example, to take advantage of the benefits of more extensive disclosure, such as potentially greater secondary market liquidity, and the benefits of a single level of regulatory review.

An increased maximum offering size for Tier 2 Regulation A offerings could increase the overall amount of securities being offered to the general public that are subject to initial and ongoing disclosure requirements that are less extensive than the requirements for registered offerings being offered to the general public, which may result in less informed decisions by investors, thus potentially impacting investor protection. This may be partly mitigated by the investment limitations imposed on non-accredited investors in Tier 2 offerings. Further, larger issuers are more likely to conduct registered offerings, associated with the more extensive disclosure requirements of the Exchange Act.[941] We believe that the annual offering limitation for Tier 2 will

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registration fees, to which we collectively refer as compliance fees - are separately reported). Offerings with gross proceeds below $1,000 are excluded to minimize measurement error.

941 Early in the firm's life cycle, it may be optimal for a firm to remain private, but as it grows larger, it may become optimal to conduct a registered IPO. *See* Chemmanur, Thomas J., and Paolo Fulghieri, 1999, A theory of the going-public decision, Review of Financial Studies 12(2), pp. 249–279. Privately held firms tend to be significantly smaller than firms with publicly traded securities. *See* Asker, John, Joan Farre-Mensa, and Alexander Ljungqvist, 2014, Corporate investment and stock market listing: A puzzle? Review of Financial Studies 28(2), pp. 342–390. Asker, John, Joan Farre-Mensa, and Alexander Ljungqvist, 2011, What do private firms look like? Data appendix, *available at:* http://ssrn.com/abstract_id=1659926. Other studies support the notion that larger firms are more likely to conduct a registered IPO. *See* Pagano, Marco, Fabio Panetta, and Luigi Zingales, 1998, Why do computers go public? An empirical analysis, Journal of

serve to limit the utility of the Regulation A exemption for larger issuers and thus will make it more likely that they will continue to raise money through registered offerings and provide the corresponding disclosure.

b. Secondary Sales

The final rules continue to permit secondary sales as part of a Regulation A offering, subject to the following conditions. The amount of securities that selling securityholders can sell at the time of an issuer's initial offering and within the following 12-month period may not exceed 30% of the aggregate offering price (offering size) of a particular offering. Following the expiration of the first 12-month period after an issuer's initial qualification of an offering statement, the amount of securities that affiliate securityholders can sell in a Regulation A offering in any 12-month period will be limited to $6 million in Tier 1 offerings and $15 million in Tier 2 offerings.[942] After the initial 12-month period, sales by non-affiliate securityholders made pursuant to the offering statement will not be subject to a limit on secondary sales but will be aggregated with sales by the issuer and affiliates for the purposes of compliance with the maximum offering limitation for the respective tier. The final rules also eliminate the provision in the current Rule 251(b), which prohibits resales by affiliates unless the issuer has had net

Finance 53, 27–64 (showing that size predicts going public using Italian data). *See* also Chemmanur, Thomas J., Shan He, and Debarshi K. Nandy, 2010, The going-public decision and the product market, Review of Financial Studies 23(5), pp. 1855–1908 (showing that size predicts a higher likelihood of conducting a registered IPO using US data). In turn, smaller firms that have undertaken an IPO in the past are more likely to go private later on. *See* Mehran, Hamid, and Stavros Peristiani, 2010, Financial visibility and the decision to go private, Review of Financial Studies, 23(2), pp. 519–547.

942 The dollar limits are broadly consistent with existing Regulation A, which limits sales by existing securityholders to $1.5 million, or 30% of the $5 million maximum offering size, in a 12-month period.

income from continuing operations in at least one of the last two years.[943]

Several commenters recommended eliminating limits on sales by existing securityholders,[944] including one commenter that recommended eliminating restrictions on sales by non-affiliate securityholders since concerns over information asymmetries between potential investors and non-affiliate securityholders would be reduced.[945] Other commenters recommended either proscribing resales entirely[946] or requiring the approval of the resale offering by a majority of the issuer's independent directors upon a finding that the offering is in the best interests of both the selling securityholders and the issuer.[947] Another commenter recommended requiring a twelve-month holding period for selling shareholders in order to distinguish between investors seeking to invest in a business and investors simply seeking to sell to the public for a gain or limiting securityholders not qualifying for the twelve-month holding period to selling a fraction of their shares, such as 50%.[948]

Whether and to what extent securityholders should be permitted to sell in a Regulation A offering involves a trade-off between enhancing liquidity for selling securityholders and limiting the potential harm to investors that could arise from such sales. The final rules attempt to balance these considerations. The trade-off between

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943 Tier 1 offerings may still be subject to state law limitations on secondary sales and sales by affiliates.

944 *See* ABA BLS Letter; B. Riley Letter; Canaccord Letter; CFIRA Letter 1; CFIRA Letter 2; Milken Institute Letter; MoFo Letter; WR Hambrecht + Co Letter.

945 *See* Milken Institute Letter.

946 *See* Massachusetts Letter 2; NASAA Letter 2; Carey Letter.

947 *See* NASAA Letter 2 (supporting the proposed limits coupled with a board approval requirement in lieu of prohibiting resales entirely) and WDFI Letter (not expressing a preference for prohibiting resales entirely).

948 *See* MCS Letter.

these countervailing considerations will depend in large part on whether the selling securityholder is an affiliate of the issuer. There are two concerns about sales by affiliates. One is that there is an information asymmetry between an affiliate and outside investors. In particular, an affiliate selling securityholder is likely to have an informational advantage that it may potentially utilize to the detriment of outside investors.[949] The other concern is the alignment of incentives. With respect to affiliates, it is often argued that the incentives of company management are better aligned with other shareholders when managers hold a significant equity interest in the company.[950] Thus, it can be important that insiders retain an ownership stake in the company to ensure that their incentives are aligned.[951] A divestiture of the ownership stake of an affiliate owner may therefore exacerbate agency conflicts, thus suggesting that large affiliate sales can be detrimental to current and future investors.

We recognize, however, that there are benefits to be realized from permitting affiliate securityholders, such as company founders and employees, to sell in a Regulation A offering. Because entrepreneurs and other affiliates consider available exit options before participating in a new venture, permitting secondary sales increases their incentives to make the original investment, which may promote innovation and business

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949 *See* Easley, D., and M. O'Hara, 2004, Information and the cost of capital, Journal of Finance 59(4), pp. 1553–1583. We note that these potential effects may be limited to the extent that purchasers are aware that they may be transacting with better informed affiliates in the course of offerings with affiliate securityholder sale disclosures, in which case these informational asymmetries could be partially or fully reflected in lower security prices and lower proceeds at the time of the offering.

950 *See* Jensen, M., and W. Meckling, 1976, Theory of the firm: Managerial behavior, agency costs and ownership structure, Journal of Financial Economics 3(4), pp. 305–360.

951 *See* Core, J., R. Holthausen, and D. Larcker, 1999, Corporate governance, chief executive officer compensation, and firm performance, Journal of Financial Economics 51(3), pp. 371–406; Mehran, H., 1995, Executive compensation structure, ownership, and firm performance, Journal of Financial Economics 38(2), pp. 163–184.

formation.[952] Allowing exit could also facilitate efficient reallocation of capital and talents of entrepreneurs to new ventures.[953] Additionally, exit of a large affiliate shareholder could potentially result in a broader base of investors.

As noted above, the final rules relax the existing limitations on secondary sales by affiliates by eliminating the net income test for affiliate resales in existing Rule 251(b). We are concerned that this criterion may not be the best measure of financial health and investment opportunities for some issuers eligible for amended Regulation A and thus may inappropriately disadvantage those issuers, and their affiliates, with respect to secondary sales.[954] In particular, this change should benefit growth and R&D-intensive issuers that may experience longer periods of negative revenues. Several commenters supported the elimination of the net income test for affiliate resales, generally noting that some issuers may have net losses for several years, including due to high R&D costs.[955] We recognize that eliminating this criterion could lead to reduced investor protection due to insiders in Regulation A offerings being able to sell securities in issuers that have not reported net income. However, we note that the disclosures required for Regulation A offerings, as well as the overall limits on secondary sales during the initial 12-month

[952] *See* Cumming, D., and J. MacIntosh, 2003, Venture-capital exits in Canada and the United States, University of Toronto Law Journal 53(2), pp. 101–199.

[953] *See* Zhang, J., 2011, The advantage of experienced start-up founders in venture capital acquisition: Evidence from serial entrepreneurs, Small Business Economics 36(2), pp. 187–208. *See also* Gompers, P., A. Kovner, J. Lerner, and D. Scharfstein, 2006, Skill vs. luck in entrepreneurship and venture capital: Evidence from serial entrepreneurs, Working paper No. w12592, National Bureau of Economic Research.

[954] *See* Davila, A., and G. Foster, 2005, Management accounting systems adoption decisions: Evidence and performance implications from early-stage/startup companies, Accounting Review 80(4), pp. 1039–1068 (suggesting that standard accounting measures are often poor indicators of financial health in small companies).

[955] *See* ABA BLS Letter; B. Riley Letter; Canaccord Letter; CFIRA Letter 1; Milken Institute Letter; MoFo Letter; WR Hambrecht + Co Letter.

period and subsequent limits on secondary sales by affiliates, should partly mitigate this cost.

The trade-off between enhanced liquidity and investor protection is different with respect to sales by non-affiliates, because these securityholders are less likely to have access to inside information, and their sales do not raise the incentive alignment concerns discussed above in the context of affiliate securityholders. The option to exit through a Regulation A offering provides additional liquidity to existing non-affiliate securityholders. During the initial 12-month period, the final rules enable selling securityholders to access liquidity through a Regulation A offering while ensuring that secondary sales at the time of such offerings are made in conjunction with new capital raising by the issuer. After the expiration of the initial 12-month period, the ability of non-affiliate securityholders to sell securities pursuant to a qualified Regulation A offering statement without limitation (except the maximum Regulation A offering size) should make Regulation A securities more attractive to prospective investors, which may encourage initial investment and increase capital formation. Non-affiliate securityholders who hold restricted securities purchased in reliance on another exemption will be able to sell them freely after a one-year holding period. Purchasers of the securities from such non-affiliate securityholders would not have the benefit of the more robust disclosure provisions of a Regulation A offering, where the seller will be subject to Section 12(a)(2) liability. Thus, allowing secondary sales in a Regulation A offering will provide an additional measure of protection for purchasers as compared to transactions in the secondary market.[956] Consequently, we believe that removing restrictions on non-affiliate securityholder sales in Regulation A offerings will not have an adverse effect on investor protection.

Although secondary sales increase the liquidity for existing securityholders, since secondary sales will be aggregated with issuer sales for purposes of compliance with the maximum offering amount permissible under the respective tiers, secondary sales may reduce the maximum amount of issuer sales in a Regulation A offering. The 30% limit on secondary sales imposed during the initial 12-month period partly mitigates this potential effect.

4. Investment Limitation

Regulation A currently does not place limits on the amount of securities that may be purchased by an investor. The proposed rules included a 10% investment limit for all investors in Tier 2 offerings. Several commenters recommended providing exceptions to the limit, or altering the limit, for certain types of investors, such as accredited investors,[957] and for securities that will be listed on an exchange upon qualification.[958]

We recognize that there are potential investor protection benefits as well as costs from imposing investment limits in Regulation A offerings. To help balance those benefits and costs, the final rules seek to focus these limits on those investors who may be less likely to be able to fend for themselves and sustain losses. Accordingly, non-

956 *See* Securities Act Section 3(b)(2)(D) (expressly providing for Section 12(a)(2) liability for any person offering or selling Section 3(b)(2) securities).

957 *See* ABA BLS Letter; Andreessen/Cowen Letter; Canaccord Letter; Cornell Clinic Letter; Fallbrook Technologies Letter; Heritage Letter; Ladd Letter 2; Leading Biosciences Letter; McCarter & English Letter; MCS Letter; Milken Institute Letter; MoFo Letter; Paul Hastings Letter; Richardson Patel Letter; SVB Letter; WR Hambrecht + Co Letter.

958 *See* Milken Institute Letter.

accredited investors in Tier 2 offerings will be limited to purchases of no more than 10% of the greater of annual income or net worth (for natural persons) or the greater of annual revenue or net assets (for non-natural persons), as proposed.[959] In a change from the proposal, the final rules do not apply the investment limit to investors in Tier 2 offerings that are accredited investors as defined in Rule 501 of Regulation D. We believe that accredited investors, due to their level of income or net worth, are more likely to be able to withstand losses from an undiversified exposure to an individual offering.

We also recognize that there are costs associated with investment limits. In particular, the investment limitation could limit potential gains for non-accredited investors in Tier 2 offerings. The investment limitation could require some issuers to solicit a greater number of investors or to solicit additional accredited investors, which could impose additional costs on those issuers or limit capital formation if they are unable to attract additional investors.[960] Despite these costs, we believe that this limitation, as tailored in the final rules, is an appropriate means of protecting investors while promoting efficiency, competition and capital formation.

The investment limitation could also lead to a more dispersed non-accredited investor base or a higher proportion of accredited investors in the investor base to the extent that the 10% threshold impacts investor participation. This could facilitate increased liquidity as there would be more investors with which to trade. More diffuse ownership could also exacerbate the shareholder collective action problem and weaken

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959 Annual income and net worth would be calculated for individual purchasers as provided in the accredited investor definition in Rule 501 of Regulation D. *See* 17 CFR 230.501.

960 An issuer would, however, be able to conduct a Tier 1 offering, which does not impose investment limitations.

external monitoring by non-affiliated shareholders to the extent that coordination costs with other shareholders increase. We do not believe, however, that either of these outcomes is a likely consequence of the 10% investment limit.

In a change from the proposal, the final rules exclude sales of securities that will be listed on a national securities exchange upon qualification from Tier 2 investment limitations. This provision may provide additional investment opportunities for some investors and may enhance capital formation for some issuers. We do not anticipate that this provision will reduce investor protection since such issuers will be required to meet the listing standards of a national securities exchange and become subject to ongoing Exchange Act reporting, resulting in a high level of investor protection.

As an alternative to the final rules, we considered imposing more restrictive investment limitations, as suggested by various comments, including extending investment limitations to Tier 1 offerings,[961] imposing a limit lower than 10% on "all but the wealthiest, least risk averse" investors,[962] or imposing a 10% investment limitation across investments in all Regulation A offerings rather than applying the limitation on a per offering basis.[963] Applying the investment limitation in Tier 1 offerings could marginally enhance investor protection, especially since these offerings will be subject to less extensive disclosure and transactional requirements. However, given that Tier 1 offerings will remain subject to state registration requirements, it is unclear whether

961 *See* CFA Institute Letter.

962 *See* CFA Letter.

963 *See* CFA Letter (not recommending this specifically, but noting this as one reason why the investment limit was not an adequate substitute for state review of Tier 2 offerings) and Cornell Clinic Letter.

investment limits would significantly enhance investor protection in these offerings.[964] Moreover, adding the investment limitation in Tier 1 offerings could have an adverse effect on capital formation for the smallest Regulation A issuers, which may face greater hurdles than larger issuers in attracting a broad investor base.

The alternative of imposing a cap that is lower than 10% on "all but the wealthiest, least risk averse" investors may confer additional investor protection benefits on investors that are unable to withstand significant investment losses. However, this alternative could also limit some investors from pursuing attractive investment opportunities and limit capital formation for some issuers. Further, since risk preferences vary considerably among investors, objectively identifying "risk averse" investors in a way that is broadly applicable is a challenge. In contrast, the 10% investment limitation in the final rules that applies to all investors in a Tier 2 offering, except accredited investors, defined pursuant to Rule 501 of Regulation D, provides a standard that market participants can easily implement.

The alternative of imposing the 10% investment limitation that is aggregated across investments in all Regulation A offerings rather than applying the limitation on a per offering basis may strengthen investor protection. Because the risk profiles of different securities offerings by the same issuer are likely to be correlated, and some issuers may participate in multiple Regulation A offerings over time, such an alternative definition of the limitation may prevent a non-accredited investor from using a significant share (potentially, significantly in excess of 10%) of their net worth or income to

[964] One commenter noted that the investment limitation is unnecessary with appropriate state oversight. *See* NASAA Letter 2.

establish a highly undiversified exposure to a single issuer. However, this alternative could also limit some investors from pursuing attractive investment opportunities and limit capital formation for issuers. Moreover, different offerings by the same issuer under Regulation A may have different risk profiles, depending on security type and class, thus for some investors, depending on their preferences, investing a larger aggregate amount in multiple offerings by the same issuer may be optimal.

Overall, while such additional restrictions may strengthen investor protection, their incremental contribution to investor protection may be small in light of other provisions of amended Regulation A. At the same time, such additional restrictions may prevent some investors from taking advantage of potentially beneficial investment opportunities and may limit the attractiveness of Regulation A to prospective issuers, reducing capital formation and competition benefits.

The final rules permit issuers to rely on an investor's representation that the investment represents no more than 10% of the greater of the investor's net worth and annual income, unless the issuer has knowledge that such representation is untrue. The ability to rely on investor representations should help mitigate potential costs that issuers could incur to comply with the investment limitation provisions. At the same time, we realize that investors might make inaccurate representations, whether intentionally or not, which could expose these investors to increased losses.

As an alternative to investor representations, we could have imposed additional requirements on the issuer to verify that investors in Tier 2 offerings are compliant with the 10% investment limit, as suggested by some commenters.[965] Such additional provisions could strengthen investor protections. At the same time, they would likely result in a disproportionate increase in the cost of compliance, especially for smaller issuers in Tier 2 offerings, and might deter some investors from participating in such offerings due to the potential burdens of the verification process and privacy concerns.

5. Integration

The final rules provide issuers with a safe harbor from integration that, with the exception of the addition of security-based crowdfunding transactions conducted pursuant to Section 4(a)(6) of the Securities Act, preserves the provisions of existing Regulation A.

We believe that the final rules provide issuers with valuable certainty as to the contours of offerings conducted before, or close in time with, Regulation A offerings. This certainty may be particularly beneficial for smaller issuers whose capital needs, and thus preferred capital raising methods, may change frequently.

As an alternative, we could have eliminated the integration safe harbor. We believe that the elimination of the safe harbor, however, would inject uncertainty into offerings conducted before, or close in time with, Regulation A offerings and would, in turn, decrease the utility of the exemption. Uncertainty as to the contours of offerings, as they relate to Regulation A, could possibly cause issuers to prefer other offering methods to Regulation A, which may have an effect on investor protection. For example, if issuers rely more on Regulation D, this alternative could result in investors receiving less

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965 *See* Accredited Assurance Letter; CFA Letter; CFA Institute Letter; Cornell Clinic Letter; MCS Letter; WDFI Letter.

information about an issuer before making an investment, thereby reducing investor protection. Instead, if issuers rely more on registered offerings, this alternative could potentially provide investors with the more extensive disclosure required of, and liability protections associated with, such offerings, although it would cause smaller issuers to incur the higher initial and ongoing costs associated with such offerings.

6. Treatment under Section 12(g)

Existing rules currently do not exempt Regulation A securities from the requirements of Section 12(g), but the Proposing Release requested comment on whether we should adopt such an exemption. A number of commenters recommended exempting Regulation A securities from Section 12(g) of the Exchange Act,[966] and several commenters recommended changing or delaying the application of Section 12(g).[967] In a change from the proposed rules, the final rules exempt securities issued in a Tier 2 offering from the provisions of Section 12(g) for so long as the issuer remains subject to, and is current in, its periodic Regulation A reporting obligations as of its fiscal year end,[968] engages the services of a transfer agent registered with the Commission pursuant to Section 17A of the Exchange Act, and had a public float of less than $75 million as of the last business day of its most recently completed semiannual period, or, in the absence of a public float, had annual revenues of less than $50 million as of its most recently

966 *See* B. Riley Letter; CFIRA Letter 1; CFIRA Letter 2; Fallbrook Technologies Letter; Frutkin Law Letter; Guzik Letter 1 and Letter 3; Heritage Letter; IPA Letter; Ladd Letter 2; Milken Institute Letter; MoFo Letter; SBIA Letter (recommending that the trigger be "raised or remedied," but not explicitly calling for elimination); U.S. Chamber of Commerce Letter; WR Hambrecht + Co Letter.

967 *See* Heritage Letter; KVCF; McCarter & English Letter; Milken Institute Letter; MoFo Letter; Paul Hastings Letter; SBIA Letter.

968 *See* Rule 12g5-1(a)(7).

completed fiscal year.[969]

The final rules are intended to provide sufficient disclosure to help investors make informed decisions while limiting the costs imposed on issuers. We believe that the initial and ongoing disclosures required for Tier 2 offerings in the final rules accomplish this objective and that the final rules also provide an appropriate balance between providing investor protection and promoting capital formation. The size of Tier 2 offerings, combined with the investment limitation and the ability to offer Tier 2 securities to the general public, may result in the number of an issuer's shareholders of record exceeding Section 12(g) thresholds. A conditional Section 12(g) exemption for small issuers of Tier 2 securities in such instances is expected to reduce the compliance cost for small issuers and facilitate capital formation and the creation of a broad investor base in offerings made pursuant to Regulation A by small Tier 2 issuers. This will benefit those small Regulation A issuers that are not seeking to list on a national securities exchange[970] and that may find the costs of Exchange Act reporting to be too high given their size.

Regulation A offerings may be particularly attractive to small private companies whose shareholder bases are approaching the Section 12(g) registration threshold. The conditional Section 12(g) exemption may enable small private issuers of Tier 2 securities under amended Regulation A to expand their shareholder base over time, as a result of secondary market trading, to the extent that such a market develops, or through subsequent security issuances, without incurring the costs associated with reporting

969 *Id.*

970 Issuers seeking to list on a national securities exchange will be required to register with the Commission under Section 12(b).

company status.[971]

While the additional requirement to use a registered transfer agent will impose costs on issuers,[972] it should provide investor protection benefits by helping to ensure that securityholder records and secondary trades will be handled accurately. As it is a conditional exemption from Section 12(g), however, issuers that are not concerned with registration under the Exchange Act; perhaps because they do not believe that Exchange Act registration will be required as a result of a Regulation A offering, would not be required to retain the services of a registered transfer agent in order to conduct a Tier 2 offering.

The final rules also include an issuer size limit in the eligibility requirements for the Section 12(g) exemption for Tier 2 offerings, consistent with providing a conditional exemption tailored to facilitate small company capital formation. The issuer size limit may make Regulation A less attractive for larger issuers and issuers anticipating growth

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971 *See* IPO Task Force. Based on two surveys, regulatory compliance costs of IPOs average $2.5 million initially, followed by an ongoing cost of $1.5 million per year.

972 We lack the information to provide a precise quantitative estimate of transfer agent costs for Tier 2 issuers. However, we have some sources of information about transfer agent costs in analogous contexts.

According to the Securities Transfer Association (STA), the registered transfer agent industry is highly competitive and many of its members can develop business models that will suit the needs of small issuers and at the same time provide adequate protection to investors. The STA further noted that it did not anticipate most small issuers to require some of the services, such as the processing of dividends, that raise the cost of recordkeeping services. *See* STA letter on JOBS Act regulatory initiatives, *available at*: http://www.sec.gov/comments/jobs-title-i/general/general-207.pdf. STA estimated that monthly transfer agent fees would be $75-$300 for security-based crowdfunding issuers, which translates into annual fees of $900-$3600. *See* STA letter on proposed crowdfunding rules, *available at*: http://www.sec.gov/comments/s7-09-13/s70913-96.pdf. In 2014, average transfer agent and registrar fees amounted to approximately $9,000 in registered IPOs with offering sizes below $50 million, based on Thomson Reuters SDC data, excluding offerings from non-Canadian foreign issuers, blank-check companies, and investment companies. Offerings with proceeds below $1,000 are excluded to minimize measurement error. While estimates for security-based crowdfunding issuers are likely to underestimate the cost for a typical Tier 2 issuer, estimates for IPOs are likely to overestimate the cost of transfer agent services for a typical Tier 2 issuer. Costs of transfer agent services for a typical Tier 2 issuer may be in the range between the two sets of estimates.

or capital appreciation that expect to reach Section 12(g) thresholds after conducting a Tier 2 offering or subsequent secondary market trading. The two-year transition period before reporting must begin may partly mitigate some of these costs to issuers. Due to the uncertainty about the future composition of the issuer and investor base in Tier 2 offerings, we cannot determine the proportion of Tier 2 issuers whose number of shareholders of record will exceed Section 12(g) thresholds or the proportion of those issuers that will not qualify for an exemption due to their size.[973]

Some issuers may be able to limit the number of shareholders of record by adopting a minimum investment size requirement. This may potentially limit the breadth of investor base and the availability of investment opportunities to some investors. We are not able to determine the extent to which the issuer size limit may affect overall capital formation and whether large or growth issuers will proceed with a Tier 2 offering or pursue a registered offering, a Regulation D offering or another method of financing. In addition, the issuer size limit may place at a competitive disadvantage those potential issuers that exceed the size limit but for which the costs of registration remain high, relative to potential issuers that are close to the size limit but that qualify for the Section 12(g) conditional exemption.

We recognize that there are costs associated with the conditional exemption adopted today. Under this exemption, some issuers in Tier 2 offerings with a large

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973 Based on the analysis by the staff of Division of Economic and Risk Analysis of 2013 data on registrants under Section 12(g), excluding issuers with a class of securities registered under Section 12(b), approximately three-quarters of Section 12(g) registrants would have been below the issuer size limit (defined similarly to smaller reporting company (SRC) criteria). These figures may not be representative of the proportion of issuers that would be below the issuer size limit among future Regulation A issuers that would potentially exceed Section 12(g) thresholds for the number of shareholders of record.

number of shareholders could avoid—potentially indefinitely—the comprehensive disclosure requirements of the Exchange Act, which may decrease the informational efficiency of prices and potentially result in less informed investment decisions by a larger number of investors than in the absence of a conditional Section 12(g) exemption. The issuer size limit partly mitigates this concern. For the same reasons, however, the inclusion of a conditional exemption from Section 12(g) may entice small issuers that would have otherwise generally preferred to raise capital in private offerings to enter the public markets through a Tier 2 offering pursuant to Regulation A.[974] In this regard, the conditional exemption could increase the availability of information about companies that would otherwise remain relatively obscure in the private markets. On balance, we believe that provisions such as the initial and periodic disclosure requirements and the investment limit in Tier 2 offerings appropriately balance investor protections and issuer compliance costs while facilitating the creation of a broad investor base in Tier 2 offerings for small issuers.

We have considered the alternative of providing a conditional exemption from Section 12(g) registration that does not incorporate an issuer size limitation. Such an alternative would enable a broader class of potential Tier 2 issuers to remain exempt from Exchange Act registration. Larger Regulation A issuers could generate a more vibrant OTC trading market, providing enhanced liquidity to those issuers that may not otherwise be of sufficient size to make listing on a national market exchange cost-effective. Providing an exemption from Section 12(g) could provide incentive for these larger

[974] For example, issuers may be more willing to raise capital publicly and become subject to some ongoing reporting requirements if such requirements are less costly to the issuer than the costs generally associated with the ongoing reporting requirements of the Exchange Act.

issuers to broaden their investor base while still providing the ongoing disclosure of the Tier 2 reporting regime. This could result in potentially beneficial effects on capital formation, competition, and informational efficiency of prices. However, such an alternative would potentially create a class of securities permanently exempt from Exchange Act registration regardless of issuer size and thus subject to less extensive disclosure requirements than public reporting companies, which may affect investor protection.

D. Offering Statement

1. Electronic Filing and Delivery

The final rules preserve the current three-part structure of Form 1-A but make various revisions and updates to the form to streamline the information included in the form. Since most of this information is already contained in other offering materials, the additional reporting burden in Part I of the Form 1-A should not entail significantly higher costs in terms of time or out-of-pocket expenses.[975]

Under existing Regulation A, offering materials are submitted to the Commission in paper form. The final rules require electronic submission of offering materials. Electronic submission is expected to offer benefits to issuers and investors. Paper documents are difficult to process both for the Commission and for investors. Electronic filing is therefore expected to reduce processing delays and costs associated with the current paper filing system, improve the overall efficiency of the filing process for

[975] For the purposes of the Paperwork Reduction Act ("PRA"), we estimate that compliance with the requirements of amended Form 1-A will result in a burden of approximately 750 hours per response (compared to the current burden associated with Form 1-A of 608 hours per response). We estimate that compliance with the requirements of amended Form 1-A will result in an aggregate annual burden of 140,625 hours of in-house personnel time and an aggregate annual cost of $18,750,000 for the services of outside professionals. *See* Section IV below.

issuers, benefit investors by providing them with faster access to the offering statement, and allow offering materials to be more easily accessed and analyzed by regulators and analysts.

We anticipate that electronic access to offering materials may promote the informational efficiency of prices of Regulation A securities.[976] Evidence, obtained from the adoption of EDGAR for 10-K filings by reporting companies, suggests that the use of EDGAR has favorably affected small investors.[977] Moreover, the adoption of XML format for Part I of Form 1-A, which captures key information about the issuer and the offering, should allow more efficient access to information and more systematic tracking of offering details by investors, analysts, other market participants and regulators. The XML format for Part I will provide a convenient and efficient means of gathering information from issuers and transmitting it to EDGAR.[978]

At the same time, we recognize that an electronic filing requirement may impose compliance costs on issuers, particularly, issuers that have not previously used the EDGAR system, which include filing Form ID (the application form for access codes to

976 In the case of reporting companies, one study found that EDGAR e-filing was associated with an increase in the speed with which information was incorporated into share prices (thus, increased informational efficiency of prices) and presented evidence of a larger market reaction to 10-K and 10-Q filings in the EDGAR period relative to the pre-EDGAR period. *See* Griffin, P., 2003, Got information? Investor response to Form 10-K and Form 10-Q EDGAR filings, Review of Accounting Studies 8(4), pp. 433–460.

977 One study has examined the effect of the switch to EDGAR filing for annual reports on Form 10-K on small versus large investors. *See* Asthana, S., S. Balsam, and S. Sankaraguruswam, 2004, Differential response of small versus large investors to 10-K filings on EDGAR, Accounting Review 79(3), pp. 571–589.

978 *See* Part I (Notification) of Form 1-A. As discussed more fully in Section II.C.3.a., the cover page and Part I of current Form 1-A would be converted into, and form the basis of, the XML-based fillable form.

permit EDGAR filing)[979] and converting filings into EDGAR format. Some of these compliance burdens will be mitigated by the savings of printing and mailing costs.

Some commenters have expressed investor protection concerns in relation to the access equals delivery model (discussed in Section II.C.1) arising from the perceived challenge of finding these materials on EDGAR and not requiring delivery 48 hours in advance of sale in all circumstances.[980] As discussed above, we do not believe that access to EDGAR generally has proven to be a challenge for investors in registered offerings since the adoption of Securities Offering Reform in 2005, nor do we believe that it will be a challenge for investors under Regulation A or raise investor protection concerns, particularly in light of our final delivery requirements (including, where applicable, the inclusion of hyperlinks to offering materials on EDGAR that must be provided to investors by issuers and intermediaries). Additionally, given that the final offering circular delivery obligations generally affect investors only after they have made their investment decisions and that, taking into account advancements in technology and expanded use of the Internet, investors will have access to the final offering circular upon its filing, we believe that using a means other than physical delivery to satisfy the final offering circular delivery obligation will not have an adverse effect on investor protection. Overall, we believe that there will be benefits to issuers of streamlining delivery requirements for the final offering circular, consistent with similar updates to

[979] For purposes of the PRA, Form ID is estimated to result in 0.15 burden hours per form, for an additional aggregate annual burden due to the rule amendments of 28.20 hours of in-house personnel time. *See* Section IV.

[980] *See* Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

delivery requirements for registered offerings.[981]

2. Disclosure Format and Content

Under the existing Regulation A, issuers can choose among three models for providing narrative disclosure in Part II of the offering statement: Model A, Model B, and Part I of Form S-1. Similar to the proposal, the final rules eliminate Model A but preserve Model B, with certain changes to the contents, and Part I of Form S-1.[982]

We believe that eliminating Model A, which uses a question-and-answer format, may benefit investors by avoiding possible confusion that could result from the lack of uniformity of information presented in the question-and-answer format. Several commenters disagreed with the elimination of the Model A format, recommending that an updated version of the Model A disclosure format be retained.[983] The Model A format may be easier to understand for non-accredited investors, who may lack the sophistication to analyze information presented in alternative disclosure formats. Compared to other formats, the Model A format might also result in lower costs of initial preparation of the offering statement, including, in some instances, lessen the need to retain outside securities counsel.[984] While a question-and-answer format may lower the cost of initial preparation, it often requires more substantive revisions after filing and before qualification, in order for the disclosure to sufficiently address the form requirements. We believe that most of the benefits associated with the lower cost of

981 *See* Securities Offering Reform, Rel. No. 33-8591.

982 *See* Section II.C.3.b for a more detailed description.

983 *See* BIO Letter; Karr Tuttle Letter; NASAA Letter 2; Verrill Dana Letter 1; WDFI Letter.

984 *See* Karr Tuttle Letter and WDFI Letter. The Karr Tuttle Letter also refers to the experience of issuers in Rule 504 offerings, indicating that NASAA's Form U-7, upon which Model A is based, has proved convenient for issuers in Rule 504 offerings qualified by states without the use of securities counsel.

initial preparation are negated subsequently during the qualification process. Consequently, we are not persuaded that there are sufficient benefits to retaining the Model A format.

The changes to Model B include updated disclosure requirements, including a new section containing management discussion and analysis of the issuer's liquidity, capital resources and business operations. While these updates may impose costs on the issuer, they are expected to increase investor protection and informational efficiency of prices by providing important information to investors. The updated disclosure requirements are, however, generally designed to assist issuers with more guidance as to the required disclosures that, while they may increase the cost to issuers associated with the initial preparation of the offering circular, should lower the overall cost of, and time to, qualification, when the process is considered in its entirety. Overall, we believe that the availability of two alternative disclosure formats—a revised Model B format and Part I of Form S-1—provides sufficient flexibility to issuers in choosing their disclosure format while preserving the benefits of disclosure of relevant information to prospective investors.

Some commenters suggested eliminating all three disclosure formats and instead creating a new disclosure format similar to Part I of Form S-1 that would reference Regulation S-K requirements (with reduced disclosure requirements in some instances).[985] Another commenter recommended reducing the disclosure requirements for offerings of $2 million or less,[986] while another suggested increasing disclosure

985 *See* Canaccord Letter; CFIRA Letter 1; E&Y Letter; Ladd Letter 2; McCarter & English Letter; WR Hambrecht + Co Letter.

986 *See* Campbell Letter.

requirements as an issuer grows in size and complexity.[987] We recognize that scaling the disclosure requirements for Form 1-A, as suggested by commenters, could ease compliance costs for Regulation A issuers. However, additional scaling of disclosure requirements within tiers may reduce the comparability of disclosures within the same tier and result in pricing inefficiencies.

3. Audited Financial Statements

The final rules require issuers conducting Tier 2 offerings to include audited financial statements in their offering materials. Audited financial statements should provide investors in Tier 2 offerings with greater confidence in the accuracy and quality of the financial statements of issuers seeking to raise larger amounts of capital. This, in turn, could benefit issuers by lowering the cost of capital or increasing the amount of capital supplied by investors.

We recognize that audited financial statements could also entail significant costs to issuers, and that the costs of an audit could discourage the use of Tier 2 offerings. Based on data from registered IPOs below $50 million in 2014 by issuers that would have been potentially eligible for amended Regulation A, average total accounting fees amounted to 1.65% of gross offering proceeds, where reported separately.[988]

The final rules require issuers in Tier 2 offerings to include audited financial

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987 *See* SVB Letter.

988 This estimate is based on Thomson Reuters SDC data on IPOs with issue dates in 2014, excluding offerings from non-Canadian foreign issuers, blank check companies, and investment companies. Offerings with proceeds below $1,000 are excluded to minimize measurement error. Issuers of interests in claims on natural resources, which also would not be eligible for amended Regulation A, were not separately eliminated due to data constraints. Accounting fees include the cost of preparing accounting statements, in addition to the cost of an audit. We also note that costs incurred by issuers in registered IPOs may not be representative of costs incurred by issuers in Tier 2 offerings. We lack the information to provide a quantitative estimate of audit costs that would be incurred by Regulation A issuers in Tier 2 offerings.

statements in their offering circulars that are audited in accordance with either the auditing standards of the American Institute of Certified Public Accountants (AICPA) (referred to as U.S. Generally Accepted Auditing Standards or GAAS) or the standards of the Public Company Accounting Oversight Board (PCAOB), as suggested by some commenters.[989] We expect this provision in the final rules to provide issuers with flexibility that may help contain issuer compliance costs, compared to requiring financial statements that are audited in accordance with the standards of the PCAOB. As noted above,[990] because AICPA rules would require an audit of a Regulation A issuer conducted in accordance with PCAOB standards to also comply with U.S. GAAS, an issuer who includes financial statements audited in accordance with PCAOB standards will likely incur additional incremental costs compared with an issuer who includes financial statements audited only in accordance with U.S. GAAS. However, we assume that an issuer would only elect to comply with both sets of auditing standards because it has concluded that the benefits of doing so (for example, to facilitate Exchange Act registration) justify these additional incremental costs.

As an alternative, we could have not required the audited financial statements until after the first year of operation as a "public startup company" or indefinitely for issuers that are pre-revenue or that have paid-in capital, assets and revenues below a modest threshold, as suggested by commenters.[991] While this alternative may decrease issuer compliance costs, it may also lower the accuracy of information provided to

989 *See* ABA BLS Letter; BDO Letter; Canaccord Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter; MoFo Letter; WR Hambrecht + Co Letter.

990 *See* Section II.C.3.

991 *See* Public Startup Co. Letter 3 (also suggesting three tiers, where at least the first two would not require this) and Public Startup Co. Letter 11.

investors in Tier 2 offerings, resulting in reduced investor protection. The large offering limit in Tier 2 offerings may make some of the fixed costs of an audit relatively less burdensome. In addition, we note that smaller issuers may opt to forgo the cost of an audit and elect a Tier 1 offering or a Regulation D offering, which does not require audited financial statements.

On the other hand, other commenters advised the Commission to require audited financial statements for Tier 1 offerings.[992] While we acknowledge that requiring audited statements is likely to result in stronger investor protections due to reduced likelihood of fraudulent financial statements being presented, this alternative would likely place a relatively greater burden on smaller issuers due to the fixed-cost nature of some of the audit costs. Also, given the relatively low maximum offering size for Tier 1, this could result in Tier 1 offerings becoming not cost-effective.

4. Other Accounting Requirements

The final rules permit Canadian issuers to prepare financial statements in accordance with either U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). This is expected to benefit Canadian issuers that currently use IFRS as issued by the IASB by helping such issuers contain compliance costs associated with Regulation A offerings, compared to requiring Canadian issuers to prepare financial statements in accordance with U.S. GAAP. Several commenters specifically supported allowing Canadian issuers to prepare their financial statements in accordance with IFRS as issued by the IASB.[993]

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992 *See* Guzik Letter 1 and Milken Institute Letter.

993 *See* ABA BLS Letter; Canaccord Letter; NASAA Letter 2; MoFo Letter; PwC Letter.

5. Continuous and Delayed Offerings

The final rules explicitly allow for continuous or delayed offerings.[994] As a result, it is now clear that eligible issuers have greater flexibility to select the timing of their offerings. Such flexibility is expected to benefit issuers by allowing them to adjust their capital raising based on macro-economic factors or company conditions.[995] These factors should facilitate financing decisions and capital market efficiency. For example, existing research on Rule 415 offerings in the registered offering market shows that costs of intermediation in shelf offerings, and consequently the cost of raising equity through shelf registration, are lower than through traditional registration.[996] The final rules condition the ability to sell securities in a continuous or delayed Tier 2 offering on being current with ongoing reporting requirements at the time of sale. This should not impose incremental costs on eligible issuers as they already file periodic updates and amendments.

The final rules restrict all "at the market" secondary offerings. Existing Regulation A prohibited primary "at the market" offerings, but did not necessarily restrict such offerings by selling securityholders. Some commenters suggested allowing such offerings, including primary offerings by the issuer.[997] We recognize that not allowing

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994 Existing Regulation A allows for continuous or delayed offerings to the extent permitted by Rule 415. Since Rule 415 only discusses "registered offerings," the reference to it may have caused confusion as to the scope of its application in Regulation A offerings.

995 *See* Bayless, M., and S. Chaplinsky, 1996, Is there a window of opportunity for seasoned equity issuance? Journal of Finance 51(1), pp. 253–278.

996 *See* Bethel, J., and L. Krigman, 2008, Managing the cost of issuing common equity: The role of registration choice, Quarterly Journal of Finance and Accounting 47(4), pp. 57–85. We recognize that the evidence based on registered offerings may not be indicative of the effects on Regulation A offerings.

997 *See* OTC Markets Letter and Paul Hastings Letter.

secondary "at the market" offerings may limit flexibility for those issuers that are uncertain about the offering price that will attract sufficient investor demand. However, the benefit of the new restriction as it applies to secondary sales is that it helps ensure that issuers do not lose their Regulation A exemption due to unanticipated market factors by inadvertently offering securities in an amount that exceeds the offering limitation. Future offerings made in reliance on the final rules may provide more information to determine whether a robust market capable of supporting "at the market" offerings develops and whether the Regulation A exemption could be an appropriate method for such offerings in the future.

6. Nonpublic Review of Draft Offering Statements

Under the final rules, issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A or an effective registration statement under the Securities Act will be permitted to submit to the Commission a draft offering statement for non-public review, so long as all such documents are publicly filed not later than 21 calendar days before qualification. The option of non-public submission of a draft offering statement is expected to reduce the barriers to entry for issuers using Regulation A. In this regard, a potential issuer could reduce the amount of time between disclosing possibly sensitive information to its competitors in its offering statement and the related sale of its securities. Furthermore, companies that are tentative about conducting an offering could start the qualification process and then abandon the offering any time before the initial public filing without receiving the related stigma in the market. To the extent that this accommodation lowers the barriers to entry, it may encourage capital formation and competition. Moreover, we do not believe that the option of draft offering statement submission will significantly affect investor protection. Disclosure requirements are unchanged for issuers that elect the option of non-public submission of draft offering statement. The initial non-public statement, all non-public statement amendments, and all correspondence with Commission staff regarding such submissions must be publicly filed and available on EDGAR as exhibits to the offering statement not less than 21 calendar days before qualification of the offering statement.

E. Solicitation of Interest ("Testing the Waters")

Under existing Regulation A, testing the waters is permitted only until the offering statement is filed with the Commission, and solicitation material is required to be filed prior to or concurrent with first use. The final rules permit issuers to test the waters and use solicitation materials both before and after the offering statement is filed, subject to issuer compliance with the rules on filing information and disclaimers.[998] Under the final rules, testing the waters materials will be required to be included as an exhibit to the offering statement at the time of initial submission or filing with the Commission, and updated thereafter.

In general, allowing issuers to gauge interest through expanded testing the waters will reduce uncertainty about whether an offering could be completed successfully. Allowing solicitation prior to filing enables issuers to determine market interest in their securities before incurring the costs of preparing and filing an offering statement. If after testing the waters, the issuer is not confident that it will attract sufficient investor interest, the issuer can consider alternate methods of raising capital and thereby avoid the costs of

[998] As noted in Section II.H.3. above, some state securities laws may impose limitations on the use of testing the waters by Tier 1 issuers.

an unsubscribed or under-subscribed offering. Allowing testing the waters at any time prior to qualification of the offering statement, rather than only prior to filing of the offering statement with the Commission, may increase the likelihood that the issuer will raise the desired amount of capital. This option may be useful for smaller issuers, especially early-stage issuers, first-time issuers, issuers in lines of business characterized by a considerable degree of uncertainty, and other issuers with a high degree of information asymmetry. This provision may attract certain issuers—those that may be uncertain about the prospects of raising investor capital—to consider using amended Regulation A when they might not otherwise, thus potentially promoting competition for investor capital as well as capital formation in the Regulation A market.

Expanding the permissible use of testing the waters communications could also increase the type and extent of information available to investors, which could lead to more efficient prices for the offered securities. The final rules permit testing the waters for an expanded period of time compared to the baseline. As a result, it may be easier for investors to become aware of a larger and more diverse set of investment opportunities in private offerings, which may allow these investors to more efficiently allocate their capital. The net effect could be to enhance both capital formation and allocative efficiency. Further, requiring issuers using testing the waters solicitations after the offering statement is publicly filed to provide the offering statement with the testing the waters materials (or provide information about where it can be accessed), and to update it and redistribute updates in the event of material changes, will allow investors to make informed investment decisions.

We recognize that there may also be potential costs associated with expanding the use of testing the waters communications. If the contents of the offering circular differ substantively from the material distributed through testing the waters communications, and if investors rely on testing the waters materials, this may lead investors to make less informed investment decisions. Some commenters were concerned that the expanded use of permissible testing the waters may facilitate misleading statements to investors and may lead to a heightened risk of fraud.[999] We believe, however, that this potential investor protection concern is mitigated by the application of Section 12(a)(2) liability to Regulation A offerings and the general anti-fraud provisions of the federal securities laws.

We considered the alternative, suggested by some commenters,[1000] of requiring submission and review of testing the waters materials before or concurrent with first use, rather than at the time the offering statement is submitted for non-public review or filed, which could aid regulators in detecting fraudulent solicitation of interest communications, potentially resulting in investor protection benefits. However, requiring initial submission and review of testing the waters materials prior to their use could dissuade issuers, particularly smaller or less experienced issuers, from engaging in testing the waters communications, thereby undermining many of the benefits of permitting such communications discussed above.

We also considered the views of other commenters who suggested we relax some of the proposed requirements for the use of testing the waters. For example, we could have treated the solicitation materials as non-public when filed with the Commission, at

999 *See* Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

1000 *See* Massachusetts Letter 2; NASAA Letter 2; WDFI Letter.

least until the offering statement is qualified,[1001] or removed the requirement for public filing of solicitation materials for all Regulation A offerings or for Tier 2 offerings.[1002] Issuers that have elected to use testing the waters communications have already incurred the cost of preparing the materials, so the incremental direct cost of the requirement to file the materials with the Commission will be low. We recognize that permitting issuers to file the solicitation materials non-publicly with the Commission could reduce the indirect costs of some issuers by limiting the ability of the issuer's competitors to discover information about the issuer.

However, we note that this information may become available to competitors in any event through the solicitation process and removing the requirement to publicly file the materials may result in adverse effects on the protection of investors to the extent that it may facilitate fraudulent statements by issuers to all or a selected group of investors that may fail to compare the statements in the solicitation materials against the offering circular. On balance, we believe that the final rule's requirements governing the use of testing the waters communications appropriately balance the goals of providing flexibility to issuers and protection to investors.

F. Ongoing Reporting

Currently, Regulation A issuers do not have ongoing reporting obligations. The final rules prescribe an ongoing reporting regime for issuers that conduct Tier 2 offerings that requires, in addition to annual reports on Form 1-K, semiannual reports on Form 1-SA, current event reporting on Form 1-U, and notice to the Commission of the

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1001 *See* Heritage Letter and Ladd Letter 2.

1002 *See* BIO Letter and MoFo Letter.

suspension of ongoing reporting obligations on Form 1-Z.

These reporting requirements will have benefits and costs. These reporting requirements should strengthen investor protection and decrease the extent of information asymmetries between issuers and investors in the Regulation A market, relative to existing Regulation A. Requiring ongoing disclosures for Tier 2 offerings will provide investors with periodically updated information, allowing them to identify investment opportunities best suited for their level of risk tolerance and re-evaluate the issuer's prospects through time, resulting in better informed investment decisions and improved allocative efficiency of capital. By standardizing the content, timing, and format of these disclosures, the amendments to Regulation A will make it easier for investors to compare information across issuers, both within and outside of the new Regulation A market.

The additional reporting requirements for Tier 2 offerings increase the availability of public information that can be used for valuing securities. A reduction in information risk due to improvements in disclosure can lower the issuer's cost of capital.[1003] Because there are no resale restrictions, some securities issued in amended Regulation A offerings are likely to be quoted on the OTC market, and required ongoing disclosure requirements will provide investors with updated information about their underlying value, and as a result, lower the inherent asymmetric information risks associated with trading in this market.[1004] The enhanced information environment should facilitate more informationally efficient pricing and better liquidity for amended Regulation A

1003 *See* Diamond, D., and R. Verrecchia, 1991, Disclosure, liquidity, and the cost of capital, Journal of Finance 46(4), pp. 1325-1359; Easley, D., and M. O'Hara, 2004, Information and the cost of capital, Journal of Finance 59(4), 1553–1583; Easley, D., S. Hvidkjaer, and M. O'Hara, 2002, Is information risk a determinant of asset returns? Journal of Finance 57(5), pp. 2185–2221.

1004 *See* Ang, A., A. Shtauber, and P. Tetlock, 2013, Asset pricing in the dark: The cross section of OTC stocks, Review of Financial Studies 26(12), pp. 2985–3028.

securities.[1005] Tier 2 ongoing disclosure requirements should also provide timely and relevant issuer information at a lower cost to broker-dealers that initiate quotations and make markets in these securities. Increased secondary market liquidity can make securities more attractive to prospective investors, which can promote capital formation. Hence, there may be significant benefits for capital formation from the ongoing reporting requirements in the final rules.

Although reporting obligations for Tier 2 issuers are less extensive than for reporting companies, we recognize that they will still result in a significant direct cost of compliance. One commenter estimated the qualification and reporting costs of a Tier 2 issuer to be approximately $400,000 in the first year and $200,000 annually thereafter (per issuer).[1006] For the purposes of the PRA, we estimate that compliance with the requirements of Forms 1-K, 1-SA, and 1-U for issuers with an ongoing reporting obligation under Regulation A will result in an aggregate annual burden of 115,351 hours of in-house personnel time and an aggregate annual cost of $13,450,272 for the services of outside professionals.[1007]

In addition to the direct costs of preparing the mandatory disclosures, issuers of securities in Tier 2 offerings will be subject to indirect disclosure costs of revealing to their competitors and other market participants information about their business not

1005 *See* Graham, J., C. Harvey, and S. Rajgopal, 2005, The economic implications of corporate financial reporting, Journal of Accounting and Economics 40(1–3), pp. 3–73; Durnev, A., R. Morck, and B. Yeung, 2003, Value enhancing capital budgeting and firm-specific stock return variation, Journal of Finance 59(1), pp. 65–106.

1006 *See* IPA Letter.

1007 *See* Section IV below.

previously required to be disclosed.[1008] These disclosures can inform the issuer's competitors about the issuer's strategic decisions regarding investment, financing, management and other aspects of business. For issuers seeking to reduce such costs of disclosure, Rule 506(c) of Regulation D could be more appealing. Based on the scope of disclosures required, an issuer's combination of direct and indirect costs of disclosure is likely to be lowest for a Regulation D Rule 506 offering, followed by a Tier 1 offering, a Tier 2 offering and, finally, a registered public offering.

We evaluate below the different provisions of the ongoing reporting requirements and the alternatives we have considered.

1. Periodic and Current Event Reporting Requirements

Currently, Regulation A issuers do not have ongoing reporting obligations. Tier 2 issuers in a Regulation A offering will have periodic and current event reporting obligations under the final rules. As noted above, these ongoing reporting requirements will result in both direct and indirect costs to Tier 2 issuers.

Commenters made various suggestions for expanding the ongoing disclosure requirements for Tier 2 issuers. For example, several commenters suggested we require quarterly reporting instead of semi-annual reporting.[1009] Another commenter suggested we require officers, directors and controlling shareholders of issuers that offer securities under Regulation A to make ongoing disclosure of transactions in company securities, similar to reporting on Forms 3, 4 and 5 and Schedules 13D, 13G and 13F in the

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1008 *See* Verrecchia, R., 2001, Essays on disclosure, Journal of Accounting and Economics 32, pp. 97–180.

1009 *See* Massachusetts Letter 2; NASAA Letter 2; OTC Markets Letter; WDFI Letter.

registered securities context.[1010] While additional requirements that would bring the Tier 2 disclosure obligations closer to the reporting company disclosure obligations are likely to have informational efficiency and investor protection benefits, they are also likely to make Regulation A more costly and less attractive to prospective issuers and may not promote capital formation as much as the final rules.

Other commenters recommended reducing the continuing disclosure burden on Tier 2 issuers[1011] or making continuing disclosure requirements contingent upon factors other than offering tier, such as whether the issuer has taken steps to foster a market in its securities.[1012] These alternatives would likely reduce compliance costs for Tier 2 issuers; however, they also may cause investors to have less information upon which to make investment decisions, resulting in weaker investor protections and less informationally efficient prices.

Other commenters recommended requiring ongoing disclosures for issuers in Tier 1 offerings, including disclosures at a level lower than is required for Tier 2,[1013] ongoing disclosure with yearly audited financials,[1014] or some unspecified continuous disclosure obligation.[1015] Such alternatives, particularly if accompanied by the requirement of audited financial statements, would increase the availability and quality of financial information provided to investors in Tier 1 offerings and strengthen investor protection

1010 *See* OTC Markets Letter.

1011 *See* Heritage Letter and IPA Letter.

1012 *See* Heritage Letter.

1013 *See* Guzik Letter 1 (suggesting that Tier 1 ongoing disclosure requirements could parallel Tier 2's requirements, but without the requirement for semiannual reports).

1014 *See* Ladd Letter 2.

1015 *See* SVB Letter.

by enabling investors to make better informed decisions. However, due to the fixed component of disclosure costs, and the likely smaller size of Tier 1 offerings relative to Tier 2 offerings, such requirements may limit capital formation and place Tier 1 issuers at a competitive disadvantage relative to Tier 2 issuers. We note that small issuers that value informational efficiency gains from ongoing disclosures above the cost of such disclosures have the option of conducting a Tier 2 offering.

2. Termination and Suspension of Reporting and Exit Reports

The final rules permit issuers in Tier 2 offerings that have filed all periodic and current reports required by Regulation A for a specified period to suspend their ongoing reporting obligation under Regulation A at any time after completing reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers or sales made in reliance on a qualified Tier 2 offering statement are not ongoing. For banks or bank holding companies, the termination threshold is fewer than 1,200 persons, consistent with Title VI of the JOBS Act. The option to cease reporting could be beneficial, especially for issuers that do not seek secondary market liquidity and for smaller issuers that find the costs of compliance with the ongoing disclosure requirements to be a relatively greater burden. At the same time, the option might be costly for investors because it will decrease the amount of information available about the issuer, making it more difficult to monitor the issuer and accurately price its securities or to find a trading venue that will allow liquidation of the investment. The public availability of information in bank regulatory filings is expected to mitigate some of these effects for bank issuers undertaking Regulation A offerings. Termination of reporting also might make it easier for inside shareholders to use an informational advantage to the detriment of minority outside investors.

The final rules require Tier 1 issuers to notify the Commission upon completion of their offerings by filing Form 1-Z (exit report). Issuers in Tier 2 offerings will be required to provide this information on Form 1-Z at the time of filing the exit report, if they have not previously provided this information on Form 1-K as part of their annual report. Form 1-Z contains limited summary information about the issuer and the completed offering and, therefore, should not impose substantial additional compliance costs on the issuer.[1016] The enhanced availability of Form 1-Z information is likely to benefit investors and facilitate evaluation of Regulation A market activity. For example, this information should allow the Commission and others to assess whether issuers have been able to raise the projected amount of capital in Regulation A offerings. We recognize, however, that, since information about the completed offering has value to an issuer's competitors, its disclosure may also impose an indirect cost on issuers.

3. Exchange Act Registration

Generally, an issuer of Regulation A securities would not be subject to Exchange Act reporting obligations unless it separately registers a class of securities under Section 12 of the Exchange Act or conducts a registered public offering. This results in significantly lower costs of periodic reporting for Regulation A issuers relative to reporting companies.[1017]

1016 For the purposes of the PRA, we estimate that filing the Form 1-Z exit report will result in an aggregate annual burden of 235.5 hours of in-house personnel time. *See* Section IV below.

1017 Ongoing compliance costs were estimated to be $1.5 million per year, following an IPO, according to two surveys cited in the IPO Task Force report.

The final rules permit issuers seeking to register a class of Regulation A securities under the Exchange Act to do so by filing a Form 8-A in conjunction with the qualification of a Form 1-A that follows Part I of Form S-1 or the Form S-11 disclosure model in the offering circular. In some circumstances this option may provide more flexibility, for instance, with respect to testing the waters, to issuers seeking to register a class of securities. The obligation to file ongoing reports in a Tier 2 offering is automatically suspended upon registration of a class of securities under Section 12 of the Exchange Act or registration of an offering of securities under the Securities Act. Given that Exchange Act reporting obligations are more extensive than those of Regulation A, the entry of such issuers into the Exchange Act reporting system upon qualification of a Regulation A offering statement is expected to have a beneficial effect on investor protection and informational efficiency of prices. While registration pursuant to the Exchange Act is likely to impose additional costs on issuers, only issuers that opt into such registration are affected. As a result, we anticipate that only those issuers for whom the perceived benefits of registration justify the accompanying costs will elect to use this provision.

G. Insignificant Deviations

Under the final rules, offerings with "certain insignificant deviations from a term, condition or requirement" of Regulation A remain exempt from registration. This is the same as the rules in existing Regulation A. As a result, the only change from the baseline is that these rules will likely apply to a greater number of offerings due to the expanded availability of amended Regulation A. Further, as in existing Regulation A, the final rules explicitly classify as significant those deviations that are related to issuer eligibility, aggregate offering price, offers and continuous or delayed offerings. This provision benefits investors by providing certainty about the provisions from which the issuer may not deviate without losing the exemption. At the same time, it enables issuers to continue to rely on the exemption and obtain its capital formation benefits even if they have an "insignificant deviation" from the final rules. This provision may be especially beneficial for issuers with limited experience with Regulation A offerings as their limited experience may make them more susceptible to an inadvertent error. In this way, the provision may encourage more issuers to engage in Regulation A transactions and thereby facilitate capital formation.

H. Bad Actor Disqualification

The final rules amend Rule 262 to include bad actor disqualification provisions in substantially the same form as adopted under Rule 506(d).[1018] The final rules specify that the covered person's status is tested at the time of filing of the offering statement. Consistent with the disqualification provisions of Rule 506(d), the final rules add two new disqualification triggers to those in existing Regulation A: Commission cease-and-desist orders relating to violations of scienter-based anti-fraud provisions of the federal securities laws or Section 5 of the Securities Act and the final orders and bars of certain state and other federal regulators. While these provisions may impose an incremental cost on issuers and other covered persons relative to the cost imposed by the disqualification provisions of existing Regulation A, they should strengthen investor protection from potential fraud.

If one of these new triggering events occurred prior to the effective date of the

1018 *See* 17 CFR 230.506(d).

final rules, the event will not cause disqualification, but instead must be disclosed on a basis consistent with Rule 506(e). This approach will not preclude the participation of bad actors whose disqualifying events occurred prior to the effective date of the final rules, which could expose investors to the risks that arise when bad actors are associated with an offering. These risks to investors may be partly mitigated since investors will have access to relevant information that could inform their investment decisions. Disclosure of triggering events may also make it more difficult for issuers to attract investors, and issuers may experience some or all of the impact of disqualification as a result. Some issuers may, accordingly, choose to exclude involvement by prior bad actors to avoid such disclosures.

We expect that the bad actor disqualification provisions in the final rules will lead most issuers to restrict bad actor participation in Regulation A offerings, which could help reduce the potential for fraud in these types of offerings and thus strengthen investor protection compared with an alternative of not including bad actor disqualification provisions. If disqualification standards lower the risk premium associated with the risk of fraud due to the presence of bad actors in securities offerings, they could also reduce the cost of capital for issuers that rely on amended Regulation A. In addition, the requirement that issuers determine whether any covered persons are subject to disqualification might reduce the need for investors to do their own investigations and could therefore increase efficiency.

The disqualification provisions also impose costs on issuers and covered persons. Issuers that are disqualified from using amended Regulation A may experience an increased cost of capital or a reduced availability of capital, which could have negative effects on capital formation. In addition, issuers may incur costs related to seeking disqualification waivers from the Commission and replacing personnel or avoiding the participation of covered persons who are subject to disqualifying events. Issuers also might incur costs to restructure their share ownership to avoid beneficial ownership of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, by individuals subject to disqualifying events.

As discussed above, the final rules also provide a reasonable care exception on a basis consistent with Rule 506(d).[1019] We anticipate that the reasonable care exception would result in benefits and costs, compared with an alternative of not providing a reasonable care exception. For example, a reasonable care exception could facilitate capital formation by encouraging issuers to proceed with Regulation A offerings in situations in which issuers otherwise might have been deterred from relying on Regulation A if they risked potential liability under Section 5 of the Securities Act for unknown disqualifying events. This exception also could increase the potential for fraud, compared with an alternative of not providing a reasonable care exception, by limiting issuers' incentives to determine whether bad actors are involved with their offerings. We also recognize that some issuers might incur costs associated with conducting and documenting their factual inquiry into possible disqualifications. The rule's flexibility with respect to the nature and extent of the factual inquiry required could allow an issuer to tailor its factual inquiry as appropriate to its particular circumstances, thereby potentially limiting costs.

One commenter recommended revising the look-back periods for disqualifying

1019 *See* Proposed Rule 262(b)(4).

events to run from the time of sale rather than the time of filing of the offering statement.[1020] These changes would relax the bad actor disqualification standard, by allowing bad actors to participate in Regulation A offerings during the qualification process. We believe that timing application of the bad actor disqualification rules to the time of filing of the offering statement, as opposed to the time of qualification, is therefore more appropriate under the final rules.

I. Relationship with State Securities Law

The final rules preempt state registration and qualification requirements for Tier 2 offerings but preserve these requirements for Tier 1 offerings, consistent with state registration of Regulation A offerings of up to $5 million under existing Regulation A.

The GAO Report found that compliance with state securities review and qualification requirements was one of the factors that appeared to have influenced the infrequent use of Regulation A by small businesses.[1021] Various commenters supporting preemption of state securities laws in the final rules noted that state review of offering statements is a significant impediment to the use of Regulation A and that the process of

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[1020] *See* KVCF Letter.

[1021] *See* GAO Report. The GAO Report also cites other factors that may have discouraged issuer use of the Regulation A exemption, including a comparatively low $5 million offering limitation, a slow and costly filing process associated with Commission qualification, and the availability of other exemptions under the federal securities laws.

A recent study performs a comparison of Rule 506 offerings with Rule 505 and Rule 504 offerings that "suggests that the Blue Sky law preemption feature unique to Rule 506 offerings has greater value to issuers than the unique features of Rule 504 or Rule 505 offerings." *See* Ivanov, V., and S. Bauguess, 2013, Capital raising in the U.S.: An analysis of unregistered offerings using the Regulation D exemption, 2009-2012, *available at*: http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

See also Leading Biosciences Letter referencing recommendations supporting preemption from the SEC Government-Business Forum on Small Business Capital Formation in 2011 and 2012. Similar recommendations were made in the final report of the SEC Forum on Small Business Capital Formation in 2013, *available at*: http://www.sec.gov/info/smallbus/gbfor32.pdf.

qualification in multiple states will remain inefficient despite NASAA's implementation of a coordinated review program.[1022] More broadly, commenters as well as the GAO Report indicated that the existing regime of federal and state qualification has been a significant disincentive to the use of Regulation A for capital raising. With respect to time and compliance costs associated with state qualification, we believe preemption will likely reduce issuers' costs, although we lack comprehensive, independent data to estimate the precise amount. Only a few commenters provided specific monetary estimates of cost components. One commenter indicated that a revenue-generating business seeking to conduct a debt or equity offering under existing Regulation A can produce a conforming offering statement for state and federal review for approximately $50,000.[1023] According to another commenter, an issuer seeking state registration in 50 states would incur $80,000 to $100,000 in legal fees.[1024]

As one commenter noted, "[t]he challenges posed by the necessity of responding to both federal and state reviews and coordinating overlapping but potentially

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1022 *See* ABA BLS Letter; Andreessen/Cowen Letter; Almerico Letter; B. Riley Letter; BIO Letter; Campbell Letter; Canaccord Letter; CFIRA Letter 1; CFIRA Letter 2; Congressional Letter 3; DuMoulin Letter; Eng Letter; Fallbrook Technologies Letter; Gilman Law Letter; Guzik Letter 1; Hart Letter; Heritage Letter; Huynh Letter; IPA Letter; Edwards Wildman Letter; Kisel Letter; Kretz Letter; KVCF Letter; Ladd Letter 2; Leading Biosciences Letter; McCarter & English Letter; Methven Letter; Milken Institute Letter; MoFo Letter; Moloney Letter; New Food Letter; OTC Markets Letter; Paul Hastings Letter; Palomino Letter; Public Startup Co. (several letters); REISA Letter; Richardson Patel Letter; SBIA Letter; Staples Letter; Sugai Letter; SVB Letter; SVGS Letter; Unorthodocs Letter; U.S. Chamber of Commerce Letter; Verrill Dana Letter 2; Warren Letter; WR Hambrecht + Co Letter.

1023 *See* Groundfloor Letter. This commenter does not separately estimate the component of the cost due to state registration.

1024 *See* Letter from Paul Hastings, LLP, November 26, 2013.

Another commenter referenced one issuer's offering in the State of Washington in the amount of $750,000, with legal and accounting expenses estimated at $10,000 and the offering statement prepared without outside securities counsel and reviewed by the state within less than three months. *See* WDFI Letter. We do not believe that this cost estimate would be representative of costs for issuers registering in multiple states rather than a single state or for issuers involving outside securities counsel.

inconsistent comments and approvals have helped to make the existing Regulation A scheme unworkable for most smaller companies."[1025] Preemption of state securities review and qualification requirements for Tier 2 offerings will eliminate the burdens of responding to multiple reviews and thus provide for a more streamlined review process than exists under existing Regulation A. We expect that this, in turn, will make Tier 2 a more attractive capital raising option for issuers than existing Regulation A. Accordingly, we believe that by eliminating the requirement for state qualification, the final rules' preemption for Tier 2 offerings will result in greater use of amended Regulation A and thereby facilitate capital formation.

We recognize that commenters were divided on the issue of preemption, and those who objected to preemption of state securities review and qualification requirements cited benefits of state review.[1026] These include additional investor protection benefits arising from the localized knowledge and resources of state regulators that may aid in detecting fraud and facilitating issuer compliance.[1027] Some of these

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1025 *See* ABA BLS Letter.

1026 *See* ASD Letter; Cornell Clinic Letter; CFA Letter; CFA Institute Letter; Groundfloor Letter (arguing that the Commission should at least evaluate NASAA's coordinated review program for 12 months); Karr Tuttle Letter (acknowledging that state preemption may still be necessary for states not participating in NASAA's new coordinated review program); MCS Letter; Congressional Letter 2; Congressional Letter 4; NASAA Letter 1; NASAA Letter 2; NASAA Letter 3; NDBF Letter; NYIPB Letter; ODS Letter; PRCFI Letter; Scherber Letter; Secretaries of State Letter; Massachusetts Letter 1; Massachusetts Letter 2; Tavakoli Letter; TSSB Letter; WDFI Letter. One commenter stated its view that the Commission's proposal to preempt state regulatory review contained little consideration of the adverse costs that come with preemption, particularly the potential harm to investors, including harm investors might incur in the absence of state review in the area of small and thinly traded company offerings. *See* NASAA Letter 2.

1027 According to the 2014 NASAA enforcement report for 2013, securities violations related to unregistered securities sold by unlicensed individuals, including fraudulent offerings marketed through the Internet, remain an important enforcement concern. The report does not detail the number and category of violations by type of exemption from registration. *See* NASAA Enforcement Report, *available at*: http://www.nasaa.org/wp-content/uploads/2011/08/2014-Enforcement-Report-on-2013-Data_110414.pdf.

commenters also noted that the launch of NASAA's coordinated review program could streamline state review of offerings among participating states.

We acknowledge that the preemption of state qualification for Tier 2 offerings may have an impact on investor protection by eliminating one level of government review. In addition, merit-based review of offerings undertaken by some states may, in some cases, provide a level of investor protections different from the disclosure-based review undertaken by the Commission. State regulators may also have a better knowledge of local issuers, which could help in detecting fraud, especially in offerings by small, localized issuers. If investors require higher returns because of a perceived increase in the risk of fraud as a result of preemption, issuers may face a higher cost of capital. We are unable to predict how the amendments to Regulation A will affect the incidence of fraud that may arise in Regulation A offerings.

Several factors could mitigate these potential impacts. First, under Section 18(c), the states retain the ability to require the filing with them of any documents filed with the Commission and to investigate and bring enforcement actions with respect to fraudulent transactions. Second, we believe that amended Regulation A provides substantial protections to purchasers in Tier 2 offerings. Under the final rules, a Regulation A offering statement will continue to provide substantive narrative and financial disclosures about the issuer. Further, the final rules require offering statements to be qualified by the Commission before an issuer can conduct sales. Additional investor protections would be afforded by Regulation A's limitations on eligible issuers and bad actor disqualification provisions. The final rules for Tier 2 offerings provide further protection by requiring audited financial statements in the offering circular, ongoing reporting, and an investment limitation for purchasers who do not qualify as accredited investors.

The anticipated costs and benefits of state preemption will depend on key offering characteristics and issuer disclosure requirements. In particular, smaller offerings with a narrow investor base, such as those expected to be conducted under Tier 1, are more likely to be concentrated in fewer states and to benefit from geographic-specific information of state regulators as part of the review process.[1028] In contrast, larger offerings that seek a broader investor base, such as those expected to be conducted under Tier 2, are more likely to span multiple states. For Tier 2 offerings, the additional disclosure, audited financial statements, and transactional requirements relative to Tier 1 offerings are expected to provide an additional layer of investor protection, thus reducing the need for, and the expected benefits of, state review. State preemption for Tier 2 offerings should lower the compliance burdens imposed on issuers, and partly offset the costs of the increased disclosure and transactional requirements.

In general, we expect that issuers in Tier 1 offerings will face significantly lower offering costs as a result of not being subjected to the requirements of audited financial statements and ongoing reporting in the final rules. For these offerings, the local knowledge of state regulators is anticipated to add value to the review process to the

1028 We believe that issuers conducting Tier 1 offerings are more likely to be smaller companies whose businesses revolve around products, services, and a customer base that will more likely be located within a single state or region or a small number of geographically dispersed states. For example, based on our analysis, issuers of securities in the seven offering statements qualified by the Commission pursuant to Regulation A in 2014 indicated, on average, that they were seeking qualification in approximately five states per offering. The financial statements provided by these issuers further indicated, on average, that issuers had approximately $1.2 million in assets. No issuer indicated assets greater than $3.6 million, while two issuers indicated assets of less than $20,000. We recognize, however, that the characteristics of Tier 1 issuers in Tier 1 offerings relying on amended Regulation A in the future may differ from the characteristics of issuers that rely on existing Regulation A (for example, due to the higher maximum offering size for Tier 1 offerings in the final rules, compared with the maximum offering size in existing Regulation A).

extent that the issuer and the investor base are more likely to be localized. Thus, state qualification is more likely to have incremental investor protection benefits in Tier 1 offerings relative to Tier 2 offerings. Moreover, to the extent that Tier 1 offerings are more likely to be concentrated in fewer states, the cost of complying with state review procedures is likely to be diminished for these types of offerings.

Some commenters also pointed to the increased burden on Commission resources as a cost of state preemption.[1029] Compared with the baseline of the existing Regulation A, we anticipate a possible increase in the burden on Commission resources as a result of the increase in the Regulation A maximum offering size and other provisions intended to make Regulation A more attractive to prospective issuers. However, we believe this increase would also occur under the alternative of no state preemption for Tier 2 offerings. While state review of Tier 2 offerings could potentially confer incremental investor protection benefits to the extent a thorough Commission staff review is constrained by the increased burden on agency resources, overall we do not believe this effect will be substantial.

As an alternative to preemption for Tier 2 offerings, we considered the option of state qualification by one state or a subset of states or the option of state review under NASAA's coordinated review program.[1030] According to one commenter, the coordinated review program creates value by defining concrete service standards regarding the timeliness of various steps of the qualification process and by introducing more legal

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1029 *See* WDFI Letter and NASAA Letter 2.

1030 A description of NASAA's coordinated review program can be found at: http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/regulation-a-offerings/.

certainty.[1031] According to another commenter, the coordinated review program will eliminate costs of identifying and addressing individual state requirements and will provide an expedient registration process.[1032] We recognize that the coordinated review process ultimately may reduce processing time and streamline certain state requirements for issuers registering in multiple states when compared to independent review conducted by individual states. To date, however, we are aware of only a few issuers that have utilized the coordinated review process, so currently there is limited evidence available to us to evaluate the effectiveness and timeliness of coordinated review, especially in the event that more potential Regulation A issuers seek state qualification under this process. While it is possible that the coordinated review process may reduce costs for issuers as compared to individual state review and qualification, it would add cost and complexity for issuers seeking an exemption under amended Regulation A when compared to Commission review and qualification alone. To the extent that disclosure or merit review (if applicable to one of the participating jurisdictions in which the issuer is seeking to offer securities) standards of participating jurisdictions impose more extensive requirements on the issuer than Commission rules, some issuers may incur additional compliance expense or require additional time to address comments. In light of the recent efforts of state securities regulators to address concerns about the cost of state review and qualification of Regulation A offerings, however, the ongoing implementation and development of the coordinated review program, particularly as it may operate within Tier 1 offerings, may, in the future, provide additional data that will aid our future

[1031] *See* Groundfloor Letter.

[1032] *See* WDFI Letter.

evaluation of whether such a program could effectively operate within the context of larger, more national Tier 2 offerings.

We believe the final rules strike appropriate balance between mitigating cost and time demands on issuers and providing investor protections.

IV. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[1033] We published a notice requesting comment on the collection of information requirements in the Proposing Release, and we submitted these requirements to the Office of Management and Budget (OMB) for review in accordance with the PRA and its implementing regulations.[1034] While several commenters provided qualitative comments on the possible costs of the proposed rules and amendments, we did not receive comments on our PRA analysis and thus are adopting our estimates substantially as proposed, except as otherwise noted herein. The titles for the collections of information are:

(1) "Regulation A (Form 1-A and Form 2-A)" (OMB Control Number 3235-0286);

(2) "Form 1-K" (OMB Control Number 3235-0720);

(3) "Form 1-SA" (OMB Control Number 3235-0721);

(4) "Form 1-U" (OMB Control Number 3235-0722);

(5) "Form 1-Z" (OMB Control Number 3235-0723);

1033 44 U.S.C. 3501 *et seq.*

1034 44 U.S.C. 3507(d) and 5 CFR 1320.11.

(6) "Form 8-A" (OMB Control Number 3235-0056);

(7) "Form ID" (OMB Control Number 3235-0328); and

(8) "Form F-X" (OMB Control Number 3235-0379).[1035]

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. We applied for OMB control numbers for the new collections of information in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13, and OMB assigned a control number to each new collection, as specified above. Responses to these new collections of information would be mandatory for issuers raising capital under Regulation A.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collections of information. In deriving estimates of these hours and costs, we recognize that the burdens likely will vary among individual issuers based on a number of factors, including the stage of development of the business, the amount of capital an issuer seeks to raise, and the number of years since inception of the business. We believe that some issuers will experience costs in excess of the average and some issuers may experience less than the average costs.

B. Estimated Number of Regulation A Offerings

Data regarding current market practices may help identify the potential number of offerings that will be conducted in reliance on the final rules.[1036] We estimate that there

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1035 Although the final rules do not amend Form F-X, the total burden hours associated with that form may increase minimally as a result of the increased number of issuers relying on Regulation A. The Commission submitted the revised burden estimate for Form F-X to OMB for review in accordance with the PRA, although the potential minimal increase in burden hours was not noted in the Proposing Release.

are currently approximately 26 Regulation A offering statements filed by issuers per year.[1037] While it is not possible to predict with certainty the number of offering statements that will be filed by issuers relating to offerings made in reliance on amended Regulation A, for purposes of this PRA analysis, we estimate that the number will be 250 offerings statements per year. We base this estimate on (i) the current approximate number of annual Form 1-A filings under the existing rules, plus (ii) 65 percent of the estimated number of registered offering of securities that would have been eligible to be conducted under Regulation A,[1038] plus (iii) an additional 16 offerings that either would not otherwise occur or would have been conducted in reliance on another exemption from Securities Act registration, such as Regulation D.[1039] For purposes of this PRA analysis, we assume that each offering statement for a unique Regulation A offering that is filed represents a unique issuer, such that approximately 250 issuers are estimated to conduct Regulation A offerings each year under the final rules.

C. PRA Reporting and Cost Burden Estimates

1. Regulation A (Form 1-A and Form 2-A)

Currently, Regulation A requires issuers to file a Form 1-A: Offering Statement and a Form 2-A: Report of Sales and Uses of Proceeds with the Commission. Regulation A has one administrative burden hour associated with it, while current

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1036 *See* Section III. above for a discussion of the data regarding current market practices.

1037 From 2009 through 2014, there were 158 Form 1-As filed with the Commission.

1038 *See* figures and graphs for registered offerings cited in Section III.B.b. above (citing approximately 320 registered initial public offerings or follow-on offerings in calendar year 2014 that would have been potentially eligible to be conducted under amended Regulation A).

1039 *See* figures and graphs for registered and exempt offerings under Regulation D cited in Section III.B.1.a.ii. above (citing 11,228 issuances under Regulation D in calendar year 2014 that would have been potentially eligible to be conducted under amended Regulation A).

Form 1-A is estimated to take approximately 608 hours to prepare and Form 2-A is estimated to take approximately 12 hours to prepare.[1040] We do not anticipate that the one administrative burden hour associated with Regulation A will change as a result of the final rules. As discussed more fully below, we believe the burden hours associated with Form 1-A will change, while Form 2-A and the associated burden hours are eliminated as a result of today's proposal.[1041]

Under the final rules, an issuer conducting a transaction in reliance on Regulation A will be able to conduct either a Tier 1 offering or a Tier 2 offering.[1042] In either case, a Regulation A issuer will continue to be required to file with the Commission specified disclosures on a Form 1-A: Offering Statement.[1043] An issuer will also be required to file amendments to Form 1-A to address comments from Commission staff and to disclose material changes in the disclosure previously provided to the Commission or investors.[1044] In light of the electronic filing requirements for Regulation A offering materials discussed above,[1045] issuers are no longer required to file a manually signed copy of Form 1-A with the Commission.[1046] Issuers are, however, required to manually sign a copy of the offering statement before or at the time of non-public submission or filing that must be retained by the issuer for a period of five

1040 *See* Form 1-A at 1; Form 2-A at 1.

1041 *See* discussion in Section II.E. above.

1042 *See* discussion in Section II.B.3. above.

1043 *See* Rule 252.

1044 *See* Rule 252(f).

1045 *See* discussion in Section II.C.1. above.

1046 *See* discussion in Section II.C.3.d. above.

years and produced to the Commission, upon request.[1047] As issuers are currently required to manually sign the Form 1-A and file it with the Commission, we do not anticipate that the Form 1-A retention requirement adopted in the final rules will alter an issuer's compliance burden. As adopted, Form 1-A is similar to existing Form 1-A. In some instances, Form 1-A, contains fewer disclosure items than existing Form 1-A (*e.g.*, Part I (Notification) of Form 1-A does not require disclosure of "Affiliate Sales"; Part II (Offering Circular) of Form 1-A requires a description of the issuer's business for a period of three years, rather than five years). Part II of Form 1-A no longer permits disclosure in reliance on the Model A disclosure format, but directs issuers to follow the provisions of Model B (renamed "Offering Circular"), Part I of Form S-1, or, where applicable, Part I of Form S-11.[1048] In other instances, Form 1-A contains more disclosure items than existing Form 1-A (*e.g.*, Part I of Form 1-A requires additional disclosure of certain summary information regarding the issuer and the offering; Part II of Form 1-A requires more detailed management discussion and analysis of the issuer's liquidity and capital resources and results of operations). Form 1-A requires disclosure similar to that required in a Form S-1 registration statement for registered offerings under the Securities Act, but with fewer disclosure items (*e.g.*, it requires less disclosure about the compensation of officers and directors, and less detailed management discussion and analysis of the issuer's liquidity and capital resources and results of operations) and,

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1047 *See* Instruction 2 to Signatures in Form 1-A.

1048 *See* discussion at Section II.C.3.b. above.

under certain circumstances, Form 1-A does not require issuers to file audited financial statements.[1049]

We expect that issuers relying on Regulation A for Tier 1 offerings of up to $20 million in a 12-month period will largely be at a similar stage of development to issuers relying on existing Regulation A and will therefore not experience an increased compliance burden with Form 1-A. Given the increased annual offering amount limit of $50 million for Tier 2 offerings, however, we expect that issuers conducting such offerings pursuant to Regulation A may be at a more advanced stage of development than issuers offering securities under Tier 1. In such cases, the complexity of the required disclosure and, in turn, the burden of compliance with the requirements of Form 1-A may be greater for some issuers than for issuers relying on existing Form 1-A. We believe that the burden hours associated with amended Form 1 A will be greater than the current estimated 608 burden hours per response but will not be as great as the current estimated 972.32 burden hours per response for Form S-1. We therefore estimate that the total burden to prepare and file Form 1-A, as adopted today, including any amendments to the form, will increase on average across all issuers in comparison to existing Form 1-A to approximately 750 hours.[1050] We estimate that the issuer will internally carry 75 percent of the burden of preparation and that outside professionals retained by the issuer at an average cost of $400 per hour will carry 25 percent.[1051]

1049 *See* discussion in Section II.C.3.b(2). above.

1050 By comparison, we estimate the burden per response for preparing Form S-1 to be 972.32 hours. *See* Form S-1, at 1.

1051 The costs of retaining outside professionals may vary depending on the nature of the professional services. For purposes of this PRA analysis, however, we estimate that such costs will be an average of $400/hour, which is consistent with the rate we typically estimate for outside legal services used in connection with public company reporting.

We estimate that compliance with the requirements of a Form 1-A will require 187,500 burden hours (250 offering statements x 750 hours/offering statement) in aggregate each year, which corresponds to 140,625 aggregated hours carried by the issuer internally (250 offering statements x 750 hours/offering statement x 0.75) and aggregated costs of $18,750,000 (250 offering statements x 750 hours/offering statement x 0.25 x $400) for the services of outside professionals. As stated above, we estimate that the proposed amendments to Regulation A will not change the one administrative burden hour associated with the review of Regulation A and will require 250 burden hours (250 offering statements x one hour/offering statement) in aggregate each year, which corresponds to 187 aggregated hours carried by the issuer internally (250 offering statements x 0.75) and aggregated costs of $25,000 (250 offering statements x one hour/offering statement x 0.25 x $400) for services of outside professionals. When combined with the estimates for Form 1-A, the administrative burden hour results in an estimated total compliance burden of 751 hours per offering statement and an estimated annual compliance burden of 187,750 hours (250 offering statements x 751 hours/offering statement) and aggregated costs of $18,775,000 (250 offering statements x 751 hours/offering statement x 0.25 x $400).

2. Form 1-K: Annual Report

Under the final rules, any issuer that conducts a Tier 2 offering pursuant to Regulation A is required to file an annual report with the Commission on Form 1-K: Annual Report.[1052] A manually signed copy of Form 1-K must be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for

1052 *See* Rule 257(b)(1).

a period of five years and, if requested, produced to the Commission.[1053] We do not anticipate that the requirement to retain a manually signed copy of Form 1-K will affect an issuer's compliance burden. We believe the compliance burden associated with disclosure provided in Form 1-K will be less than the compliance burden associated with reporting required under Exchange Act Sections 13 or 15(d). We also believe the burden is more analogous to the compliance burden attendant to Form 1-A. Unlike the disclosure required in Form 1-A, however, offering-specific disclosure in Form 1-K is not required. Additionally, under certain circumstances, an issuer will be required to disclose information similar to the information previously required of issuers on Form 2-A.[1054] Unlike the disclosure previously required on Form 2-A, however, an issuer is not required to provide disclosure about the use of proceeds. We estimate that the burden to prepare and file a Form 1-K will be less than that required to prepare and file a Form 1-A. We estimate that compliance with Form 1-K will result in a burden of 600 hours per response.[1055] We further estimate that 75 percent of the burden of preparation will be carried by the issuer internally and that 25 percent will be carried by outside professionals retained by the issuer at an average cost of $400 per hour. While we do not know the exact number of issuers that will conduct Tier 2 offerings in reliance on amended Regulation A, we estimate 75 percent of all issuers filing a Form 1-A (or 188 issuers, 250

1053 *See* General Instruction C to Form 1-K and related discussion in Section II.E.1.c. above.

1054 *Id.*

1055 We estimate that the burden of preparing the information required by Form 1-K will be approximately 3/4 of the burden for filing Form 1-A due to the lack of offering-specific disclosure and an issuer's ability to update previously provided disclosure.

issuers x .75) will conduct Tier 2 offerings, enter the Regulation A ongoing reporting regime and therefore be required to file Form 1-K.[1056]

We estimate that compliance with the requirements of Form 1-K for issuers with an ongoing reporting obligation under Regulation A will require 112,800 burden hours (188 issuers x 600 hours/issuer) in the aggregate each year, which corresponds to 84,600 hours carried by the issuer internally (188 issuers x 600 hours/issuer x 0.75) and costs of $11,280,000 (188 issuers x 600 hours/issuer x 0.25 x $400) for the services of outside professionals.

3. Form 1-SA: Semiannual Report

Under the final rules, any issuer that conducts a Tier 2 offering in reliance on Regulation A will be required to file a semiannual report with the Commission on Form 1-SA: Semiannual Report.[1057] A manually signed copy of the Form 1-SA must be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to the Commission.[1058] We do not anticipate that the requirement to retain a manually signed copy of the Form 1-SA will affect an issuer's compliance burden. Issuers must provide semiannual updates on Form 1-SA, which, like a Form 10-Q,[1059] consists primarily of financial statements and MD&A. Unlike Form 10-Q, Form 1-SA does not require disclosure regarding quantitative and qualitative market risk or controls and

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1056 This estimate includes any special financial reports required to be filed on Form 1-K.

1057 *See* Rule 257(b)(3).

1058 *See* General Instruction C to Form 1-SA and related discussion in Section II.E.1.c(2). above.

1059 17 CFR 249.308a.

procedures.[1060] We estimate, however, that on balance the reduction in burden attributable to eliminating these two items in Form 1-SA will be offset by the increased burden associated with requiring financial statement disclosure covering six months, rather than three months. We therefore believe the per response compliance burden of Form 1-SA will be similar to the compliance burden for issuers filing a Form 10-Q under the Exchange Act.[1061] Therefore, for purposes of this PRA analysis, we estimate that the burden to prepare and file a Form 1-SA will equal the burden to prepare and file Form 10-Q, which we have previously estimated as 187.43 hours per response.[1062] Unlike Form 1-K, Form 1-SA does not require the provision of audited financial statements. We therefore believe, in comparison to Form 1-K, issuers filing a Form 1-SA will be able to prepare more of the required disclosures internally. Accordingly, we estimate that 85 percent of the burden of preparation will be carried by the issuer internally and that 15 percent will be carried by outside professionals retained by the issuer at an average cost of $400 per hour.

We estimate that compliance with the requirements of Form 1-SA for issuers with an ongoing reporting obligation under Regulation A will require 35,237burden hours (188 issuers x 187 hours/issuer/filing x 1 filing/year) in the aggregate each year, which corresponds to 29,952 hours carried by the issuer internally (188 issuers x 187 hours/issuer/filing x 1 filing/year x 0.85) and costs of $2,113,872 (188 issuers x 187

1060 *See* discussion in Section II.E.1.c(2). above.

1061 Issuers will, however, have to file Form 1-SA, a semiannual report, less frequently than Form 10-Q, a quarterly report.

1062 *See* Form 10-Q, at 1.

hours/issuer/filing x 1 filing/year x 0.15 x $400) for the services of outside professionals.[1063]

4. Form 1-U: Current Reporting

Under the final rules, any issuer that conducts a Tier 2 offering in reliance on Regulation A is required to promptly file current reports on Form 1-U with the Commission.[1064] A manually signed copy of the Form 1-U must be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to Commission.[1065] We do not anticipate that the requirement to retain a manually signed copy of the Form 1-U will affect an issuer's compliance burden. Issuers are required to file such reports in the event they experience certain corporate events, much the same way as issuers subject to an ongoing reporting obligation under the Exchange Act file current reports on Form 8-K.[1066] The requirement to file a Form 1-U, however, will be triggered by significantly fewer corporate events than those that trigger a reporting requirement on a Form 8-K, and the form itself will be slightly less burdensome for issuers to fill out.[1067] Thus, the frequency of filing the required disclosure and the burden to prepare and file a Form 1-U will be considerably less than for Form 8-K. We estimate that the burden to prepare and file each current report will be 5 hours. While we do not know for certain how often an issuer would experience a corporate event that would trigger a current

1063 This estimate includes any special financial reports required to be filed on Form 1-SA.

1064 *See* Rule 257(b)(4).

1065 *See* General Instruction C to Form 1-U and related discussion in Section II.E.1.c(3). above.

1066 We estimate the burden per response for preparing a Form 8-K to be 5.71 hours. *See* Form 8-K, at 1.

1067 *See* discussion at Section II.E.1.c(3). above.

report filing on Form 1-U, we estimate that many issuers may not experience a corporate event that triggers reporting, while others may experience multiple events that trigger reporting. On average, we estimate that an issuer will be required to file one current report annually.[1068] Therefore, we estimate that an issuer's compliance with Form 1-U will result in an annual aggregate burden of 5 hours (1 current report annually x 5 hours per current report) per issuer.

As with Form 1-SA, we estimate that 85 percent of the burden of preparation will be carried by the issuer internally and that 15 percent will be carried by outside professionals retained by the issuer at an average cost of $400 per hour. We estimate that compliance with the requirements of Form 1-U will require 940 burden hours (188 issuers x 1 current report annually x 5 hours per current report) in aggregate each year, which corresponds to 799 hours carried by the issuer internally (188 issuers x 5 hours/issuer/year x 0.85) and costs of $56,400 (188 issuers x 5 hours/issuer/year x 0.15 x $400) for the services of outside professionals.

5. Form 1-Z: Exit Report

Under the final rules, all Regulation A issuers are required to file a notice under cover of Form 1-Z: Exit Report. Issuers conducting Tier 1 offerings will be required to file Part I of Form 1-Z that discloses information similar to the information previously required of issuers on Form 2-A.[1069] Issuers conducting Tier 2 offerings will also be required to disclose the same information as issuers conducting Tier 1 offerings in Part I

1068 We have previously estimated that on average issuers file one current report on Form 8-K annually. Although we believe that the frequency of filing a Form 1-U will be considerably less than a Form 8-K, we are estimating that each issuer will be required to file one Form 1-U per year.

1069 *See* discussion in Section II.E.4.b. above.

of Form 1-Z, unless previously reported by the issuer on Form 1-K. Issuers conducting Tier 2 offerings will also be required to complete Part II of Form 1-Z in order to notify investors and the Commission that it will no longer file and provide annual reports pursuant to the requirements of Regulation A.[1070] In Tier 2 offerings, an issuer's obligations to file ongoing reports could be terminated at any time after completion of reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers and sales made in reliance on a qualified offering statement are not ongoing.[1071] A manually signed copy of the Form 1-Z must be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to Commission.[1072] We do not anticipate that the requirement to retain a manually signed copy of the Form 1-Z will affect an issuer's compliance burden. We estimate that all of the issuers conducting Tier 1 offerings (63 issuers, 250 total estimated issuers x 0.25) and 50 percent of issuers conducting Tier 2 offerings (94 issuers, 188 issuers with an ongoing reporting obligation x 0.50) will file a Form 1-Z in the second fiscal year after qualification of the offering statement (157 total issuers, 63 + 94). Although we believe that the vast majority of issuers subject to ongoing reporting under Regulation A will qualify for termination in the second fiscal year after qualification, we believe that only half or 50 percent of such issuers will actually choose to terminate their reporting obligations. An issuer may have many reasons for continuing its reporting obligations, such as a desire to facilitate

1070 *See* Rule 257(d).

1071 *See* Rule 252(f)(2).

1072 *See* Instruction to Form 1-Z and related discussion in Section II.E.4.b. above.

continued quotations in the over-the-counter (OTC) markets pursuant to revisions to Exchange Act Rule 15c2-11.[1073]

The Form 1-Z is similar to the Form 15 that issuers file to provide notice of termination of the registration of a class of securities under Exchange Act Section 12(g) or to provide notice of the suspension of the duty to file reports required by Exchange Act Sections 13(a) or 15(d).[1074] Therefore, we estimate that compliance with the Form 1-Z will result in a similar burden as compliance with Form 15 that is, a burden of 1.50 hours per response. We estimate that 100% of the burden will be carried by the issuer internally. We estimate that compliance with Form 1-Z will result in a burden of 235.5 hours (157 issuers filing Form 1-Z x 1.50 hours/issuer) in the aggregate.

6. Form 8-A: Short Form Registration under the Exchange Act

Under the final rules, Regulation A issuers in Tier 2 offerings that elect to list securities offered pursuant to a qualified offering statement on a national securities exchange or that seek to register the class of securities offered pursuant to a qualified offering statement under the Exchange Act may do so by filing a Form 8-A (short form) registration statement with the Commission.[1075] In such circumstances, an issuer will be required to comply with the form requirements of Form 8-A, which will generally allow issuers to incorporate by reference in the form information provided in the related Form 1-A. While we do not know the exact number of issuers conducting Tier 2 offerings that will seek to register a class of securities under the Exchange Act at or near

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1073 *See* discussion in Section II.E.2. above.

1074 We currently estimate the burden per response for preparing a Form 15 to be 1.50 hours. *See* Form 15 at 1.

1075 *See* discussion in Section II.E.3. above.

the time of qualification of an offering statement, for purpose of this PRA analysis, we estimate 2 percent of all issuers filing a Form 1-A (or 5 issuers, 250 issuers x .02) will elect to register a class of securities under the Exchange Act and file a Form 8-A.

The final rules do not alter the burden hour per response of Form 8-A, but rather amend the existing Form 8-A to permit issuers in Tier 2 offerings to rely on the form. Therefore, we estimate that compliance with the Form 8-A will not change as a result of the final rules, a burden of 3 hours per response.[1076] We estimate that compliance with Form 8-A by issuers conducting a Tier 2 offering will result in a burden of 15 hours (5 issuers filing Form 8-A x 3 hours/issuer) in aggregate each year. We estimate that 100% of the burden will be carried by the issuer internally.

7. Form ID Filings

Under the final rules, an issuer will be required to file specified disclosures with the Commission on EDGAR.[1077] We anticipate that many issuers relying on Regulation A for the first time will not have previously filed an electronic submission with the Commission and so will need to file a Form ID. Form ID is the application form for access codes to permit filing on EDGAR. The final rules will not change the form itself, but we anticipate that the number of Form ID filings will increase due to an increase in issuers relying on Regulation A. For purposes of this PRA analysis, we estimate that 75 percent of the issuers who seek to offer and sell securities in reliance on amended Regulation A will not have previously filed an electronic submission with the Commission and will, therefore, be required to file a Form ID. As noted above, we

1076 17 CFR 249.208a.

1077 *See* Rules 252 and 257.

estimate that approximately 250 issuers per year will seek to offer and sell securities in reliance on Regulation A, which corresponds to approximately 188 additional Form ID filings. We estimate that 100% of the burden will be carried by the issuer internally. As a result, we estimate the additional annual burden will be approximately 28.20 hours (188 filings x 0.15 hours/filing).[1078]

8. Form F-X

Under the final rules, Canadian issuers are required to file a Form F-X, which furnishes to the Commission a written irrevocable consent and power of attorney at the time of filing the offering statement required by Rule 252. It is used to appoint an agent for service of process by Canadian issuers eligible to use Regulation A, issuers registering securities on Forms F-8 or F-10 under the Securities Act or filing periodic reports on Form 40-F under the Exchange Act, as well as in certain other circumstances.

The proposed rules will not change Form F-X itself, but will amend the rules to allow for the form to be filed electronically for offerings under Regulation A. Canadian companies are the only type of issuer that will be required to use this form under the proposed rules and we estimate that 100% of the burden will be carried by the issuer internally. We estimate that approximately 2 percent of issuers utilizing amended Regulation A will be Canadian companies (or 5 responses, 250 issuers x 0.02) resulting in an annual burden of approximately 10 hours (2 hours per response x 5 responses).[1079]

1078 We currently estimate the burden associated with Form ID is 0.15 hours per response. *See* Form ID at 1.

1079 In this regard, we note that no Canadian issuers filed a Form 1-A in 2013.

D. Collections of Information are Mandatory

The collections of information required under Rules 251 through 263 will be mandatory for all issuers seeking to rely on the Regulation A exemption. Responses on Form 1-A, Form 1-K, Form 1-SA, Form 1-U and Form 1-Z will not be kept confidential, although an issuer may request confidential treatment for non-publicly submitted offering materials, or any portion thereof, for which it believes an exemption from the FOIA exists.[1080] It is anticipated that most material not subject to a confidential treatment request will be made public when the offering is qualified. A Form 1-A that is non-publicly submitted by an issuer and later abandoned before being publicly filed with the Commission and responses on Form ID will, however, remain non-public, absent a request for such information under the Freedom of Information Act.[1081]

V. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act, 5 U.S.C. 603. It relates to the following:

- amendments to Rule 157(a), Rules 251 through 263 of Regulation A, Rule 505 of Regulation D, Form 1-A, Form 8-A, Rule 30-1 of the Commission's organizational rules, Rule 4a-1 under the Trust Indenture Act, Rule 12g5-1 and Rule 15c2-11 under the Exchange Act, and Item 101 of Regulation S-T;
- new Forms 1-K, 1-SA, 1-U, and 1-Z; and
- the rescission of Form 2-A.

1080 *See* Commission Rule 83, 17 CFR 200.83, and Securities Act Rule 406, 17 CFR 230.406.

1081 5 U.S.C. 552. The Commission's regulations that implement the Freedom of Information Act are at 17 CFR 200.80 *et seq.*

An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Need for the Rules

The rule amendments, new forms, and rescission of Form 2-A are designed to implement the requirements of Section 3(b)(2) of the Securities Act and to make certain conforming changes based on our amendments to Regulation A. Section 3(b)(2) directs the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to $50 million of securities within a 12-month period, subject to various additional terms and conditions set forth in Section 3(b)(2) or as provided for by the Commission as part of the rulemaking process.

Our primary objective is to implement Section 401 of the JOBS Act by expanding and updating Regulation A in a manner that makes public offerings of up to $50 million less costly and more flexible while providing a framework for regulatory oversight to protect investors. In so doing, we have crafted a revision of Regulation A that both promotes small company capital formation and provides for meaningful investor protection. We believe that issuers, particularly small businesses, benefit from having a wide range of capital-raising strategies available to them, and that an expanded and updated Regulation A could serve as a valuable option that augments the exemptions from registration more frequently relied upon, thereby facilitating capital formation for small businesses.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed rules. We did not receive any comments specifically addressing the IRFA. We did, however, receive comments from members of the public on matters that could potentially impact small entities. These comments are discussed at length by topic in the corresponding subsections of Section II. above.

While the proposed rules contemplated that small entities would be able to elect to proceed under the requirements of either Tier 1 or Tier 2, as discussed more fully below, an entity considered a small business under our rules would only be required to file ongoing reports under Regulation A if it elected to conduct a Tier 2 offering.[1082] The following discussion therefore focuses on the suggestions of commenters, as they relate to the proposed and final requirements for Tier 1 offerings, which is the tier most likely to be relied upon by small entities.[1083]

Many commenters recommended making changes to proposed rules that, in their view, would make Regulation A a more viable capital raising option for smaller issuers.[1084] Some commenters recommended improving the utility of Regulation A for smaller issuers by preempting state regulation of Tier 1 offerings.[1085] Others, however,

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1082 The distinction between a Tier 1 offering and Tier 2 offering is discussed in Section II. above.

1083 For a more comprehensive discussion of commenter suggestions as to the proposed rules for both Tier 1 and Tier 2 that could potentially impact small entities, *see* Section II. above.

1084 Andreessen/Cowen Letter; BDO Letter; Bernard Letter; Campbell Letter; CAQ Letter; Public Startup Co. Letter 1; Deloitte Letter; E&Y Letter; Guzik Letter 1; Heritage Letter; ICBA Letter; KPMG Letter; McGladrey Letter; Milken Institute Letter; Ladd Letter 2; SVB Financial Letter; Verrill Dana Letter 1; WR Hambrecht + Co Letter.

1085 Andreessen/Cowen Letter; Bernard Letter; Campbell Letter; Public Startup Co. Letter 1; Guzik Letter 1; Heritage Letter; Milken Institute Letter; Ladd Letter 2; SVB Financial Letter.

opposed preemption for all Regulation A offerings.[1086] Some commenters recommended that we adopt a third tier, either expressly or through fleixble applicability of the proposed tier requirements.[1087] Some commenters suggested that raising the offering limit of Tier 1 from $5 million to $10 million or more would make Tier 1 more useful,[1088] while others recommended including various forms of ongoing disclosure at a level lower than what was proposed to be required for Tier 2.[1089] One commenter suggested reducing the Tier 1 narrative disclosure obligations, particularly for offerings of $2 million or less, so that such requirements would be more appropriately tailored for smaller issuers.[1090] Several commenters made recommendations with respect to the financial statement and auditing requirements in Form 1-A, as they relate to the requirements for Tier 1.[1091]

The final rules for Regulation A take into account some of the suggestions by commenters on ways to make Tier 1 more useful for small entities. For example, the final rules raise the offering limit of Tier 1 to $20 million. Also, with respect to the offering circular narrative disclosure requirements,[1092] we have adopted certain additional scaled disclosure requirements for Tier 1 that are intended to lessen the compliance obligations for smaller issuers. We are further providing issuers under both tiers with the accommodation provided to emerging growth companies in Securities Act Section 7(a) to

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1086 *See* fn. 772 above.

1087 *See, e.g.*, Public Startup Co. Letter 1.

1088 Guzik Letter 1; ICBA Letter.

1089 Guzik Letter 1 (suggesting that Tier 1 ongoing disclosure requirements could parallel Tier 2's requirements, but without the requirement for semiannual reports); Ladd Letter 2; Public Startup Co. Letters 1 and 5; SVB Financial Letter.

1090 Campbell Letter.

1091 BDO Letter; CAQ Letter; Deloitte Letter; E&Y Letter; KPMG Letter; McGladrey Letter.

1092 *See* Section II.C.3.b(1). above.

use the extended transition periods applicable to private companies for complying with new or revised accounting standards under U.S. GAAP. Additionally, we have provided Tier 1 issuers with additional flexibility with respect to auditor independence standards.

As noted in Section II.H.3. above, however, we do not agree with the position of some commenters that preemption of state securities laws registration and qualification requirements is necessary or appropriate for Tier 1 offerings.[1093] We note that some commenters who suggested that preemption of state securities laws may improve the attractiveness of Tier 1 offerings did so on the condition that other aspects of the tier should change accordingly, namely requiring Tier 1 issuers to provide audited financial statements in the offering statement and possibly on an ongoing basis. For the reasons discussed in Section II.D.3.b(2)(c). above, we have not adopted such changes in Tier 1.

Additionally, as noted in Section II.I. above, we do not believe that the creation of a third tier, as suggested by some commenters, would meaningfully alter a smaller entity's options for capital formation under Regulation A. While a third tier may provide issuers with some additional flexibility for capital formation under Regulation A, this additional flexibility would have potential costs. For example, a third tier may unnecessarily complicate compliance with Regulation A for smaller entities, and could potentially confuse investors as to the type of Regulation A offering an issuer was undertaking and the type of information such investor could expect to receive as a result, thereby lessening the viability of the exemption as a whole. For this reason, we are not adopting a third or intermediate tier in Regulation A.

1093 *See* Section II.H.3. above.

In the light of the changes discussed above, we believe that the final rules we are adopting today provide smaller issuers with an appropriately tailored regulatory regime that takes into account the needs of small entities to have a viable capital formation option in Regulation A, while maintaining appropriate investor protections.

C. Small Entities Subject to the Rules

For purposes of the Regulatory Flexibility Act, under our rules, an issuer (other than an investment company) is a "small business" or "small organization" if it has total assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed $5 million.[1094]

While Regulation A is available for offerings of up to $50 million in securities in a 12-month period, only offerings up to $5 million in securities in a 12-month period will constitute offerings by small entities under the definition set forth above. It is difficult to predict the number of small entities that will use Regulation A due to the many variables included in the amendments. Nevertheless, we believe that the final rules for Regulation A will increase the overall number of Regulation A offerings of $5 million or less due to the ability to non-publicly submit draft offering statements for review by the Commission's staff, the expanded use of solicitation of interest materials, the ability to electronically file and transmit offering statements and offering circulars, the potential for preemption of state regulatory review if the issuer elects to conduct a Tier 2 offering, and other significant changes summarized in Section II. above.

1094 Securities Act Rule 157 [17 CFR 230.157]. We note that currently this rule refers to "the dollar limitation prescribed by Section 3(b) of the Securities Act." The JOBS Act amended Section 3(b) of the Securities Act. The former Section 3(b) is now Section 3(b)(1), and a new Section 3(b)(2) was added. To retain the meaning of Rule 157, we are adopting a technical correction to replace the reference to "Section 3(b)" with a reference to "Section 3(b)(1)."

Regulation A is currently limited to offerings with an aggregate offering price and aggregate sales of $5 million or less.[1095] From 2009 through 2014, 158 issuers filed offering statements and 36 offering statements were qualified by the Commission, or an average of approximately six qualified offering statements per year. Of the 36 offering statements that were qualified, 28 included financial statements indicating that the issuer had total assets of $5 million or less (as of the most recent balance sheet included in such issuer's offering statement at the time of qualification), or an average of approximately five qualified offering statements per year in which the issuer indicated it had total assets of $5 million or less. Based on these data, and for the reasons discussed above, we believe that at least five small businesses will conduct offerings under Regulation A per year.

D. Reporting, Recordkeeping, and Other Compliance Requirements

As discussed above in Section II., the final rules include reporting, recordkeeping and other compliance requirements. In particular, the final rules impose certain reporting requirements on issuers offering and selling securities in a transaction relying on the exemption provided by Section 3(b) and Regulation A. The final rules require that issuers relying on the exemption file with the Commission certain information specified in Form 1-A about the issuer and the offering, including the issuer's contact information; use of proceeds from the offering; price or method for calculating the price of the securities being offered; business and business plan; property; financial condition and results of operations; directors, officers, significant employees and certain beneficial

[1095] As explained in Section II.B.3. above, aggregate sales under Regulation A include prior sales generated from Regulation A offerings that occurred in the 12 months preceding the current offering.

owners; material agreements and contracts; and past securities sales.[1096] Such issuers are also required to provide information on the material factors that make an investment in the issuer speculative or risky; dilution; the plan of distribution for the offering; executive and director compensation; conflicts of interest and related party transactions; and financial statements. Similar to existing Regulation A, for Tier 1 offerings, Form 1-A does not require the financial statements to be audited unless the issuer has already had them audited for another purpose.

As discussed above in Section II.E.1.c., issuers conducting Tier 2 offerings are also required to file annual reports on new Form 1-K, semiannual updates on new Form 1-SA, current event reporting on new Form 1-U, and to provide notice to the Commission of the termination of their ongoing reporting obligations on new Form 1-Z.

An issuer subject to the Tier 2 periodic and current event reporting described above is required to provide information annually on Form 1-K, including the issuer's business and business plan; conflicts of interest and related party transactions; executive and director compensation; financial condition and results of operations; and audited financial statements. The semiannual update on Form 1-SA consists primarily of unaudited, interim financial statements for the issuer's first two fiscal quarters and information regarding the issuer's financial condition and results of operations. The current event reporting on Form 1-U requires issuers to disclose certain major developments, including changes of control; changes in the principal executive officer and principal financial officer; fundamental changes in the nature of business; material transactions or corporate events; unregistered sales of five percent or more of outstanding

[1096] *See* discussion in Section II.C.3.b. above.

equity securities; changes in the issuer's certifying accountant; and non-reliance on previous financial statements.

Form 1-Z is required for issuers in both Tier 1 and Tier 2 offerings to report summary information about a completed or terminated Regulation A offering. Issuers conducting Tier 2 offerings also will be subject to the additional provision in Form 1-Z that relates to the voluntary termination of an issuer's continuous reporting obligations under Tier 2; however, we expect its use by small entities will be limited. .

Although we estimated in the Proposing Release that approximately 188 issuers would enter the proposed Tier 2 ongoing reporting regime every year, we believe that very few small businesses will do so. A small business under our rules will only be required to file ongoing reports under Regulation A if it elects to conduct a Tier 2 offering.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the final amendments and rules, we considered the following alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rules, or any parts of the rules, for small entities.

We considered whether it is necessary or appropriate to establish different compliance or reporting requirements, timetables, or to clarify, consolidate, or simplify compliance and reporting requirements under the final rules for small entities. We have made several changes from the proposal that may reduce compliance burdens on small entities. For example, in response to public comment, the final rules provide for the further scaling of disclosure items pertaining to executive compensation and related party transactions for entities offering securities pursuant to Tier 1, which are likely to be smaller entities.

With respect to using performance rather than design standards, we used performance standards to the extent appropriate under the statute. For example, issuers have the flexibility to customize the presentation of certain disclosures in their offering statements.[1097]

We also considered whether there should be an exemption from coverage of the rules, or any parts of the rules, for small entities. As discussed above, we are adopting different compliance reporting requirements for issuers that qualify $20 million or less in securities annually under Tier 1. Those issuers, which are more likely to be small entities, are not subject to ongoing reporting requirements and the requirement to provide audited financial statements, although such entities retain the flexibility to comply with more rigorous initial and ongoing compliance obligations if they so choose. While audited financial statements are not a Tier 1 requirement, in comparison to the proposed rules, the final rules provide certain additional flexibility as to the independence standards required to be followed by auditors of financial statements for issuers of less

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1097 *See* Section II.C.3.b. above.

than $20 million that conduct Tier 1 offerings—to the extent an issuer elects to provide audited financial statements—by allowing such auditors to comply with the independence standards of either the AICPA or Article 2 of Regulation S-X. We believe that further distinctions in compliance requirements for Form 1-A users beyond the different sets of requirements for Tier 1 and Tier 2 issuers may lead to investor confusion or reduced investor confidence in Regulation A offerings, especially considering that the disclosure requirements are already less than what is required by Form S-1 for registered offerings. Further, we anticipate that the burden for preparing a Form 1-A should be less for companies at an earlier stage of development and with less extensive operations that are likely to be small entities.[1098] For these reasons, we believe that small entities should be covered by the final rules to the extent specified above.

VI. STATUTORY BASIS AND TEXT OF AMENDMENTS

The amendments and forms contained in this document are being adopted under the authority set forth in Sections 3(b), 19 and 28 of the Securities Act of 1933, as amended, Sections 12, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Section 304 of the Trust Indenture Act of 1939, as amended.

1098 *See* discussion in Section IV.A.1. above.

List of Subjects

17 CFR Part 200

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

17 CFR Parts 230, 232, 239, 240, 249 and 260

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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

1. The authority citation for part 200 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77o, 77s, 77z-3, 77sss, 78d, 78d-1, 78d-2, 78o-4, 78w, 78*ll*(d), 78mm, 80a-37, 80b-11, 7202, and 7211 et seq., unless otherwise noted.

* * * * *

2. § 200.30-1 is amended to:

   a. Revise paragraphs (b)(2) and (b)(3) and

   b. Add paragraph (b)(4).

The revisions and addition read as follows:

§ 200.30-1 Delegation of authority to Director of Division of Corporation Finance.

* * * * *

(b) * * *

(2) to determine the date and time of qualification for offering statements and amendments to offering statements pursuant to Rule 252(e) (§230.252(e) of this chapter);

(3) to consent to the withdrawal of an offering statement or to declare an offering statement abandoned pursuant to Rule 259 (§ 230.259 of this chapter); and

(4) to deny a Form 1-Z filing pursuant to Rule 257 (§ 230.257 of this chapter).

* * * * *

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

3. The authority citation for part 230 is revised to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. No. 112-106, § 201(a), § 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

4. § 230.157 paragraph (a) is revised to read as follows:

§ 230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.

* * * * *

(a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, mean an issuer whose total assets on the last day of its most recent fiscal year were $5 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b)(1) of the Securities Act.

* * * * *

5. §§ 230.251 through 230.263 are revised to read as follows:

§ 230.251 Scope of exemption.

(a) *Tier 1 and Tier 2.* A public offer or sale of eligible securities, as defined in Rule 261 (§ 230.261), pursuant to Regulation A shall be exempt under section 3(b) from the registration requirements of the Securities Act of 1933 (the "Securities Act") (15 U.S.C. 77a *et seq.*).

(1) *Tier 1.* Offerings pursuant to Regulation A in which the sum of all cash and other consideration to be received for the securities being offered ("aggregate offering price") plus the gross proceeds for all securities sold pursuant to other offering statements within the 12 months before the start of and during the current offering of securities ("aggregate sales") does not exceed $20,000,000, including not more than $6,000,000 offered by all selling securityholders that are affiliates of the issuer ("Tier 1 offerings").

(2) *Tier 2.* Offerings pursuant to Regulation A in which the sum of the aggregate offering price and aggregate sales does not exceed $50,000,000, including not more than $15,000,000 offered by all selling securityholders that are affiliates of the issuer ("Tier 2 offerings").

(3) *Additional limitation on secondary sales in first year.* The portion of the aggregate offering price attributable to the securities of selling securityholders shall not exceed 30% of the aggregate offering price of a particular offering in:

(i) The issuer's first offering pursuant to Regulation A; or

(ii) Any subsequent Regulation A offering that is qualified within one year of the qualification date of the issuer's first offering.

NOTE: Where a mixture of cash and non-cash consideration is to be received, the aggregate offering price must be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price or aggregate sales attributable to cash received in a foreign currency must be translated into United States currency at a currency exchange rate in effect on, or at a reasonable time before, the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price or aggregate sales must be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Valuations of non-cash consideration must be reasonable at the time made. If convertible securities or warrants are being offered and such securities are convertible, exercisable, or exchangeable within one year of the offering statement's qualification or at the discretion of the issuer, the underlying securities must also be qualified and the aggregate offering price must include the actual or maximum estimated conversion, exercise, or exchange price of such securities.

(b) *Issuer.* The issuer of the securities:

(1) Is an entity organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia, with its principal place of business in the United States or Canada;

(2) Is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78a *et seq.*) immediately before the offering;

(3) Is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with or acquire an

unidentified company or companies;

(4) Is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48));

(5) Is not issuing fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights;

(6) Is not, and has not been, subject to any order of the Commission entered pursuant to Section 12(j) of the Exchange Act (15 U.S.C. 78*l*(j)) within five years before the filing of the offering statement;

(7) Has filed with the Commission all reports required to be filed, if any, pursuant to Rule 257 (§ 230.257) during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports); and

(8) Is not disqualified under Rule 262 (§ 230.262).

(c) *Integration with other offerings.* Offers or sales made in reliance on this Regulation A will not be integrated with:

(1) Prior offers or sales of securities; or

(2) Subsequent offers or sales of securities that are:

(i) Registered under the Securities Act, except as provided in Rule 255(e) (§ 230.255(e));

(ii) Exempt from registration under Rule 701 (§ 230.701);

(iii) Made pursuant to an employee benefit plan;

(iv) Exempt from registration under Regulation S (§ 230.901-905);

(v) Made more than six months after the completion of the Regulation A offering; or

(vi) Exempt from registration under Section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)).

NOTE: If these safe harbors do not apply, whether subsequent offers and sales of securities will be integrated with the Regulation A offering will depend on the particular facts and circumstances.

(d) *Offering conditions*—(1) *Offers.*

(i) Except as allowed by Rule 255 (§ 230.255), no offer of securities may be made unless an offering statement has been filed with the Commission.

(ii) After the offering statement has been filed, but before it is qualified:

(A) Oral offers may be made;

(B) Written offers pursuant to Rule 254 (§ 230.254) may be made; and

(C) Solicitations of interest and other communications pursuant to Rule 255 (§ 230.255) may be made.

(iii) Offers may be made after the offering statement has been qualified, but any written offers must be accompanied with or preceded by the most recent offering circular filed with the Commission for such offering.

(2) *Sales.*

(i) No sale of securities may be made:

(A) Until the offering statement has been qualified;

(B) By issuers that are not currently required to file reports pursuant to Rule 257(b) (§ 230.257(b)), until a Preliminary Offering Circular is delivered at least 48 hours before the sale to any person that before qualification of the offering statement had indicated an interest in purchasing securities in the offering, including those persons that responded to an issuer's solicitation of interest materials; and

(C) In a Tier 2 offering of securities that are not listed on a registered national securities exchange upon qualification, unless the purchaser is either an accredited investor (as defined in Rule 501 (§ 230.501)) or the aggregate purchase price to be paid by the purchaser for the securities (including the actual or maximum estimated conversion, exercise, or exchange price for any underlying securities that have been qualified) is no more than ten percent (10%) of the greater of such purchaser's:

(*1*) Annual income or net worth if a natural person (with annual income and net worth for such natural person purchasers determined as provided in Rule 501 (§ 230.501)); or

(*2*) Revenue or net assets for such purchaser's most recently completed fiscal year end if a non-natural person.

(D) The issuer may rely on a representation of the purchaser when determining compliance with the ten percent (10%) investment limitation in this paragraph (d)(2)(i)(C), provided that the issuer does not know at the time of sale that any such representation is untrue.

NOTE: When securities underlying warrants or convertible securities are being qualified pursuant to Tier 2 of Regulation A one year or more after the qualification of an offering for which investment limitations previously applied, purchasers of the underlying securities for which investment limitations would apply at that later date may determine compliance with the ten percent (10%) investment limitation using the conversion, exercise, or exchange price to acquire the underlying securities at that later time without aggregating such price with the price of the overlying warrants or convertible securities.

(ii) In a transaction that represents a sale by the issuer or an underwriter, or a sale by a dealer within 90 calendar days after qualification of the offering statement, each underwriter or dealer selling in such transaction must deliver to each purchaser from it, not later than two business days following the completion of such sale, a copy of the Final Offering Circular, subject to the following provisions:

(A) If the sale was by the issuer and was not effected by or through an underwriter or dealer, the issuer is responsible for delivering the Final Offering Circular as if the issuer were an underwriter;

(B) For continuous or delayed offerings pursuant to paragraph (d)(3) of this rule, the 90 calendar day period for dealers shall commence on the day of the first bona fide offering of securities under such offering statement;

(C) If the security is listed on a registered national securities exchange, no offering circular need be delivered by a dealer more than 25 calendar days after the later of the qualification date of the offering statement or the first date on which the security was bona fide offered to the public;

(D) No offering circular need be delivered by a dealer if the issuer is subject, immediately prior to the time of the filing of the offering statement, to the reporting requirements of Rule 257(b) (§ 230.257(b)); and

(E) The Final Offering Circular delivery requirements set forth in this paragraph may be satisfied by delivering a notice to the effect that the sale was made pursuant to a qualified offering statement that includes the uniform resource locator ("URL"), which, in the case of an electronic-only offering, must be an active hyperlink, where the Final Offering Circular, or the offering statement of which such Final Offering Circular is part, may be obtained on the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") and contact information sufficient to notify a purchaser where a request for a Final Offering Circular can be sent and received in response.

(3) *Continuous or delayed offerings.* (i) Continuous or delayed offerings may be made under this Regulation A, so long as the offering statement pertains only to:

(A) Securities that are to be offered or sold solely by or on behalf of a person or persons other than the issuer, a subsidiary of the issuer, or a person of which the issuer is a subsidiary;

(B) Securities that are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;

(C) Securities that are to be issued upon the exercise of outstanding options, warrants, or rights;

(D) Securities that are to be issued upon conversion of other outstanding securities;

(E) Securities that are pledged as collateral; or

(F) Securities the offering of which will be commenced within two calendar days after the qualification date, will be made on a continuous basis, may continue for a period in excess of 30 calendar days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the initial qualification date. These securities may be offered and sold only if not more than three years have elapsed since the initial qualification date of the offering statement under which they are being offered and sold; provided, however, that if a new offering statement has been filed pursuant to this paragraph (d)(3)(i)(F), securities covered by the prior offering statement may continue to be offered and sold until the earlier of the qualification date of the new offering statement or 180 calendar days after the third anniversary of the initial qualification date of the prior offering statement. Before the end of such three-year period, an issuer may file a new offering statement covering the securities. The new offering statement must include all the information that would be required at that time in an offering statement relating to all offerings that it covers. Before the qualification date of the new offering statement, the issuer may include as part of such new offering statement any unsold securities covered by the earlier offering statement by identifying on the cover page of the new offering circular, or the latest amendment, the amount of such unsold securities being included. The offering of securities on the earlier offering statement will be deemed terminated as of the date of qualification of the new offering statement. Securities may be sold pursuant to this paragraph (d)(3)(i)(F) only if the issuer is current in its annual and semiannual filings pursuant to Rule 257(b) (§230.257(b)), at the time of such sale.

(ii) At the market offerings, by or on behalf of the issuer or otherwise, are not permitted under this Regulation A. As used in this paragraph (d)(3)(ii), the term *at the market offering* means an offering of equity securities into an existing trading market for outstanding shares of the same class at other than a fixed price.

(e) *Confidential treatment.* A request for confidential treatment may be made under Rule 406 (§ 230.406) for information required to be filed, and Rule 83 (§ 200.83) for information not required to be filed.

(f) *Electronic filing.* Documents filed or otherwise provided to the Commission pursuant to this Regulation A must be submitted in electronic format by means of EDGAR in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

§ 230.252 Offering statement.

(a) *Documents to be included.* The offering statement consists of the contents required by Form 1-A (§ 239.90 of this chapter) and any other material information necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

(b) *Paper, printing, language and pagination.* Except as otherwise specified in this rule, the requirements for offering statements are the same as those specified in Rule 403 (§ 230.403) for registration statements under the Act. No fee is payable to the Commission upon either the submission or filing of an offering statement on Form 1-A, or any amendment to an offering statement.

(c) *Signatures.* The issuer, its principal executive officer, principal financial officer, principal accounting officer, and a majority of the members of its board of directors or other governing body, must sign the offering statement in the manner prescribed by Form 1-A. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed, except where an executive officer signs for the issuer.

(d) *Non-public submission.* An issuer whose securities have not been previously sold pursuant to a qualified offering statement under this Regulation A or an effective registration statement under the Securities Act may submit a draft offering statement to the Commission for non-public review by the staff of the Commission before public filing, provided that the offering statement shall not be qualified less than 21 calendar days after the public filing with the Commission of:

(1) the initial non-public submission;

(2) all non-public amendments; and

(3) all non-public correspondence submitted by or on behalf of the issuer to the Commission staff regarding such submissions (subject to any separately approved confidential treatment request under Rule 251(e) (§ 230.251(e)).

(e) *Qualification*. An offering statement and any amendment thereto can be qualified only at such date and time as the Commission may determine.

(f) *Amendments*. (1) (i) Amendments to an offering statement must be signed and filed with the Commission in the same manner as the initial filing. Amendments to an offering statement must be filed under cover of Form 1-A and must be numbered consecutively in the order in which filed.

(ii) Every amendment that includes amended audited financial statements must include the consent of the certifying accountant to the use of such accountant's certification in connection with the amended financial statements in the offering statement or offering circular and to being named as having audited such financial statements.

(iii) Amendments solely relating to Part III of Form 1-A must comply with the requirements of paragraph (f)(1)(i) of this rule, except that such amendments may be limited to Part I of Form 1-A, an explanatory note, and all of the information required by Part III of Form 1-A.

(2) Post-qualification amendments must be filed in the following circumstances for ongoing offerings:

(i) At least every 12 months after the qualification date to include the financial statements that would be required by Form 1-A as of such date; or

(ii) To reflect any facts or events arising after the qualification date of the offering statement (or the most recent post-qualification amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the offering statement.

§ 230.253 Offering circular.

(a) *Contents.* An offering circular must include the information required by Form 1-A for offering circulars.

(b) *Information that may be omitted.* Notwithstanding paragraph (a) of this rule, a qualified offering circular may omit information with respect to the public offering price, underwriting syndicate (including any material relationships between the issuer or selling securityholders and the unnamed underwriters, brokers or dealers), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date; provided, that the following conditions are met:

(1) The securities to be qualified are offered for cash.

(2) The outside front cover page of the offering circular includes a bona fide

estimate of the range of the maximum offering price and the maximum number of shares or other units of securities to be offered or a bona fide estimate of the principal amount of debt securities offered, subject to the following conditions:

(i) The range must not exceed $2 for offerings where the upper end of the range is $10 or less or 20% if the upper end of the price range is over $10; and

(ii) The upper end of the range must be used in determining the aggregate offering price under Rule 251(a) (§ 230.251(a)).

(3) The offering statement does not relate to securities to be offered by competitive bidding.

(4) The volume of securities (the number of equity securities or aggregate principal amount of debt securities) to be offered may not be omitted in reliance on this paragraph (b).

NOTE: A decrease in the volume of securities offered or a change in the bona fide estimate of the offering price range from that indicated in the offering circular filed as part of a qualified offering statement may be disclosed in the offering circular filed with the Commission pursuant to Rule 253(g) (§ 230.253(g)), so long as the decrease in the volume of securities offered or change in the price range would not materially change the disclosure contained in the offering statement at qualification. Notwithstanding the foregoing, any decrease in the volume of securities offered and any deviation from the low or high end of the price range may be reflected in the offering circular supplement filed with the Commission pursuant to Rule 253(g)(1) or (3) (§ 230.253(g)(1) or (3)) if, in the aggregate, the decrease in volume and/or change in price represent no more than a

20% change from the maximum aggregate offering price calculable using the information in the qualified offering statement. In no circumstances may this paragraph be used to offer securities where the maximum aggregate offering price would result in the offering exceeding the limit set forth in Rule 251(a) (§ 230.251(a)) or if the change would result in a Tier 1 offering becoming a Tier 2 offering. An offering circular supplement may not be used to increase the volume of securities being offered. Additional securities may only be offered pursuant to a new offering statement or post-qualification amendment qualified by the Commission.

(c) *Filing of omitted information.* The information omitted from the offering circular in reliance upon paragraph (b) of this rule must be contained in an offering circular filed with the Commission pursuant to paragraph (g) of this rule; except that if such offering circular is not so filed by the later of 15 business days after the qualification date of the offering statement or 15 business days after the qualification of a post-qualification amendment thereto that contains an offering circular, the information omitted in reliance upon paragraph (b) of this rule must be contained in a qualified post-qualification amendment to the offering statement.

(d) *Presentation of information.*

(1) Information in the offering circular must be presented in a clear, concise and understandable manner and in a type size that is easily readable. Repetition of information should be avoided; cross-referencing of information within the document is permitted.

(2) Where an offering circular is distributed through an electronic medium, issuers

may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors.

(e) *Date.* An offering circular must be dated approximately as of the date it was filed with the Commission.

(f) *Cover page legend.* The cover page of every offering circular must display the following statement highlighted by prominent type or in another manner:

> The United States Securities and Exchange Commission does not pass upon the merits of or give its approval to any securities offered or the terms of the offering, nor does it pass upon the accuracy or completeness of any offering circular or other solicitation materials. These securities are offered pursuant to an exemption from registration with the Commission; however, the Commission has not made an independent determination that the securities offered are exempt from registration.

(g) *Offering circular supplements.*

(1) An offering circular that discloses information previously omitted from the offering circular in reliance upon Rule 253(b) (§ 230.253(b)) must be filed with the Commission no later than two business days following the earlier of the date of determination of the offering price or the date such offering circular is first used after qualification in connection with a public offering or sale.

(2) An offering circular that reflects information other than that covered in paragraph (g)(1) of this rule that constitutes a substantive change from or addition to the information set forth in the last offering circular filed with the Commission must be filed with the Commission no later than five business days after the date it is first used after

qualification in connection with a public offering or sale. If an offering circular filed pursuant to this paragraph (g)(2) consists of an offering circular supplement attached to an offering circular that previously had been filed or was not required to be filed pursuant to paragraph (g) of this rule because it did not contain substantive changes from an offering circular that previously was filed, only the offering circular supplement need be filed under paragraph (g) of this rule, provided that the cover page of the offering circular supplement identifies the date(s) of the related offering circular and any offering circular supplements thereto that together constitute the offering circular with respect to the securities currently being offered or sold.

(3) An offering circular that discloses information, facts or events covered in both paragraphs (g)(1) and (2) must be filed with the Commission no later than two business days following the earlier of the date of the determination of the offering price or the date it is first used after qualification in connection with a public offering or sale.

(4) An offering circular required to be filed pursuant to paragraph (g) of this rule that is not filed within the time frames specified in paragraphs (g)(1)-(3), as applicable, must be filed pursuant to this paragraph (g)(4) as soon as practicable after the discovery of such failure to file.

(5) Each offering circular filed under this rule must contain in the upper right corner of the cover page the paragraph and subparagraph of this rule under which the filing is made, and the file number of the offering statement to which the offering circular relates.

§ 230.254 Preliminary offering circular.

After the filing of an offering statement, but before its qualification, written offers of securities may be made if they meet the following requirements:

(a) *Outside front cover page.* The outside front cover page of the material bears the caption *Preliminary Offering Circular*, the date of issuance, and the following legend, which must be highlighted by prominent type or in another manner:

> An offering statement pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted before the offering statement filed with the Commission is qualified. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor may there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful before registration or qualification under the laws of any such state. We may elect to satisfy our obligation to deliver a Final Offering Circular by sending you a notice within two business days after the completion of our sale to you that contains the URL where the Final Offering Circular or the offering statement in which such Final Offering Circular was filed may be obtained.

(b) *Other contents.* The Preliminary Offering Circular contains substantially the information required to be in an offering circular by Form 1-A (§ 239.90 of this chapter), except that certain information may be omitted under Rule 253(b) (§ 230.253(b)) subject to the conditions set forth in such rule.

(c) *Filing.* The Preliminary Offering Circular is filed as a part of the offering statement.

§ 230.255 Solicitations of interest and other communications.

(a) *Solicitation of interest.* At any time before the qualification of an offering statement, including before the non-public submission or public filing of such offering statement, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated securities offering. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until qualification of the offering statement.

(b) *Conditions.* The communications must:

(1) State that no money or other consideration is being solicited, and if sent in response, will not be accepted;

(2) State that no offer to buy the securities can be accepted and no part of the purchase price can be received until the offering statement is qualified, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time before notice of its acceptance given after the qualification date;

(3) State that a person's indication of interest involves no obligation or commitment of any kind; and

(4) After the public filing of the offering statement:

(i) State from whom a copy of the most recent version of the Preliminary Offering Circular may be obtained, including a phone number and address of such person;

(ii) Provide the URL where such Preliminary Offering Circular, or the offering statement in which such Preliminary Offering Circular was filed, may be obtained; or

(iii) Include a complete copy of the Preliminary Offering Circular.

(c) *Indications of interest.* Any written communication under this rule may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. This issuer may require the name, address, telephone number, and/or e-mail address in any response form included pursuant to this paragraph (c).

(d) *Revised solicitations of interest.* If solicitation of interest materials are used after the public filing of the offering statement and such solicitation of interest materials contain information that is inaccurate or inadequate in any material respect, revised solicitation of interest materials must be redistributed in a substantially similar manner as such materials were originally distributed. Notwithstanding the foregoing in this paragraph (d), if the only information that is inaccurate or inadequate is contained in a Preliminary Offering Circular provided with the solicitation of interest materials pursuant to paragraphs (b)(4)(i) or (b)(4)(ii) of this rule, no such redistribution is required in the following circumstances:

(1) in the case of paragraph (b)(4)(i) of this rule, the revised Preliminary Offering Circular will be provided to any persons making new inquiries and will be recirculated to any persons making any previous inquiries; or

(2) in the case of paragraph (b)(4)(ii) of this rule, the URL continues to link directly to the most recent Preliminary Offering Circular or to the offering statement in which such revised Preliminary Offering Circular was filed.

(e) *Abandoned offerings*. Where an issuer decides to register an offering under the Securities Act after soliciting interest in a contemplated, but subsequently abandoned, Regulation A offering, the abandoned Regulation A offering would not be subject to integration with the registered offering if the issuer engaged in solicitations of interest pursuant to this rule only to qualified institutional buyers and institutional accredited investors permitted by Section 5(d) of the Securities Act. If the issuer engaged in solicitations of interest to persons other than qualified institutional buyers and institutional accredited investors, an abandoned Regulation A offering would not be subject to integration if the issuer (and any underwriter, broker, dealer, or agent used by the issuer in connection with the proposed offering) waits at least 30 calendar days between the last such solicitation of interest in the Regulation A offering and the filing of the registration statement with the Commission.

§ 230.256 Definition of "qualified purchaser."

For purposes of Section 18(b)(3) of the Securities Act [15 USC 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A.

§ 230.257 Periodic and current reporting; exit report.

(a) *Tier 1: Exit report.* Each issuer that has filed an offering statement for a Tier 1 offering that has been qualified pursuant to this Regulation A must file an exit report on Form 1-Z (§ 239.94) not later than 30 calendar days after the termination or completion of the offering.

(b) *Tier 2: Periodic and current reporting.* Each issuer that has filed an offering statement for a Tier 2 offering that has been qualified pursuant to this Regulation A must file with the Commission the following periodic and current reports:

(1) *Annual reports.* An annual report on Form 1-K (§ 239.91) for the fiscal year in which the offering statement became qualified and for any fiscal year thereafter, unless the issuer's obligation to file such annual report is suspended under paragraph (d) of this rule. Annual reports must be filed within the period specified in Form 1-K.

(2) *Special financial report.* (i) A special financial report on Form 1-K or Form 1-SA if the offering statement did not contain the following:

(A) audited financial statements for the issuer's most recent fiscal year (or for the life of the issuer if less than a full fiscal year) preceding the fiscal year in which the issuer's offering statement became qualified; or

(B) unaudited financial statements covering the first six months of the issuer's current fiscal year if the offering statement was qualified during the last six months of that fiscal year.

(ii) The special financial report described in paragraph (b)(2)(i)(A) of this rule must be filed under cover of Form 1-K within 120 calendar days after the qualification date of the offering statement and must include audited financial statements for such fiscal year or other period specified in that paragraph, as the case may be. The special financial report described in paragraph (b)(2)(i)(B) of this rule must be filed under cover of Form 1-SA within 90 calendar days after the qualification date of the offering statement and must include the semiannual financial statements for the first six months of the issuer's fiscal year, which may be unaudited.

(iii) A special financial report must be signed in accordance with the requirements of the form on which it is filed.

(3) *Semiannual report.* A semiannual report on Form 1-SA (§ 239.92) within the period specified in Form 1-SA. Semiannual reports must cover the first six months of each fiscal year of the issuer, commencing with the first six months of the fiscal year immediately following the most recent fiscal year for which full financial statements were included in the offering statement, or, if the offering statement included financial statements for the first six months of the fiscal year following the most recent full fiscal year, for the first six months of the following fiscal year.

(4) *Current reports.* Current reports on Form 1-U (§ 239.93) with respect to the matters and within the period specified in that form, unless substantially the same information has been previously reported to the Commission by the issuer under cover of Form 1-K or Form 1-SA.

(5) *Reporting by successor issuers.* Where in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise, securities of any issuer that is not required to file reports pursuant to paragraph (b) of this rule are issued to the holders of any class of securities of another issuer that is required to file such reports, the duty to file reports pursuant to paragraph (b) of this rule shall be deemed to have been assumed by the issuer of the class of securities so issued. The successor issuer must, after the consummation of the succession, file reports in accordance with paragraph (b) of this rule, unless that issuer is exempt from filing such reports or the duty to file such reports is terminated or suspended under paragraph (d).

(c) *Amendments.* All amendments to the reports described in paragraphs (a) and (b) of this rule must be filed under cover of the form amended, marked with the letter *A* to designate the document as an amendment, *e.g.*, "1-K/A," and in compliance with pertinent requirements applicable to such reports. Amendments filed pursuant to this paragraph (c) must set forth the complete text of each item as amended, but need not include any items that were not amended. Amendments must be numbered sequentially and be filed separately for each report amended. Amendments must be signed on behalf of the issuer by a duly authorized representative of the issuer. An amendment to any report required to include certifications as specified in the applicable form must include new certifications by the appropriate persons.

(d) *Suspension of duty to file reports.* (1) The duty to file reports under this rule shall be automatically suspended if and so long as the issuer is subject to the duty to file reports required by section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o).

(2) The duty to file reports under paragraph (b) of this rule with respect to a class of securities held of record (as defined in Rule 12g5-1 (§ 240.12g5-1)) by less than 300 persons, or less than 1,200 persons for a bank (as defined in Section 3(a)(6) of the Exchange Act (15 U.S.C. 78c(a)(6)), or a bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841)), shall be suspended for such class of securities immediately upon filing with the Commission an exit report on Form 1-Z (§ 239.94) if the issuer of such class has filed all reports due pursuant to this rule before the date of such Form 1-Z filing for the shorter of:

(i) The period since the issuer became subject to such reporting obligation; or

(ii) Its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z.

(3) For the purposes of paragraph (d)(2), the term *class* shall be construed to

include all securities of an issuer that are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. If the Form 1-Z is subsequently withdrawn or if it is denied because the issuer was ineligible to use the form, the issuer must, within 60 calendar days, file with the Commission all reports which would have been required if such exit report had not been filed. If the suspension resulted from the issuer's merger into, or consolidation with, another issuer or issuers, the notice must be filed by the successor issuer.

(4) The ability to suspend reporting, as described in paragraph (d)(2) of this rule, is not available for any class of securities if:

(i) During that fiscal year a Tier 2 offering statement was qualified;

(ii) The issuer has not filed an annual report under this rule or the Exchange Act for the fiscal year in which a Tier 2 offering statement was qualified; or

(iii) Offers or sales of securities of that class are being made pursuant to a Tier 2 Regulation A offering.

(e) *Termination of duty to file reports*. If the duty to file reports is suspended pursuant to paragraph (d)(1) of this rule and such suspension ends because the issuer terminates or suspends its duty to file reports under the Exchange Act, the issuer's obligation to file reports under paragraph (b) of this rule shall:

(1) Automatically terminate if the issuer is eligible to suspend its duty to file reports under paragraph (d)(2)-(3); or

(2) Recommence with the report covering the most recent financial period after that included in any effective registration statement or filed Exchange Act report.

§ 230.258 Suspension of the exemption.

(a) *Suspension*. The Commission may at any time enter an order temporarily suspending a Regulation A exemption if it has reason to believe that:

(1) No exemption is available or any of the terms, conditions or requirements of Regulation A have not been complied with;

(2) The offering statement, any sales or solicitation of interest material, or any report filed pursuant to Rule 257 (§ 230.257) contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading;

(3) The offering is being made or would be made in violation of section 17 of the Securities Act;

(4) An event has occurred after the filing of the offering statement that would have rendered the exemption hereunder unavailable if it had occurred before such filing;

(5) Any person specified in Rule 262(a) (§ 230.262(a)) has been indicted for any crime or offense of the character specified in Rule 262(a)(1) (§ 230.262(a)(1)), or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in Rule 262(a)(2) (§ 230.262(a)(2)), or any proceeding has been initiated for the purposes of Rule 262(a)(3)-(8) (§ 230.262(a)(3)-(8)); or

(6) The issuer or any promoter, officer, director, or underwriter has failed to cooperate, or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made in reliance on Regulation A.

(b) *Notice and hearing*. Upon the entry of an order under paragraph (a) of this rule, the Commission will promptly give notice to the issuer, any underwriter, and any selling securityholder:

(1) That such order has been entered, together with a brief statement of the reasons for the entry of the order; and

(2) That the Commission, upon receipt of a written request within 30 calendar days after the entry of the order, will, within 20 calendar days after receiving the request, order a hearing at a place to be designated by the Commission.

(c) *Suspension order.* If no hearing is requested and none is ordered by the Commission, an order entered under paragraph (a) of this rule shall become permanent on the 30th calendar day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of and opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

(d) *Permanent suspension.* The Commission may, at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this rule. Any such order shall remain in effect until vacated by the Commission.

(e) *Notice procedures.* All notices required by this rule must be given by personal service, registered or certified mail to the addresses given by the issuer, any underwriter and any selling securityholder in the offering statement.

§ 230.259 Withdrawal or abandonment of offering statements.

(a) *Withdrawal.* If none of the securities that are the subject of an offering statement has been sold and such offering statement is not the subject of a proceeding under

Rule 258 (§ 230.258), the offering statement may be withdrawn with the Commission's consent. The application for withdrawal must state the reason the offering statement is to be withdrawn and must be signed by an authorized representative of the issuer. Any withdrawn document will remain in the Commission's files, as well as the related request for withdrawal.

(b) *Abandonment.* When an offering statement has been on file with the Commission for nine months without amendment and has not become qualified, the Commission may, in its discretion, declare the offering statement abandoned. If the offering statement has been amended, the nine-month period shall be computed from the date of the latest amendment.

§ 230.260 Insignificant deviations from a term, condition or requirement of Regulation A.

(a) *Failure to comply.* A failure to comply with a term, condition or requirement of Regulation A will not result in the loss of the exemption from the requirements of section 5 of the Securities Act for any offer or sale to a particular individual or entity, if the person relying on the exemption establishes that:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity;

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraphs (a), (b), (d)(1) and (3) of Rule 251 (§ 230.251) shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Regulation A.

(b) *Action by Commission.* A transaction made in reliance upon Regulation A must comply with all applicable terms, conditions and requirements of the regulation. Where an exemption is established only through reliance upon paragraph (a) of this rule, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Securities Act.

(c) *Suspension.* This provision provides no relief or protection from a proceeding under Rule 258 (§ 230.258).

§ 230.261 Definitions.

As used in this Regulation A, all terms have the same meanings as in Rule 405 (§ 230.405), except that all references to *registrant* in those definitions shall refer to the issuer of the securities to be offered and sold under Regulation A. In addition, these terms have the following meanings:

(a) *Affiliated issuer.* An affiliate (as defined in Rule 501 (§ 230.501)) of the issuer that is issuing securities in the same offering.

(b) *Business day.* Any day except Saturdays, Sundays or United States federal holidays.

(c) *Eligible securities.* Equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities, but not including asset-backed securities as such term is defined in Item 1101(c) of Regulation AB.

(d) *Final order.* A written directive or declaratory statement issued by a federal or state agency described in Rule 262(a)(3) (§ 230.262(a)(3)) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.

(e) *Final offering circular.* The more recent of: the current offering circular contained in a qualified offering statement; and any offering circular filed pursuant to Rule 253(g) (§ 230.253(g)). If, however, the issuer is relying on Rule 253(b) ((§ 230.253(b)), the Final Offering Circular is the most recent of the offering circular filed pursuant to Rule 253(g)(1) or (3) (§ 230.253(g)(1) or (3)) and any subsequent offering circular filed pursuant to Rule 253(g) (§ 230.253(g)).

(f) *Offering statement.* An offering statement prepared pursuant to Regulation A.

(g) *Preliminary offering circular.* The offering circular described in Rule 254 (§ 230.254).

§ 230.262 Disqualification provisions.

(a) *Disqualification events.* No exemption under this Regulation A shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after qualification, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such solicitor; or any director, executive officer or other officer participating in the offering of any such solicitor or general partner or managing member of such solicitor:

(1) Has been convicted, within ten years before the filing of the offering statement (or five years, in the case of issuers, their predecessors and affiliated issuers), of any

felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the offering statement, that, at the time of such filing, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(3) Is subject to a final order (as defined in Rule 261 (§ 230.261)) of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the offering statement, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency, or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such filing of the offering statement;

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78 *o* (b) or 78 *o* -4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of the filing of the offering statement:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the offering statement that, at the time of such filing, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C.

78 *o* (c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or offering statement filed with the Commission that, within five years before the filing of the offering statement, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the offering statement, or is, at the time of such filing, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(b) *Transition, waivers, reasonable care exception.* Paragraph (a) of this rule shall not apply:

(1) With respect to any order under § 230.262(a)(3) or (a)(5) that occurred or was issued before [insert day 60 days after publication in the Federal Register];

(2) Upon a showing of good cause and without prejudice to any other action by

the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(3) If, before the filing of the offering statement, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this rule should not arise as a consequence of such order, judgment or decree; or

(4) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (a) of this rule.

Instruction to paragraph (b)(4). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(c) *Affiliated issuers.* For purposes of paragraph (a) of this rule, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(1) In control of the issuer; or

(2) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(d) *Disclosure of prior "bad actor" events.* The issuer must include in the offering circular a description of any matters that would have triggered disqualification under paragraphs (a)(3) and (a)(5) of this rule but occurred before [insert day 60 days after publication in the Federal Register]. The failure to provide such information shall not prevent an issuer from relying on Regulation A if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

NOTE: An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

§ 230.263 Consent to service of process.

(a) If the issuer is not organized under the laws of any of the states or territories of the United States of America, it shall furnish to the Commission a written irrevocable consent and power of attorney on Form F-X (§ 239.42 of this chapter) at the time of filing the offering statement required by Rule 252 (§ 230.252).

(b) Any change to the name or address of the agent for service of the issuer shall be communicated promptly to the Commission through amendment of the requisite form and referencing the file number of the relevant offering statement.

* * * * *

6. § 230.505(b)(2)(iii)(A) and (B) are revised to read as follows:

§ 230.505 Exemption for limited offers and sales of securities not exceeding $5,000,000.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(A) The term *filing of the offering statement* as used in § 230.262 shall mean the first sale of securities under this section;

(B) The term *underwriter* as used in § 230.262(a) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

* * * * *

PART 232 – REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

7. The authority citation for part 232 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

8. § 232.101 is amended by:

a. Revising paragraph (a)(1)(vii) and (c)(6);

b. Adding paragraph (a)(1)(xvii); and

c. Reserving paragraph (b)(8).

The revisions, additions and reservations read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(vii) Form F-X (§ 239.42 of this chapter) when filed in connection with a Form CB (§§ 239.800 and 249.480 of this chapter) or a Form 1-A (§ 239.90);

* * * * *

(xvii) Filings made pursuant to Regulation A (§§ 230.251-230.263 of this chapter).

* * * * *

(b) * * *

(8) [Reserved]

* * * * *

(c) * * *

(6) Filings on Form 144 (§ 239.144 of this chapter) where the issuer of the securities is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), respectively).

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

9. The authority citation for Part 239 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78 l, 78m,78n, 78 o (d), 78o–7 note, 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

10. Amend Form 1-A (referenced in § 239.90) by revising it to read as follows:

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-A
REGULATION A OFFERING STATEMENT
UNDER THE SECURITIES ACT OF 1933

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form 1-A.

This Form is to be used for securities offerings made pursuant to Regulation A (17 CFR 230.251 *et seq.*). Careful attention should be directed to the terms, conditions and requirements of Regulation A, especially Rule 251, because the exemption is not available to all issuers or for every type of securities transaction. Further, the aggregate offering price and aggregate sales of securities in any 12-month period is strictly limited to $20 million for Tier 1 offerings and $50 million for Tier 2 offerings, including no more than $6 million offered by all selling securityholders that are affiliates of the issuer for Tier 1 offerings and $15 million by all selling securityholders that are affiliates of the issuer for Tier 2 offerings. Please refer to Rule 251 of Regulation A for more details.

II. Preparation, Submission and Filing of the Offering Statement.

An offering statement must be prepared by all persons seeking exemption under the provisions of Regulation A. Parts I, II and III must be addressed by all issuers. Part II, which relates to the content of the required offering circular, provides alternative formats, of which the issuer must choose one. General information regarding the preparation, format, content, and submission or filing of the offering statement is contained in Rule 252. Information regarding non-public submission of the offering statement is contained in Rule 252(d). Requirements relating to the offering circular are contained in Rules 253 and 254. The offering statement must be submitted or filed with the Securities and Exchange Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232) for such submission or filing.

III. Incorporation by Reference and Cross-Referencing.

An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR. Cross-referencing within the offering statement is also encouraged to avoid repetition of information. For example, you may respond to an item of this Form by providing a cross-reference to the location of the information in the financial statements, instead of repeating such information. Incorporation by reference and cross-referencing are subject to the following additional conditions:

(a) The use of incorporation by reference and cross-referencing in Part II of this Form is limited to the following items:

(1) Items 2-14 of Part II if following the Offering Circular format;

(2) Items 3-11 (other than Item 11(e)) of Form S-1 if following the Part I of Form S-1 format; or

(3) Items 3-26, 28, and 30 of Form S-11 if following the Part I of Form S-11 format.

(b) Descriptions of where the information incorporated by reference or cross-referenced can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits incorporated by reference, this description must be noted in the exhibits index for each relevant exhibit. All descriptions of where information incorporated by reference can be found must be accompanied by a hyperlink to the incorporated document on EDGAR, which hyperlink need not remain active after the filing of the offering statement. Inactive hyperlinks must be updated in any amendment to the offering statement otherwise required.

(c) Reference may not be made to any document if the portion of such document containing the pertinent information includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Incorporating information into the financial statements from elsewhere is not permitted. Information shall not be incorporated by reference or cross-referenced in any case where such incorporation would render the statement or report incomplete, unclear, or confusing.

(d) If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

IV. Supplemental Information.

The information specified below must be furnished to the Commission as supplemental information, if applicable. Supplemental information shall not be required to be filed with or deemed part of the offering statement, unless otherwise required. The information shall be returned to the issuer upon request made in writing at the time of submission, provided that the return of such information is consistent with the protection of investors and the provisions of the Freedom of Information Act [5 U.S.C. 552] and the information was not filed in electronic format.

(a) A statement as to whether or not the amount of compensation to be allowed or paid to the underwriter has been cleared with the Financial Industry Regulatory Authority (FINRA).

(b) Any engineering, management, market, or similar report referenced in the offering circular or provided for external use by the issuer or by a principal underwriter in connection with the proposed offering. There must also be furnished at the same time a statement as to the actual or proposed use and distribution of such report or memorandum. Such statement must identify each class of persons who have received or will receive the report or memorandum, and state the number of copies distributed to each such class along with a statement as to the actual or proposed use and distribution of such report or memorandum.

(c) Such other information as requested by the staff in support of statements, representations and other assertions contained in the offering statement or any correspondence to the staff.

Correspondence appropriately responding to any staff comments made on the offering statement must also be furnished electronically. When applicable, such correspondence must clearly indicate where changes responsive to the staff's comments may be found in the offering statement.

PART I—NOTIFICATION

The following information must be provided in the XML-based portion of Form 1-A available through the EDGAR portal and must be completed or updated before uploading each offering statement or amendment thereto. The format of Part I shown below may differ from the electronic version available on EDGAR. The electronic version of Part I will allow issuers to attach Part II and Part III for filing by means of EDGAR. All items must be addressed, unless otherwise indicated.

* * * * * *

☐ No changes to the information required by Part I have occurred since the last filing of this offering statement.

ITEM 1. Issuer Information

Exact name of issuer as specified in the issuer's charter: ______________________

Jurisdiction of incorporation/organization: ______________________

Year of incorporation: ______________________

CIK: ______________________

Primary Standard Industrial Classification Code: ______________________

I.R.S. Employer Identification Number: ______________________

Total number of full-time employees: ______________________

Total number of part-time employees: ______________________

Contact Information

Address of Principal Executive Offices: ______________________________
____

Telephone: ( ) ______________________________

Provide the following information for the person the Securities and Exchange Commission's staff should call in connection with any pre-qualification review of the offering statement:

Name: ______________________________
Address: ______________________________
Telephone: ( ) ______________________________

Provide up to two e-mail addresses to which the Securities and Exchange Commission's staff may send any comment letters relating to the offering statement. After qualification of the offering statement, such e-mail addresses are not required to remain active: ______
____

Financial Statements

Industry Group (select one): ☐ Banking ☐ Insurance ☐ Other

Use the financial statements for the most recent fiscal period contained in this offering statement to provide the following information about the issuer. The following table does not include all of the line items from the financial statements. Long Term Debt would include notes payable, bonds, mortgages, and similar obligations. To determine "Total Revenues" for all companies selecting "Other" for their industry group, refer to Article 5-03(b)(1) of Regulation S-X. For companies selecting "Insurance," refer to Article 7-04 of Regulation S-X for calculation of "Total Revenues" and paragraphs 5 and 7(a) for "Costs and Expenses Applicable to Revenues".

[If "Other" is selected, display the following options in the Financial Statements table:]

Balance Sheet Information	
Cash and Cash Equivalents:	______
Investment Securities:	______
Accounts and Notes Receivable:	______
Property, Plant and Equipment (PP&E):	______
Total Assets:	______
Accounts Payable and Accrued Liabilities:	______
Long Term Debt:	______
Total Liabilities:	______

Total Stockholders' Equity: ______________________
Total Liabilities and Equity: ______________________

Income Statement Information
Total Revenues: ______________________
Costs and Expenses Applicable to Revenues: ______________________
Depreciation and Amortization: ______________________
Net Income: ______________________
Earnings Per Share – Basic: ______________________
Earnings Per Share – Diluted: ______________________

[If "Banking" is selected, display the following options in the Financial Statements table:]

Balance Sheet Information
Cash and Cash Equivalents: ______________________
Investment Securities: ______________________
Loans: ______________________
Property and Equipment: ______________________
Total Assets: ______________________
Accounts Payable and Accrued Liabilities: ______________________
Deposits: ______________________
Long Term Debt: ______________________
Total Liabilities: ______________________
Total Stockholders' Equity: ______________________
Total Liabilities and Equity: ______________________

Income Statement Information
Total Interest Income: ______________________
Total Interest Expense: ______________________
Depreciation and Amortization: ______________________
Net Income: ______________________
Earnings Per Share – Basic: ______________________
Earnings Per Share – Diluted: ______________________

[If "Insurance" is selected, display the following options in the Financial Statements table:]

Balance Sheet Information

Cash and Cash Equivalents: ____________________
Total Investments: ____________________
Accounts and Notes Receivable: ____________________
Property and Equipment: ____________________
Total Assets: ____________________
Accounts Payable and Accrued Liabilities: ____________________
Policy Liabilities and Accruals: ____________________
Long Term Debt: ____________________
Total Liabilities: ____________________
Total Stockholders' Equity: ____________________
Total Liabilities and Equity: ____________________

Income Statement Information

Total Revenues: ____________________
Costs and Expenses Applicable to Revenues: ____________________
Depreciation and Amortization: ____________________
Net Income: ____________________
Earnings Per Share – Basic: ____________________
Earnings Per Share – Diluted: ____________________

[End of section that varies based on the selection of Industry Group]

Name of Auditor (if any): ____________________

Outstanding Securities

	Name of Class (if any)	Units Outstanding	CUSIP (if any)	Name of Trading Center or Quotation Medium (if any)
Common Equity				
Preferred Equity				
Debt Securities				

ITEM 2. Issuer Eligibility

☐ Check this box to certify that all of the following statements are true for the issuer(s):

- Organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia.

- Principal place of business is in the United States or Canada.
- Not subject to section 13 or 15(d) of the Securities Exchange Act of 1934.
- Not a development stage company that either (a) has no specific business plan or purpose, or (b) has indicated that its business plan is to merge with an unidentified company or companies.
- Not an investment company registered or required to be registered under the Investment Company Act of 1940.
- Not issuing fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights.
- Not issuing asset-backed securities as defined in Item 1101(c) of Regulation AB.
- Not, and has not been, subject to any order of the Commission entered pursuant to Section 12(j) of the Exchange Act (15 U.S.C. 78*l*(j)) within five years before the filing of this offering statement.
- Has filed with the Commission all the reports it was required to file, if any, pursuant to Rule 257 during the two years immediately before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports).

ITEM 3. Application of Rule 262

☐ Check this box to certify that, as of the time of this filing, each person described in Rule 262 of Regulation A is either not disqualified under that rule or is disqualified but has received a waiver of such disqualification.

☐ Check this box if "bad actor" disclosure under Rule 262(d) is provided in Part II of the offering statement.

ITEM 4. Summary Information Regarding the Offering and Other Current or Proposed Offerings

Check the appropriate box to indicate whether you are conducting a Tier 1 or Tier 2 offering:

☐ Tier 1 ☐ Tier 2

Check the appropriate box to indicate whether the annual financial statements have been audited:

☐ Unaudited ☐ Audited

Types of Securities Offered in this Offering Statement (select all that apply):

☐ Equity (common or preferred stock)

☐ Debt

☐ Option, warrant or other right to acquire another security

☐ Security to be acquired upon exercise of option, warrant or other right to acquire security

☐ Tenant-in-common securities

☐ Other (describe) ______________________________

Does the issuer intend to offer the securities on a delayed or continuous basis pursuant to Rule 251(d)(3)?

Yes ☐ No ☐

Does the issuer intend this offering to last more than one year?
Yes ☐ No ☐

Does the issuer intend to price this offering after qualification pursuant to Rule 253(b)?
Yes ☐ No ☐

Will the issuer be conducting a best efforts offering?
Yes ☐ No ☐

Has the issuer used solicitation of interest communications in connection with the proposed offering?

Yes ☐ No ☐

Does the proposed offering involve the resale of securities by affiliates of the issuer?
Yes ☐ No ☐

Number of securities offered: ______________________________

Number of securities of that class already outstanding: ______________________________

The information called for by this item below may be omitted if undetermined at the time of filing or submission, except that if a price range has been included in the offering statement, the midpoint of that range must be used to respond. Please refer to Rule 251(a) for the definition of "aggregate offering price" or "aggregate sales" as used in this item. Please leave the field blank if undetermined at this time and include a zero if a particular item is not applicable to the offering.

Price per security: $____________________________

The portion of the aggregate offering price attributable to securities being offered on behalf of the issuer:
$_______________

The portion of the aggregate offering price attributable to securities being offered on behalf of selling securityholders:
$_______________

The portion of aggregate offering attributable to all the securities of the issuer sold pursuant to a qualified offering statement within the 12 months before the qualification of this offering statement:
$_______________

The estimated portion of aggregate sales attributable to securities that may be sold pursuant to any other qualified offering statement concurrently with securities being sold under this offering statement:
$_______________

Total: $_______________ (the sum of the aggregate offering price and aggregate sales in the four preceding paragraphs).

Anticipated fees in connection with this offering and names of service providers:

	Name of Service Provider	Fees
Underwriters:		$
Sales Commissions:		$
Finders' Fees:		$
Audit:		$
Legal:		$
Promoters:		$
Blue Sky Compliance:		$

CRD Number of any broker or dealer listed:________________________
Estimated net proceeds to the issuer: $________________________

Clarification of responses (if necessary): ________________________

ITEM 5. Jurisdictions in Which Securities are to be Offered

Using the list below, select the jurisdictions in which the issuer intends to offer the securities:

[List will include all U.S. and Canadian jurisdictions, with an option to add and remove them individually, add all and remove all.]

Using the list below, select the jurisdictions in which the securities are to be offered by underwriters, dealers or sales persons or check the appropriate box:

☐ None

☐ Same as the jurisdictions in which the issuer intends to offer the securities.

[List will include all U.S. and Canadian jurisdictions, with an option to add and remove them individually, add all and remove all.]

ITEM 6. Unregistered Securities Issued or Sold Within One Year

☐ None

As to any unregistered securities issued by the issuer or any of its predecessors or affiliated issuers within one year before the filing of this Form 1-A, state:

(a) Name of such issuer.

(b) (1) Title of securities issued

(2) Total amount of such securities issued

(3) Amount of such securities sold by or for the account of any person who at the time was a director, officer, promoter or principal securityholder of the issuer of such securities, or was an underwriter of any securities of such issuer

(c) (1) Aggregate consideration for which the securities were issued and basis for computing the amount thereof.

____

____

____

(2) Aggregate consideration for which the securities listed in (b)(3) of this item (if any) were issued and the basis for computing the amount thereof (if different from the basis described in (c)(1)).

(e) Indicate the section of the Securities Act or Commission rule or regulation relied upon for exemption from the registration requirements of such Act and state briefly the facts relied upon for such exemption: ____

____

PART II — INFORMATION REQUIRED IN OFFERING CIRCULAR

(a) Financial statement requirements regardless of the applicable disclosure format are specified in Part F/S of this Form 1-A. The narrative disclosure contents of offering circulars are specified as follows:

(1) The information required by:

(i) the Offering Circular format described below; or

(ii) The information required by Part I of Form S-1 (17 CFR 239.11) or Part I of Form S-11 (17 CFR 239.18), except for the financial statements, selected financial data, and supplementary financial information called for by those forms. An issuer choosing to follow the Form S-1 or Form S-11 format may follow the requirements for smaller reporting companies if it meets the definition of that term in Rule 405 (17 CFR 230.405). An issuer may only use the Form S-11 format if the offering is eligible to be registered on that form;

The cover page of the offering circular must identify which disclosure format is being followed.

(2) The offering circular must describe any matters that would have triggered disqualification under Rule 262(a)(3) or (a)(5) but for the provisions set forth in Rule 262(b)(1);

(3) The legend required by Rule 253(f) of Regulation A must be included on the offering circular cover page (for issuers following the S-1 or S-11 disclosure models this legend must be included instead of the legend required by Item 501(b)(7) of Regulation S-K);

(4) For preliminary offering circulars, the legend required by Rule 254(a) must be included on the offering circular cover page (for issuers following the S-1 or S-11 disclosure models, this legend must be included instead of the legend required by Item 501(b)(10) of Regulation S-K); and

(5) For Tier 2 offerings where the securities will not be listed on a registered national securities exchange upon qualification, the offering circular cover page must include the following legend highlighted by prominent type or in another manner:

> Generally, no sale may be made to you in this offering if the aggregate purchase price you pay is more than 10% of the greater of your annual income or net worth. Different rules apply to accredited investors and non-natural persons. Before making any representation that your

> investment does not exceed applicable thresholds, we encourage you to review Rule 251(d)(2)(i)(C) of Regulation A. For general information on investing, we encourage you to refer to www.investor.gov.

(b) The Commission encourages the use of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. See Rule 175, 17 CFR 230.175.

(c) Offering circulars need not follow the order of the items or the order of other requirements of the disclosure form except to the extent otherwise specifically provided. Such information may not, however, be set forth in such a fashion as to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading. Information requested to be presented in a specified tabular format must be given in substantially the tabular format specified. For incorporation by reference, please refer to General Instruction III of this Form.

OFFERING CIRCULAR

Item 1. Cover Page of Offering Circular

The cover page of the offering circular must be limited to one page and must include the information specified in this item.

(a) Name of the issuer.

Instruction to Item 1(a):

> *If your name is the same as, or confusingly similar to, that of a company that is well known, include information to eliminate any possible confusion with the other company. If your name indicates a line of business in which you are not engaged or you are engaged only to a limited extent, include information to eliminate any misleading inference as to your business. In some circumstances, disclosure may not be sufficient and you may be required to change your name. You will not be required to change your name if you are an established company, the character of your business has changed, and the investing public is generally aware of the change and the character of your current business.*

(b) Full mailing address of the issuer's principal executive offices and the issuer's telephone number (including the area code) and, if applicable, website address.

(c) Date of the offering circular.

(d) Title and amount of securities offered. Separately state the amount of securities offered by selling securityholders, if any. Include a cross-reference to the section where the disclosure required by Item 14 of Part II of this Form 1-A has been provided;

(e) The information called for by the applicable table below as to all the securities being offered, in substantially the tabular format indicated. If necessary, you may estimate any underwriting discounts and commissions and the proceeds to the issuer or other persons.

	Price to public	Underwriting discount and commissions	Proceeds to issuer	Proceeds to other persons
Per share/unit:	______	______	______	______
Total:	______	______	______	______

If the securities are to be offered on a best efforts basis, the cover page must set forth the termination date, if any, of the offering, any minimum required sale and any arrangements to place the funds received in an escrow, trust, or similar arrangement. The following table must be used instead of the preceding table.

	Price to public	Underwriting discount and commissions	Proceeds to issuer	Proceeds to other persons
Per share/unit:	______	______	______	______
Total Minimum:	______	______	______	______
Total Maximum:	______	______	______	______

Instructions to Item 1(e):

1. The term "commissions" includes all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made in connection with the sale of such security.

2. Only commissions paid by the issuer in cash are to be indicated in the table. Commissions paid by other persons or any form of non-cash compensation must be briefly identified in a footnote to the table with a cross-reference to a more complete description elsewhere in the offering circular.

3. Before the commencement of sales pursuant to Regulation A, the issuer must inform the Commission whether or not the amount of compensation to be allowed *or paid to the underwriters, as described in the offering statement, has been cleared with FINRA.*

4. If the securities are not to be offered for cash, state the basis upon which the offering is to be made.

5. Any finder's fees or similar payments must be disclosed on the cover page with a reference to a more complete discussion in the offering circular. Such disclosure must identify the finder, the nature of the services rendered and the nature of any relationship between the finder and the issuer, its officers, directors, promoters, principal stockholders and underwriters (including any affiliates of such persons).

6. The amount of the expenses of the offering borne by the issuer, including underwriting expenses to be borne by the issuer, must be disclosed in a footnote to the table.

(f) The name of the underwriter or underwriters.

(g) Any legend or information required by the law of any state in which the securities are to be offered.

(h) A cross-reference to the risk factors section, including the page number where it appears in the offering circular. Highlight this cross-reference by prominent type or in another manner.

(i) Approximate date of commencement of proposed sale to the public.

(j) If the issuer intends to rely on Rule 253(b) and a preliminary offering circular is circulated, provide (1) a bona fide estimate of the range of the maximum offering price and the maximum number of securities offered or (2) a bona fide estimate of the principal amount of the debt securities offered. The range must not exceed $2 for offerings where the upper end of the range is $10 or less and 20% if the upper end of the price range is over $10.

Instruction to Item 1(j):

The upper limit of the price range must be used in determining the aggregate offering price for purposes of Rule 251(a).

Item 2. Table of Contents

On the page immediately following the cover page of the offering circular, provide a reasonably detailed table of contents. It must show the page numbers of the various sections or subdivisions of the offering circular. Include a specific listing of the risk factors section required by Item 3 of Part II of this Form 1-A.

Item 3. Summary and Risk Factors

(a) An issuer may provide a summary of the information in the offering circular where the length or complexity of the offering circular makes a summary useful. The summary should be brief and must not contain all of the detailed information in the offering circular.

(b) Immediately following the Table of Contents required by Item 2 or the Summary, there must be set forth under an appropriate caption, a carefully organized series of short, concise paragraphs, summarizing the most significant factors that make the offering speculative or substantially risky. Issuers should avoid generalized statements and include only factors that are specific to the issuer.

Item 4. Dilution

Where there is a material disparity between the public offering price and the effective cash cost to officers, directors, promoters and affiliated persons for shares acquired by them in a transaction during the past year, or that they have a right to acquire, there must be included a comparison of the public contribution under the proposed public offering and the average effective cash contribution of such persons.

Item 5. Plan of Distribution and Selling Securityholders

(a) If the securities are to be offered through underwriters, give the names of the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship to the issuer and state the nature of the relationship. State briefly the nature of the underwriters' obligation to take the securities.

Instructions to Item 5(a):

1. All that is required as to the nature of the underwriters' obligation is whether the underwriters are or will be committed to take and to pay for all of the securities if any are taken, or whether it is merely an agency or the type of best efforts arrangement under which the underwriters are required to take and to pay for only such securities as they may sell to the public. Conditions precedent to the underwriters' taking the securities, including market outs, need not be described except in the case of an agency or best efforts arrangement.

2. It is not necessary to disclose each member of a selling group. Disclosure may be limited to those underwriters who are in privity of contract with the issuer with respect to the offering.

(b) State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other consideration to be received by any dealer in connection with the sale of the securities.

(c) Outline briefly the plan of distribution of any securities being issued that are to be offered through the selling efforts of brokers or dealers or otherwise than through underwriters.

(d) If any of the securities are to be offered for the account of securityholders, identify each selling securityholder, state the amount owned by the securityholder prior to the offering, the amount offered for his or her account and the amount to be owned after the offering. Provide such disclosure in a tabular format. At the bottom of the table, provide the total number of securities being offered for the account of all securityholders and describe what percent of the pre-offering outstanding securities of such class the offering represents.

Instruction to Item 5(d):

> *The term "securityholder" in this paragraph refers to beneficial holders, not nominee holders or other such holders of record. If the selling securityholder is an entity, disclosure of the persons who have sole or shared voting or investment power must be included.*

(e) Describe any arrangements for the return of funds to subscribers if all of the securities to be offered are not sold. If there are no such arrangements, so state.

(f) If there will be a material delay in the payment of the proceeds of the offering by the underwriter to the issuer, the salient provisions in this regard and the effects on the issuer must be stated.

(g) Describe any arrangement to (1) limit or restrict the sale of other securities of the same class as those to be offered for the period of distribution, (2) stabilize the market for any of the securities to be offered, or (3) withhold commissions, or otherwise to hold each underwriter or dealer responsible for the distribution of its participation.

(h) Identify any underwriter that intends to confirm sales to any accounts over which it exercises discretionary authority and include an estimate of the amount of securities so intended to be confirmed.

Instruction to Item 5:

> *Attention is directed to the provisions of Rules 10b-9 [17 CFR 240.10b-9] and 15c2-4 [17 CFR 240.15c2-4] under the Securities Exchange Act of 1934. These rules outline, among other things, antifraud provisions concerning the return of funds to subscribers and the transmission of proceeds of an offering to a seller.*

Item 6. Use of Proceeds to Issuer

State the principal purposes for which the net proceeds to the issuer from the securities to be offered are intended to be used and the approximate amount intended to be used for each such purpose. If the issuer will not receive any of proceeds from the offering, so state.

Instructions to Item 6:

> *1. If any substantial portion of the proceeds has not been allocated for particular purposes, a statement to that effect must be made together with a statement of the amount of proceeds not so allocated.*
>
> *2. State whether or not the proceeds will be used to compensate or otherwise make payments to officers or directors of the issuer or any of its subsidiaries.*
>
> *3. For best efforts offerings, describe any anticipated material changes in the use of proceeds if all of the securities being qualified on the offering statement are not sold.*
>
> *4. If an issuer must provide the disclosure described in Item 9(c) the use of proceeds and plan of operations should be consistent.*
>
> *5. If any material amounts of other funds are to be used in conjunction with the proceeds, state the amounts and sources of such other funds and whether such funds are firm or contingent.*
>
> *6. If any material part of the proceeds is to be used to discharge indebtedness, describe the material terms of such indebtedness. If the indebtedness to be discharged was incurred within one year, describe the use of the proceeds arising from such indebtedness.*
>
> *7. If any material amount of the proceeds is to be used to acquire assets, otherwise than in the ordinary course of business, briefly describe and state the cost of the assets. If the assets are to be acquired from affiliates of the issuer or their associates, give the names of the persons from whom they are to be acquired and set forth the basis used in determining the purchase price to the issuer.*
>
> *8. The issuer may reserve the right to change the use of proceeds, so long as the reservation is prominently disclosed in the section where the use of proceeds is discussed. It is not necessary to describe the possible alternative uses of proceeds unless the issuer believes that a change in circumstances leading to an alternative use of proceeds is likely to occur.*

Item 7. Description of Business

(a) Narrative description of business.

(1) Describe the business done and intended to be done by the issuer and its subsidiaries and the general development of the business during the past three years or such shorter period as the issuer may have been in business. Such description must include, but not be limited to, a discussion of the following factors if such factors are material to an understanding of the issuer's business:

(i) The principal products and services of the issuer and the principal market for and method of distribution of such products and services.

(ii) The status of a product or service if the issuer has made public information about a new product or service that would require the investment of a material amount of the assets of the issuer or is otherwise material.

(iii) If material, the estimated amount spent during each of the last two fiscal years on company-sponsored research and development activities determined in accordance with generally accepted accounting principles. In addition, state, if material, the estimated dollar amount spent during each of such years on material customer-sponsored research activities relating to the development of new products, services or techniques or the improvement of existing products, services or techniques.

(iv) The total number of persons employed by the issuer, indicating the number employed full time.

(v) Any bankruptcy, receivership or similar proceeding.

(vi) Any legal proceedings material to the business or financial condition of the issuer.

(vii) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(2) The issuer must also describe those distinctive or special characteristics of the issuer's operation or industry that are reasonably likely to have a material impact upon the issuer's future financial performance. Examples of factors that might be discussed include dependence on one or a few major customers or suppliers (including suppliers of raw materials or financing), effect of existing or probable governmental regulation (including environmental regulation), material terms of and/or expiration of material labor contracts or patents, trademarks, licenses, franchises, concessions or royalty agreements, unusual competitive conditions in the industry, cyclicality of the industry and anticipated raw material or energy shortages to the extent management may not be able to secure a continuing source of supply.

(b) Segment Data. If the issuer is required by generally accepted accounting principles to include segment information in its financial statements, an appropriate cross-reference must be included in the description of business.

(c) Industry Guides. The disclosure guidelines in all Securities Act Industry Guides must be followed. To the extent that the industry guides are codified into Regulation S-K, the Regulation S-K industry disclosure items must be followed.

(d) For offerings of limited partnership or limited liability company interests, an issuer must comply with the Commission's interpretive views on substantive disclosure requirements set forth in Securities Act Release No. 6900 (June 17, 1991).

Item 8. Description of Property

State briefly the location and general character of any principal plants or other material physical properties of the issuer and its subsidiaries. If any such property is not held in fee or is held subject to any major encumbrance, so state and briefly describe how held. Include information regarding the suitability, adequacy, productive capacity and extent of utilization of the properties and facilities used in the issuer's business.

Instruction to Item 8:

Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.

Item 9. Management's Discussion and Analysis of Financial Condition and Results of Operations

Discuss the issuer's financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required, including the causes of material changes from year to year or period to period in financial statement line items, to the extent necessary for an understanding of the issuer's business as a whole. Information provided also must relate to the segment information of the issuer. Provide the information specified below as well as such other information that is necessary for an investor's understanding of the issuer's financial condition, changes in financial condition and results of operations.

(a) Operating results. Provide information regarding significant factors, including unusual or infrequent events or transactions or new developments, materially affecting the issuer's income from operations, and, in each case, indicating the extent to which income was so affected. Describe any other significant component of revenue or expenses necessary to understand the issuer's results of operations. To the extent that the financial statements disclose material changes in net sales or revenues, provide a narrative discussion of the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of products or services being sold or to the introduction of new products or services.

Instruction to Item 9(a):

1. The discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include descriptions and amounts of (A) matters that would have an impact on future operations that have not had an impact in the past, and (B) matters that have had an impact on reported operations that are not expected to have an impact upon future operations.

2. Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described to the extent necessary to an understanding of the issuer's businesses as a whole. If the causes for a change in one line item also relate to other line items, no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Issuers need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion must not merely repeat numerical data contained in the consolidated financial statements.

3. When interim period financial statements are included, discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. Discuss any material changes in the issuer's results of operations with respect to the most recent fiscal year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year.

(b) Liquidity and capital resources. Provide information regarding the following:

(1) the issuer's liquidity (both short and long term), including a description and evaluation of the internal and external sources of liquidity and a brief discussion of any material unused sources of liquidity. If a material deficiency in liquidity is identified, indicate the course of action that the issuer has taken or proposes to take to remedy the deficiency.

(2) the issuer's material commitments for capital expenditures as of the end of the latest fiscal year and any subsequent interim period and an indication of the general purpose of such commitments and the anticipated sources of funds needed to fulfill such commitments.

(c) Plan of Operations. Issuers (including predecessors) that have not received revenue from operations during each of the three fiscal years immediately before the filing of the offering statement (or since inception, whichever is shorter) must describe, if formulated, their plan of operation for the 12 months following the commencement of the proposed offering. If such information is not available, the reasons for its unavailability must be stated. Disclosure relating to any plan must include, among other things, a statement indicating whether, in the issuer's opinion, the proceeds from the offering will satisfy its cash requirements or whether it anticipates it will be necessary to raise additional funds in the next six months to implement the plan of operations.

(d) Trend information. The issuer must identify the most significant recent trends in production, sales and inventory, the state of the order book and costs and selling prices since the latest financial year. The issuer also must discuss, for at least the current financial year, any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer's net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition.

Item 10. Directors, Executive Officers and Significant Employees

(a) For each of the directors, persons nominated or chosen to become directors, executive officers, persons chosen to become executive officers, and significant employees, provide the information specified below in substantially the following tabular format:

Name	Position	Age	Term of Office[1]	Approximate hours per week for part-time employees[2]
Executive Officers:				
Directors:				
Significant Employees:				

(1) Provide the month and year of the start date and, if applicable, the end date. To the extent you are unable to provide specific dates, provide such other description in the table or in an appropriate footnote clarifying the term of office. If the person is a nominee or chosen to become a director or executive officer, it must be indicated in this column or by footnote.

(2) For executive officers and significant employees that are working part-time, indicate approximately the average number of hours per week or month such person works or is anticipated to work. This column may be left blank for directors. The entire column may be omitted if all those listed in the table work full time for the issuer.

In a footnote to the table, briefly describe any arrangement or understanding between the persons described above and any other persons (naming such persons) pursuant to which the person was or is to be selected to his or her office or position.

Instructions to Item 10(a):

1. No nominee or person chosen to become a director or person chosen to be an executive officer who has not consented to act as such may be named in response to this item.

2. The term "executive officer" means the president, secretary, treasurer, any vice president in charge of a principal business function (such as sales, administration, or finance) and any other person who performs similar policy making functions for the issuer.

3. The term "significant employee" means persons such as production managers, sales managers, or research scientists, who are not executive officers, but who make or are expected to make significant contributions to the business of the issuer.

(b) Family relationships. State the nature of any family relationship between any director, executive officer, person nominated or chosen by the issuer to become a director or executive officer or any significant employee.

Instruction to Item 10(b):

The term "family relationship" means any relationship by blood, marriage, or adoption, not more remote than first cousin.

(c) Business experience. Give a brief account of the business experience during the past five years of each director, executive officer, person nominated or chosen to become a director or executive officer, and each significant employee, including his or her principal occupations and employment during that period and the name and principal business of any corporation or other organization in which such occupations and employment were carried on. When an executive officer or significant employee has been employed by the issuer for less than five years, a brief explanation must be included as to the nature of the responsibilities undertaken by the individual in prior positions to provide adequate disclosure of this prior business experience. What is required is information relating to the level of the employee's professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

(d) Involvement in certain legal proceedings. Describe any of the following events which occurred during the past five years and which are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the issuer:

(1) A petition under the federal bankruptcy laws or any state insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was general partner at or within two years before the time of such filing, or any corporation or business association of which he was an executive officer at or within two years before the time of such filing; or

(2) Such person was convicted in a criminal proceeding (excluding traffic violations and other minor offenses).

Item 11. Compensation of Directors and Executive Officers

(a) Provide, in substantially the tabular format indicated, the annual compensation of each of the three highest paid persons who were executive officers or directors during the issuer's last completed fiscal year.

Name	Capacities in which compensation was received (e.g., Chief Executive Officer, director, etc.)	Cash compensation ($)	Other compensation ($)	Total compensation ($)

(b) Provide the aggregate annual compensation of the issuer's directors as a group for the issuer's last completed fiscal year. Specify the total number of directors in the group.

(c) For Tier 1 offerings, the annual compensation of the three highest paid persons who were executive officers or directors and the aggregate annual compensation of the issuer's directors may be provided as a group, rather than as specified in paragraphs (a) and (b) of this item. In such case, issuers must specify the total number of persons in the group.

(d) Briefly describe all proposed compensation to be made in the future pursuant to any ongoing plan or arrangement to the individuals specified in paragraphs (a) and (b) of this item. The description must include a summary of how each plan operates, any performance formula or measure in effect (or the criteria used to determine payment amounts), the time periods over which the measurements of benefits will be determined, payment schedules, and any recent material amendments to the plan. Information need not be included with respect to any group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation in favor of executive officers or directors of the issuer and that are available generally to all salaried employees.

Instructions to Item 11:

1. In case of compensation paid or to be paid otherwise than in cash, if it is impracticable to determine the cash value thereof, state in a note to the table the nature and amount thereof.

2. This item is to be answered on an accrual basis if practicable; if not so answered, state the basis used.

Item 12. Security Ownership of Management and Certain Securityholders

(a) Include the information specified in paragraph (b) of this item as of the most recent practicable date (stating the date used), in substantially the tabular format indicated, with respect to voting securities beneficially owned by:

(1) all executive officers and directors as a group, individually naming each director or executive officer who beneficially owns more than 10% of any class of the issuer's voting securities;

(2) any other securityholder who beneficially owns more than 10% of any class of the issuer's voting securities as such beneficial ownership would be calculated if the issuer were subject to Rule 13d-3(d)(1) of the Securities Exchange Act of 1934.

(b) Beneficial Ownership Table:

Title of class	Name and address of beneficial owner[(1)]	Amount and nature of beneficial ownership	Amount and nature of beneficial ownership acquirable[(2)]	Percent of class[(3)]

(1) The address given in this column may be a business, mailing, or residential address. The address may be included in an appropriate footnote to the table rather than in this column.

(2) This column must include the amount of equity securities each beneficial owner has the right to acquire using the manner specified in Rule 13d-3(d)(1) of the Securities Exchange Act of 1934. An appropriate footnote must be included if the column heading does not sufficiently describe the circumstances upon which such securities could be acquired.

(3) This column must use the amounts contained in the two preceding columns to calculate the percent of class owned by such beneficial owner.

Item 13. Interest of Management and Others in Certain Transactions

(a) Describe briefly any transactions or any currently proposed transactions during the issuer's last two completed fiscal years and the current fiscal year, to which the issuer or any of its subsidiaries was or is to be a participant and the amount involved exceeds \$50,000 for Tier 1 or the lesser of \$120,000 and one percent of the average of the issuer's total assets at year end for the last two completed fiscal years for Tier 2, and in which any of the following persons had or is to have a direct or indirect material interest, naming the person and stating his or her relationship to the issuer, the nature of the person's interest in the transaction and, where practicable, the amount of such interest:

(1) Any director or executive officer of the issuer;

(2) Any nominee for election as a director;

(3) Any securityholder named in answer to Item 12(a)(2);

(4) If the issuer was incorporated or organized within the past three years, any promoter of the issuer; or

(5) Any immediate family member of the above persons. An "immediate family member" of a person means such person's child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, or any person (other than a tenant or employee) sharing such person's household.

Instructions to Item 13(a):

1. For purposes of calculating the amount of the transaction described above, all periodic installments in the case of any lease or other agreement providing for periodic payments must be aggregated to the extent they occurred within the time period described in this item.

2. No information need be given in answer to this item as to any transaction where:

(a) The rates of charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier at rates or charges fixed in conformity with law or governmental authority;

(b) The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;

(c) The interest of the specified person arises solely from the ownership of securities of the issuer and the specified person receives no extra or

special benefit not shared on a pro-rata basis by all of the holders of securities of the class.

3. This item calls for disclosure of indirect as well as direct material interests in transactions. A person who has a position or relationship with a firm, corporation, or other entity which engages in a transaction with the issuer or its subsidiaries may have an indirect interest in such transaction by reason of the position or relationship. However, a person is deemed not to have a material indirect interest in a transaction within the meaning of this item where:

(a) the interest arises only (i) from the person's position as a director of another corporation or organization (other than a partnership) that is a party to the transaction, or (ii) from the direct or indirect ownership by the person and all other persons specified in paragraphs (1) through (5) of this item, in the aggregate, of less than a 10 percent equity interest in another person (other than a partnership) that is a party to the transaction, or (iii) from both such position and ownership;

(b) the interest arises only from the person's position as a limited partner in a partnership in which the person and all other persons specified in paragraphs (1) through (5) of this item had an interest of less than 10 percent; or

(c) the interest of the person arises solely from the holding of an equity interest (unless the equity interest confers management rights similar to a general partner interest) or a creditor interest in another person that is a party to the transaction with the issuer or any of its subsidiaries and the transaction is not material to the other person.

4. Include the name of each person whose interest in any transaction is described and the nature of the relationships by reason of which such interest is required to be described. The amount of the interest of any specified person must be computed without regard to the amount of the profit or loss involved in the transaction. Where it is not practicable to state the approximate amount of the interest, the approximate amount involved in the transaction must be disclosed.

5. Information must be included as to any material underwriting discounts and commissions upon the sale of securities by the issuer where any of the specified persons was or is to be a principal underwriter or is a controlling person, or member, of a firm which was or is to be a principal underwriter. Information need not be given concerning ordinary management fees paid by underwriters to a managing underwriter pursuant to an agreement among underwriters, the parties to which do not include the issuer or its subsidiaries.

6. As to any transaction involving the purchase or sale of assets by or to any issuer or any subsidiary, otherwise than in the ordinary course of business, state *the cost of the assets to the purchaser and, if acquired by the seller within two years before the transaction, the cost to the seller.*

7. Information must be included in answer to this item with respect to transactions not excluded above which involve compensation from the issuer or its subsidiaries, directly or indirectly, to any of the specified persons for services in any capacity unless the interest of such persons arises solely from the ownership individually and in the aggregate of less than 10 percent of any class of equity securities of another corporation furnishing the services to the issuer or its subsidiaries.

(b) If any expert named in the offering statement as having prepared or certified any part of the offering statement was employed for such purpose on a contingent basis or, at the time of such preparation or certification or at any time thereafter, had a material interest in the issuer or any of its parents or subsidiaries or was connected with the issuer or any of its subsidiaries as a promoter, underwriter, voting trustee, director, officer or employee, describe the nature of such contingent basis, interest or connection.

Item 14. Securities Being Offered

(a) If capital stock is being offered, state the title of the class and furnish the following information regarding all classes of capital stock outstanding:

(1) Outline briefly: (i) dividend rights; (ii) voting rights; (iii) liquidation rights; (iv) preemptive rights; (v) conversion rights; (vi) redemption provisions; (vii) sinking fund provisions; (viii) liability to further calls or to assessment by the issuer; (ix) any classification of the Board of Directors, and the impact of classification where cumulative voting is permitted or required; (x) restrictions on alienability of the securities being offered; (xi) any provision discriminating against any existing or prospective holder of such securities as a result of such securityholder owning a substantial amount of securities; and (xii) any rights of holders that may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class.

(2) Briefly describe potential liabilities imposed on securityholders under state statutes or foreign law, for example, to employees of the issuer, unless such disclosure would be immaterial because the financial resources of the issuer or other factors are such as to make it unlikely that the liability will ever be imposed.

(3) If preferred stock is to be offered or is outstanding, describe briefly any restriction on the repurchase or redemption of shares by the issuer while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

(b) If debt securities are being offered, outline briefly the following:

(1) Provisions with respect to interest, conversion, maturity, redemption, amortization, sinking fund or retirement.

(2) Provisions with respect to the kind and priority of any lien securing the issue, together with a brief identification of the principal properties subject to such lien.

(3) Material affirmative and negative covenants.

Instruction to Item 14(b):

In the case of secured debt there must be stated: (i) the approximate amount of unbonded property available for use against the issuance of bonds, as of the most recent practicable date, and (ii) whether the securities being issued are to be issued against such property, against the deposit of cash, or otherwise.

(c) If securities described are to be offered pursuant to warrants, rights, or convertible securities, state briefly:

(1) the amount of securities issuable upon the exercise or conversion of such warrants, convertible securities or rights;

(2) the period during which and the price at which the warrants, convertible securities or rights are exercisable;

(3) the amounts of warrants, convertible securities or rights outstanding; and

(4) any other material terms of such securities.

(d) In the case of any other kind of securities, include a brief description with comparable information to that required in (a), (b) and (c) of Item 14.

Part F/S

(a) General Rules

(1) The appropriate financial statements set forth below of the issuer, or the issuer and its predecessors or any businesses to which the issuer is a successor must be filed as part of the offering statement and included in the offering circular that is distributed to investors.

(2) Unless the issuer is a Canadian company, financial statements must be prepared in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a Canadian company, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If the financial statements comply with IFRS, such

compliance must be explicitly and unreservedly stated in the notes to the financial statements and if the financial statements are audited, the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

(3) The issuer may elect to delay complying with any new or revised financial accounting standard until the date that a company that is not an issuer (as defined under section 2(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a)) is required to comply with such new or revised accounting standard, if such standard also applies to companies that are not issuers. Issuers electing such extension of time accommodation must disclose it at the time the issuer files its offering statement and apply the election to all standards. Issuers electing not to use this accommodation must forgo this accommodation for all financial accounting standards and may not elect to rely on this accommodation in any future filings.

(b) Financial Statements for Tier 1 Offerings

(1) The financial statements prepared pursuant to this paragraph (b), including (b)(7), need not be prepared in accordance with Regulation S-X.

(2) The financial statements prepared pursuant to paragraph (b), including (b)(7), need not be audited. If the financial statements are not audited, they shall be labeled as "unaudited". However, if an audit of these financial statements is obtained for other purposes and that audit was performed in accordance with either U.S. generally accepted auditing standards or the Standards of the Public Company Accounting Oversight Board by an auditor that is independent pursuant to either the independence standards of the American Institute of Certified Public Accountants (AICPA) or Rule 2-01 of Regulation S-X, those audited financial statements must be filed, and an audit opinion complying with Rule 2-02 of Regulation S-X must be filed along with such financial statements. The auditor may, but need not, be registered with the Public Company Accounting Oversight Board.

(3) *Consolidated Balance Sheets.* Age of balance sheets at filing and at qualification:

(A) If the filing is made, or the offering statement is qualified, more than three months but no more than nine months after the most recently completed fiscal year end, include a balance sheet as of the two most recently completed fiscal year ends.

(B) If the filing is made, or the offering statement is qualified, more than nine months after the most recently completed fiscal year end, include a balance sheet as of the two most recently completed fiscal year ends and an interim balance sheet as of a date no earlier than six months after the most recently completed fiscal year end.

(C) If the filing is made, or the offering statement is qualified, within three months after the most recently completed fiscal year end, include a balance sheet as of the two fiscal year ends preceding the most recently completed fiscal year end and an interim balance sheet as of a date no earlier than six months after the date of the most recent fiscal year end balance sheet that is required.

(D) If the filing is made, or the offering statement is qualified, during the period from inception until three months after reaching the annual balance sheet date for the first time, include a balance sheet as of a date within nine months of filing or qualification.

(4) *Statements of comprehensive income, cash flows, and changes in stockholders' equity.* File consolidated statements of income, cash flows, and changes in stockholders' equity for each of the two fiscal years preceding the date of the most recent balance sheet being filed or such shorter period as the issuer has been in existence. If a consolidated interim balance sheet is required by (b)(3) above, consolidated interim statements of income and cash flows shall be provided and must cover at least the first six months of the issuer's fiscal year and the corresponding period of the preceding fiscal year.

(5) *Interim financial statements.* Interim financial statements may be condensed as described in Rule 8-03(a) of Regulation S-X. The interim income statements must be accompanied by a statement that in the opinion of management all adjustments necessary in order to make the interim financial statements not misleading have been included.

(6) *Oil and Gas Producing Activities.* Issuers engaged in oil and gas producing activities must follow the financial accounting and reporting standards specified in Rule 4-10 of Regulation S-X.

(7) *Financial Statements of Other Entities.* The circumstances described below may require you to file financial statements of other entities in the offering statement. The financial statements of other entities must be presented for the same periods as if the other entity was the issuer as described above in paragraphs (b)(3) and (b)(4) unless a shorter period is specified by the rules below. The financial statement of other entities shall follow the same audit requirement as paragraph (b)(2) of this Part F/S.

(i) *Financial Statements of Guarantors and Issuers of Guaranteed Securities.* Financial statements of a subsidiary that issues securities guaranteed by the parent or guarantees securities issued by the parent must be presented as required by Rule 3-10 of Regulation S-X.

(ii) *Financial Statements of Affiliates Whose Securities Collateralize an Issuance.* Financial statements for an issuer's affiliates whose securities constitute a substantial portion of the collateral for any class of securities being offered must be presented as required by Rule 3-16 of Regulation S-X.

(iii) *Financial Statements of Businesses Acquired or to be Acquired.* File the financial statements required by Rule 8-04 of Regulation S-X.

(iv) *Pro Forma Financial Information.* If financial statements are presented under paragraph (b)(7)(iii) above, file pro forma information showing the effects of the acquisition as described in Rule 8-05 of Regulation S-X.

(v) *Real Estate Operations Acquired or to be Acquired.* File the financial information required by Rule 8-06 of Regulation S-X.

Instructions to paragraph (b) in Part F/S:

1. Issuers should refer to Rule 257(b)(2) to determine whether a special financial report will be required after qualification of the offering statement.

2. If the last day that the financial statements included in the offering statement can be accepted, according to the age requirements of this item falls on a Saturday, Sunday, or holiday, such offering statement may be filed on the first business day following the last day of the specified period.

3. As an alternative, an issuer may—but need not—elect to comply with the provisions of paragraph (c).

(c) Financial Statement Requirements for Tier 2 Offerings

(1) In addition to the general rules in paragraph (a), provide the financial statements required by paragraph (b) of this Part F/S, except the following rules should be followed in the preparation of the financial statements:

(i) The issuer and, when applicable, other entities for which financial statements are required, must comply with Article 8 of Regulation S-X, as if it was conducting a registered offering on Form S-1, except the age of interim financial statements may follow paragraphs (b)(3)-(4) of this Part F/S.

(ii) Audited financial statements are required for Tier 2 offerings for the issuer and, when applicable, for financial statements of other entities. However, interim financial statements may be unaudited.

(iii) The audit must be conducted in accordance with either U.S. Generally Accepted Auditing Standards or the standards of the Public Company Accounting Oversight Board (United States) and the report and qualifications of the independent accountant shall comply with the requirements of Article 2 of Regulation S-X. Accounting firms conducting audits for the financial statements included in the offering circular may, but need not, be registered with the Public Company Accounting Oversight Board.

PART III—EXHIBITS

Item 16. Index to Exhibits

(a) An exhibits index must be presented at the beginning of Part III.

(b) Each exhibit must be listed in the exhibit index according to the number assigned to it under Item 17 below.

(c) For incorporation by reference, please refer to General Instruction III of this Form.

Item 17. Description of Exhibits

As appropriate, the following documents must be filed as exhibits to the offering statement.

1. *Underwriting agreement*—Each underwriting contract or agreement with a principal underwriter or letter pursuant to which the securities are to be distributed; where the terms have yet to be finalized, proposed formats may be provided.

2. *Charter and bylaws*—The charter and bylaws of the issuer or instruments corresponding thereto as currently in effect and any amendments thereto.

3. *Instruments defining the rights of securityholders*—

(a) All instruments defining the rights of any holder of the issuer's securities, including but not limited to (i) holders of equity or debt securities being issued; (ii) holders of long-term debt of the issuer, and of all subsidiaries for which consolidated or unconsolidated financial statements are required to be filed.

(b) The following instruments need not be filed if the issuer agrees to file them with the Commission upon request: (i) instruments defining the rights of holders of long-term debt of the issuer and all of its subsidiaries for which consolidated financial statements are required to be filed if such debt is not being issued pursuant to this Regulation A offering and the total amount of such authorized issuance does not exceed 5% of the total assets of the issuer and its subsidiaries on a consolidated basis; (ii) any instrument with respect to a class of securities that is to be retired or redeemed before the issuance or upon delivery of the securities being issued pursuant to this Regulation A offering and appropriate steps have been taken to assure such retirement or redemption; and (iii) copies of instruments evidencing scrip certificates or fractions of shares.

4. *Subscription agreement*—The form of any subscription agreement to be used in connection with the purchase of securities in this offering.

5. *Voting trust agreement*—Any voting trust agreements and amendments.

6. *Material contracts*

(a) Every contract not made in the ordinary course of business that is material to the issuer and is to be performed in whole or in part at or after the filing of the offering statement or was entered into not more than two years before such filing. Only contracts need be filed as to which the issuer or subsidiary of the issuer is a party or has succeeded to a party by assumption or assignment or in which the issuer or such subsidiary has a beneficial interest. Schedules (or similar attachments) to material contracts may be excluded if not material to an investment decision or if the material information contained in such schedules is otherwise disclosed in the agreement or the offering statement. The material contract filed must contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

(b) If the contract is such as ordinarily accompanies the kind of business conducted by the issuer and its subsidiaries, it is made in the ordinary course of business and need not be filed unless it falls within one or more of the following categories, in which case it must be filed except where immaterial in amount or significance: (i) any contract to which directors, officers, promoters, voting trustees, securityholders named in the offering statement, or underwriters are parties, except where the contract merely involves the purchase or sale of current assets having a determinable market price, at such market price; (ii) any contract upon which the issuer's business is substantially dependent, as in the case of continuing contracts to sell the major part of the issuer's products or services or to purchase the major part of the issuer's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which the issuer's business depends to a material extent; (iii) any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15% of such fixed assets of the issuer on a consolidated basis; or (iv) any material lease under which a part of the property described in the offering statement is held by the issuer.

(c) Any management contract or any compensatory plan, contract or arrangement including, but not limited to, plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description) is deemed material and must be filed except for the following: (i) ordinary purchase and sales agency agreements; (ii) agreements with managers of stores in a chain organization or similar organization; (iii) contracts providing for labor or salesperson's bonuses or payments to a class of securityholders, as such; (iv) any compensatory plan, contract or arrangement that pursuant to its terms is available to employees generally and that in operation provides for the same method of allocation of benefits between management and non-management participants.

7. *Plan of acquisition, reorganization, arrangement, liquidation, or succession*—Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation or arrangement and any amendments thereto described in the offering statement. Schedules (or similar attachments) to these exhibits must not be filed unless such schedules contain information that is material to an investment decision and that is not otherwise disclosed in the agreement or the offering statement. The plan filed must contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

8. *Escrow agreements*—Any escrow agreement or similar arrangement which has been executed in connection with the Regulation A offering.

9. *Letter re change in certifying accountant*—A letter from the issuer's former independent accountant regarding its concurrence or disagreement with the statements made by the issuer in the current report concerning the resignation or dismissal as the issuer's principal accountant.

10. *Power of attorney*—If any name is signed to the offering statement pursuant to a power of attorney, signed copies of the power of attorney must be filed. Where the power of attorney is contained elsewhere in the offering statement or documents filed therewith, a reference must be made in the index to the part of the offering statement or document containing such power of attorney. In addition, if the name of any officer signing on behalf of the issuer is signed pursuant to a power of attorney, certified copies of a resolution of the issuer's board of directors authorizing such signature must also be filed. A power of attorney that is filed with the Commission must relate to a specific filing or an amendment thereto. A power of attorney that confers general authority may not be filed with the Commission.

11. *Consents*—

(a) Experts: The written consent of (i) any accountant, counsel, engineer, geologist, appraiser or any persons whose profession gives authority to a statement made by them and who is named in the offering statement as having prepared or certified any part of the document or is named as having prepared or certified a report or evaluation whether or not for use in connection with the offering statement; (ii) the expert that authored any portion of a report quoted or summarized as such in the offering statement, expressly stating their consent to the use of such quotation or summary; (iii) any persons who are referenced as having reviewed or passed upon any information in the offering statement, and that such information is being included on the basis of their authority or in reliance upon their status as experts.

(b) All written consents must be dated and signed.

12. *Opinion re legality*—An opinion of counsel as to the legality of the securities covered by the Offering Statement, indicating whether they will when sold, be legally issued, fully paid and non-assessable, and if debt securities, whether they will be binding obligations of the issuer.

13. *"Testing the waters" materials*—Any written communication or broadcast script used under the authorization of Rule 255. Such materials need not be filed if they are substantively the same as materials previously filed with the offering statement.

14. *Appointment of agent for service of process*—A Canadian issuer must file Form F-X.

15. *Additional exhibits*—

(a) Any non-public, draft offering statement previously submitted pursuant to Rule 252(d) and any related, non-public correspondence submitted by or on behalf of the issuer.

(b) Any additional exhibits which the issuer may wish to file, which must be so marked as to indicate clearly the subject matters to which they refer.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form 1-A and has duly caused this offering statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of _________, State of ________________, on___ _________ *(date)*.

(Exact name of issuer as specified in its charter) __________________________

By (Signature and Title) ____

This offering statement has been signed by the following persons in the capacities and on the dates indicated.

(Signature)____

(Title)____

(Date)____

Instructions to Signatures:

1. The offering statement must be signed by the issuer, its principal executive officer, principal financial officer, principal accounting officer, and a majority of the members of its board of directors or other governing body. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed with the offering statement, except where an executive officer signs on behalf of the issuer.

2. The offering statement must be signed using a typed signature. Each signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

3. The name and title of each person signing the offering statement must be typed or printed beneath the signature.

Note: The text of Form 1-A will not appear in the Code of Federal Regulations.

* * * * *

11. Revise § 239.91 to read as follows:

§ 239.91 Form 1-K.

This form shall be used for filing annual reports under Regulation A (§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-K

GENERAL INSTRUCTIONS

A. Rules as to Use of Form 1-K.

(1) This Form shall be used for annual reports pursuant to Rule 257(b)(1) of Regulation A (§§ 230.251-230.263).

(2) Annual reports on this Form shall be filed within 120 calendar days after the end of the fiscal year covered by the report.

(3) This Form also shall be used for special financial reports filed pursuant to Rule 257(b)(2)(i)(A) of Regulation A. Such special financial reports shall be filed and signed in the manner set forth in this Form, but otherwise need only provide Part I and the financial statements required by Rule 257(b)(2)(i)(A). Special financial reports filed using this Form shall be filed within 120 calendar days after the qualification date of the offering statement.

B. Preparation of Report.

(1) Regulation A contains certain general requirements that are applicable to reports on any form, including amendments to reports. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form.

(2) This Form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report.

(3) Except where information is required to be given for the fiscal year or as of a specified date, it shall be given as of the latest date reasonably practicable.

(4) References in this Form to the items in Form 1-A are to the items set forth in Part II and Part III of Form 1-A, not Part I.

(5) In addition to the information expressly required to be included in this Form, there shall be added 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.

C. Signature and Filing of Report.

(1) The report must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) The report must be signed by the issuer, its principal executive officer, principal financial officer, principal accounting officer, and at least a majority of the members of its board of directors or other governing body. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed with the report, except where an executive officer signs on behalf of the issuer.

(3) The report must be signed using a typed signature. Each signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be

executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this paragraph.

D. Incorporation by Reference and Cross-Referencing.

(1) An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR. Cross-referencing within the report is also encouraged to avoid repetition of information. For example, you may respond to an item of this Form by providing a cross-reference to the location of the information in the financial statements, instead of repeating such information. Descriptions of where the information incorporated by reference or cross-referenced can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits incorporated by reference, this description must be noted in the exhibits index for each relevant exhibit. All descriptions of where information incorporated by reference can be found must be accompanied by a separate hyperlink to the incorporated document on EDGAR. A hyperlink need not remain active after the filing of the report, except that amendments to the report must update any hyperlinks referred to in the amendment that are inactive.

(2) Reference may not be made to any document if the portion of such document containing the pertinent information includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Information shall not be incorporated by reference or cross-referenced in any case where such incorporation would render the statement or report incomplete, unclear, or confusing. Incorporating information into the financial statements from elsewhere is not permitted.

(3) If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

PART I
NOTIFICATION

The following information must be provided in the XML-based portion of Form 1-K available through the EDGAR portal and must be completed or updated before uploading each offering statement or amendment thereto. The format of Part I shown below may differ from the electronic version available on EDGAR. The electronic version of Part I will allow issuers to attach Part II for filing by means of EDGAR. All items must be addressed, unless otherwise indicated.

* * * * * *

This Form 1-K is to provide an ☐ Annual Report ***OR*** ☐ Special Financial Report for the fiscal year ended ______________________________

Exact name of issuer as specified in the issuer's charter: ______________________

Jurisdiction of incorporation/organization: ______________________

I.R.S. Employer Identification Number: ______________________

Address of Principal Executive Offices: ______________________
____

Phone: ( ) ______________________

Title of each class of securities issued pursuant to Regulation A: ______________________
____

Summary Information Regarding Prior Offerings and Proceeds

The following information must be provided for any Regulation A offering that has terminated or completed prior to the filing of this Form 1-K, unless such information has been previously reported in a manner permissible under Rule 257. If such information has been previously reported, check this box ☐ and leave the rest of Part I blank.

Commission File Number of the offering statement: ______________________

Date of qualification of the offering statement: ______________________

Date of commencement of the offering: ______________________

Amount of securities qualified to be sold in the offering: ______________________

Amount of securities sold in the offering: ______________________

Price per security: $______________________

The portion of aggregate sales attributable to securities sold on behalf of the issuer:
$______________

The portion of aggregate sales attributable to securities sold on behalf of selling securityholders:
$______________

Fees in connection with this offering and names of service providers:

	Name of Service Provider	Fees
Underwriters:	______________	$______________
Sales Commissions:	______________	$______________

Finders' Fees:	________	$________
Audit:	________	$________
Legal:	________	$________
Promoters:	________	$________
Blue Sky Compliance:	________	$________

CRD Number of any broker or dealer listed:________________

Net proceeds to the issuer: $________________

Clarification of responses (if necessary): ________________

PART II
INFORMATION TO BE INCLUDED IN REPORT

Item 1. Business

Set forth the information required by Item 7 of Form 1-A.

Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations

Set forth the information required by Item 9(a), (b) and (d) of Form 1-A for the most recent two completed fiscal years.

Item 3. Directors and Officers

Set forth the information required by Items 10 and 11 of Form 1-A.

Item 4. Security Ownership of Management and Certain Securityholders

Set forth the information required by Item 12 of Form 1-A.

Item 5. Interest of Management and Others in Certain Transactions

Set forth the information required by Item 13 of Form 1-A.

Item 6. Other Information

Set forth any information required to be disclosed in a report on Form 1-U during the last six months of the fiscal year covered by this Form 1-K, but not reported, whether or not otherwise required by this Form 1-K. If disclosure of such information is made under this item, it need not be repeated in a report on Form 1-U that would otherwise be required to be filed with respect to such information or in a subsequent report on Form 1-U.

Item 7. Financial Statements

(a) The appropriate audited financial statements set forth below of the issuer, or the issuer and its predecessors or any businesses to which the issuer is a successor must be filed as part of the Form 1-K.

(b) Unless the issuer is a Canadian company, financial statements must be prepared in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a Canadian company, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If the financial statements comply with IFRS, such compliance must be explicitly and unreservedly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

(c) The audit of the financial statements must be conducted in accordance with either U.S. Generally Accepted Auditing Standards or the standards of the Public Company Accounting Oversight Board (United States) and the report and qualifications of the independent accountant shall comply with the requirements of Article 2 of Regulation S-X. Accounting firms conducting audits for the financial statements may, but need not, be registered with the Public Company Accounting Oversight Board.

(d) *Balance Sheet.* There shall be filed an audited consolidated balance sheet as of the end of each of the most recent two fiscal years.

(e) *Statements of income, cash flows, and changes in stockholders' equity.* File audited consolidated statements of income, cash flows, and changes in stockholders' equity for each of the two fiscal years preceding the date of the most recent balance sheet being filed or such shorter period as the issuer has been in existence.

(f) *Oil and Gas Producing Activities.* Issuers engaged in oil and gas producing activities must follow the financial accounting and reporting standards specified in Rule 4-10 of Regulation S-X.

(g) *Financial Statements of Other Entities.* The circumstances described below may require you to file financial statements of other entities. The financial statements of other entities must be presented for the same periods as the issuer's financial statements described above in paragraphs (d) and (e) unless a shorter period is specified by the rules below.

> (1) *Financial Statements of Guarantors and Issuers of Guaranteed Securities.* Financial statements of a subsidiary that issues securities guaranteed by the parent or guarantees securities issued by the parent must be presented as required by Rule 3-10 of Regulation S-X.

(2) *Financial Statements of Affiliates Whose Securities Collateralize an Issuance.* Financial statements for an issuer's affiliates whose securities constitute a substantial portion of the collateral for any class of securities being offered must be presented as required by Rule 3-16 of Regulation S-X.

Item 8. Exhibits

(a) An exhibits index must be presented immediately preceding the first signature page of the report.

(b) File, as exhibits to this Form, the exhibits required by Form 1-A, except for the exhibits required by paragraphs 1, 12, and 13 of Item 17.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Exact name of issuer as specified in its charter)____

By (Signature and Title)____________________________________

Date____

Pursuant to the requirements of Regulation A, this report has been signed below by the following persons on behalf of the issuer and in the capacities and on the dates indicated.

By (Signature and Title)____________________________________

Date____

By (Signature and Title)____________________________________

Date____

Note: The text of Form 1-K will not appear in the Code of Federal Regulations.

* * * * *

12. Revise § 239.92 to read as follows:

§ 239.92 Form 1-SA.

This form shall be used for filing semiannual reports under Regulation A

(§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-SA

[ ] SEMIANNUAL REPORT PURSUANT TO REGULATION A
or
[ ] SPECIAL FINANCIAL REPORT PURSUANT TO REGULATION A

For the fiscal semiannual period ended ______________________________

____
(Exact name of issuer as specified in its charter)

State or other jurisdiction of incorporation or organization	(I.R.S. Employer Identification No.)

____
(Full mailing address of principal executive offices)

____
(Issuer's telephone number, including area code)

GENERAL INSTRUCTIONS

A. Rules as to Use of Form 1-SA.

(1) This Form shall be used for semiannual reports pursuant to Rule 257(b)(3) of Regulation A (§§ 230.251-230.263).

(2) Semiannual reports on this Form shall be filed within 90 calendar days after the end of the semiannual period covered by the report.

(3) This Form also shall be used for special financial reports filed pursuant to Rule 257(b)(2)(i)(B) of Regulation A. Such special financial reports shall be filed and signed in the manner set forth in this Form, but otherwise need only provide the cover page and financial statements required by Rule 257(b)(2)(i)(B). Special financial reports filed using this Form shall be filed within 90 calendar days after the qualification date of the offering statement.

B. Preparation of Report.

(1) Regulation A contains certain general requirements that are applicable to reports on any form, including amendments to reports. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form.

(2) This Form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report.

(3) In addition to the information expressly required to be included in this Form, there shall be added 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.

C. Signature and Filing of Report.

(1) The report must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) The report must be signed by the issuer, its principal executive officer, principal financial officer and principal accounting officer. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed with the report, except where an executive officer signs on behalf of the issuer.

(3) The report must be signed using a typed signature. Each signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this paragraph.

D. Incorporation by Reference and Cross-Referencing.

(1) An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR. Cross-referencing within the report is also encouraged to avoid repetition of information. For example, you may respond to an item of this Form by providing a cross-reference to the location of the information in the financial statements, instead of repeating such information. Descriptions of where the information incorporated by reference or cross-referenced can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits incorporated by reference, this description must be noted in the exhibits index for each relevant exhibit. All such descriptions of where information incorporated by reference can be found must be accompanied by a separate hyperlink to the incorporated document on EDGAR. A hyperlink need not remain active after the filing of the report, except that amendments to the report must update any hyperlinks referred to in the amendment that are inactive.

(2) Reference may not be made to any document if the portion of such document containing the pertinent information includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Information shall not be incorporated by reference or cross-referenced in any case where such incorporation would render the statement or report incomplete, unclear, or confusing. Incorporating information into the financial statements from elsewhere is not permitted.

(3) If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

INFORMATION TO BE INCLUDED IN REPORT

Item 1. Management's Discussion and Analysis of Financial Condition and Results of Operations

Set forth the information required by Item 9(a), (b), and (d) of Form 1-A for the interim period for which financial statements are required by Item 3 below.

Item 2. Other Information

Set forth any information required to be disclosed in a report on Form 1-U during the semiannual period covered by this Form 1-SA, but not reported, whether or not otherwise required by this Form 1-SA. If disclosure of such information is made under this item, it need not be repeated in a report on Form 1-U that would otherwise be required to be filed with respect to such information or in a subsequent report on Form 1-U.

Item 3. Financial Statements

The appropriate financial statements set forth below of the issuer, or the issuer and its predecessors or any businesses to which the issuer is a successor must be filed as part of the Form 1-SA.

Unless the issuer is a Canadian company, financial statements must be prepared on a consolidated basis in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a Canadian company, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If the financial statements comply with IFRS as issued by the IASB, such compliance must be explicitly and unreservedly stated in the notes to the financial statements.

The financial statements included pursuant to this item may be condensed, unaudited, and are not required to be reviewed. For additional guidance on presentation of the financial statements refer to Rule 8-03(a) of Regulation S-X. The financial statements must include the following:

(a) An interim consolidated balance sheet as of the end of the six month period covered by this report and a balance sheet as of the end of the preceding fiscal year. An interim balance sheet as of the end of the corresponding six month interim period of the preceding fiscal year need not be provided unless necessary for an understanding of the impact of seasonal fluctuations on the issuer's financial condition.

(b) Interim consolidated statements of income must be provided for the six month interim period covered by this report and for the corresponding period of the preceding fiscal year. Income statements must be accompanied by a statement that in the opinion of management all adjustments necessary in order to make the interim financial statements not misleading have been included.

(c) Interim statements of cash flows must be provided for the six month interim period covered by this report and for the corresponding period of the preceding fiscal year.

(d) Footnote and other disclosures should be provided as needed for fair presentation and to ensure that the financial statements are not misleading. Refer to Rule 8-03(b) of Regulation S-X for examples of disclosures that may be needed.

(e) *Financial Statements of Guarantors and Issuers of Guaranteed Securities.* Financial statements of a subsidiary that issues securities guaranteed by the parent or guarantees securities issued by the parent must be presented as required by Rule 3-10 of Regulation S-X, except that the periods presented are those required by this item and the financial statements need not be audited.

Item 4. Exhibits

(a) An exhibits index must be presented immediately preceding the first signature page of the report.

(b) File, as exhibits to this Form, the exhibits required by Form 1-A, except for the exhibits required by paragraphs 1, 12, and 13 of Item 17.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Exact name of issuer as specified in its charter)______________________________

By (Signature and Title)____

Date____

Pursuant to the requirements of Regulation A, this report has been signed below by the following persons on behalf of the issuer and in the capacities and on the dates indicated.

By (Signature and Title)____

Date____

By (Signature and Title)____

Date____

Note: The text of Form 1-SA will not appear in the Code of Federal Regulations.

* * * * *

13. Revise § 239.93 to read as follows:

§ 239.93 Form 1-U.

This form shall be used for filing current reports under Regulation A (§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-U

CURRENT REPORT PURSUANT TO REGULATION A

Date of Report (Date of earliest event reported)________________________

____
(Exact name of issuer as specified in its charter)

State or other jurisdiction of incorporation or organization	(I.R.S. Employer Identification No.)

____
(Full mailing address of principal executive offices)

(Issuer's telephone number, including area code)

Title of each class of securities issued pursuant to Regulation A: ____________

GENERAL INSTRUCTIONS

A. Rules as to Use of Form 1-U.

(1) This Form shall be used for current reports pursuant to Rule 257(b)(4) of Regulation A (§§ 230.251-230.263).

(2) A report on this Form is required to be filed, as applicable, upon the occurrence of any one or more of the events specified in Items 1 – 9 of this Form. Unless otherwise specified, a report is to be filed within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday, or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include, the first business day thereafter.

(3) If the issuer previously has provided substantially the same information as required by this Form in a report required by Rule 257(b) of Regulation A, the issuer need not make an additional report of the information on this Form. To the extent that an item calls for disclosure of developments concerning a previously reported event or transaction, any information required in the new report or amendment about the previously reported event or transaction may be provided by incorporation by reference to the previously filed report, if a hyperlink to such report as filed with the Commission is included.

(4) Copies of agreements, amendments or other documents or instruments are not required to be filed as exhibits to the Form 1-U unless specifically required by the applicable item. This instruction does not affect the requirement to otherwise file such agreements, amendments or other documents or instruments, including as exhibits to offering statements and periodic reports pursuant to the requirements of Regulation A.

B. Preparation of Report.

(1) Regulation A contains certain general requirements which are applicable to reports on any form, including amendments to reports. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form.

(2) This Form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report. Nevertheless, the report shall contain the number and caption of each applicable item, but the text of such item may be omitted. All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

(3) In addition to the information expressly required to be included in this Form, there shall be added 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.

C. Signature and Filing of Report.

(1) The report must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) The report must be signed by an officer duly authorized to sign on behalf of the issuer. The report must be signed using a typed signature. The signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this paragraph.

D. Incorporation by Reference and Cross-Referencing.

(1) An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR. Cross-referencing within the report is also encouraged to avoid repetition of information. For example, you may respond to an item of this Form by providing a cross-reference to the location of the information in another item, instead of repeating such information. Descriptions of where the information incorporated by reference or cross-referenced can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits incorporated by reference, this description must be noted in the exhibits index for each relevant exhibit. All such descriptions of where information incorporated by reference can be found must be accompanied by a separate hyperlink to the incorporated document on EDGAR. A hyperlink need not remain active after the filing of the report, except that amendments to the report must update any hyperlinks referred to in the amendment that are inactive.

(2) Reference may not be made to any document if the portion of such document containing the pertinent information includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Information shall not be incorporated by reference or cross-referenced in any case where such incorporation would render the statement or report incomplete, unclear, or confusing. Incorporating information into any financial statements from elsewhere is not permitted.

(3) If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

INFORMATION TO BE INCLUDED IN THE REPORT

Item 1. Fundamental Changes

(a) If the issuer has entered into or terminated a material definitive agreement that has resulted in or would reasonably be expected to result in a fundamental change to the nature of its business or plan of operations, disclose the following information to the extent applicable:

(1) the date on which the agreement was entered into, amended, or terminated, the identity of the parties to the agreement or amendment, and a brief description of any material relationship between the issuer or its affiliates and any of the parties (other than the relationship created by the material definitive agreement or amendment);

(2) a brief description of the material terms and conditions of the agreement;

(3) a brief description of the material circumstances surrounding the termination; and

(4) any material early termination penalties incurred by the issuer due to a termination.

(b) For purposes of this item, a material definitive agreement means an agreement that provides for obligations that are material to and enforceable against the issuer, or rights that are material to the issuer and enforceable by the issuer against one or more other parties to the agreement, in each case whether or not subject to conditions.

(c) File any material definitive agreement disclosed pursuant to this item as an exhibit to the report on this Form.

Instructions to Item 1:

1. A material definitive agreement that is not made in the ordinary course of business is not necessarily required to be disclosed under this item if it does not result in, and would not reasonably be expected to result in, a fundamental change to the nature of the issuer's business or plan of operations.

2. Without limiting the generality of the foregoing and solely for the purposes of this Item 1, a material definitive agreement is deemed to result in a fundamental change if it involves any of the following:

a. An acquisition transaction for which the purchase price, as defined by U.S. GAAP or IFRS, exceeds fifty-percent of the total consolidated assets of the issuer as of the end of the most recently completed fiscal year. If the *acquirer transferred assets to the acquiree than the carrying value of those assets should be excluded from the purchase price;*

b. A merger, consolidation, acquisition or similar transaction that requires approval by the issuer's securityholders; or

c. Any contract upon which the issuer's business is substantially dependent, as in the case of continuing contracts to sell the major part of the issuer's products or services or to purchase the major part of the issuer's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which the issuer's business is substantially dependent.

3. An issuer must provide disclosure under this item if the issuer succeeds as a party to the agreement or amendment to the agreement by assumption or assignment (other than in connection with a merger or acquisition or similar transaction that is otherwise reported pursuant to this item).

4. No disclosure under this item is required regarding the termination of a material definitive agreement if:

a. The agreement terminated on its stated termination date, or as a result of all parties completing their obligations under such agreement.

b. Only negotiations or discussions regarding termination of a material definitive agreement are being conducted and the agreement has not been terminated.

c. The issuer believes in good faith that the material definitive agreement has not been terminated, unless the issuer has received a notice of termination pursuant to the terms of agreement.

Item 2. Bankruptcy or Receivership

(a) If a receiver, fiscal agent or similar officer has been appointed for an issuer or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state, federal, or Canadian laws, in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the issuer or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental authority, disclose the following information:

(1) the name or other identification of the proceeding;

(2) the identity of the court or governmental authority;

(3) the date that jurisdiction was assumed; and

(4) the identity of the receiver, fiscal agent or similar officer and the date of his or her appointment.

(b) If an order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the issuer or its parent, disclose the following:

(1) the identity of the court or governmental authority;

(2) the date that the order confirming the plan was entered by the court or governmental authority;

(3) a summary of the material features of the plan;

(4) the number of shares or other units of the issuer or its parent issued and outstanding, the number reserved for future issuance in respect of claims and interests filed and allowed under the plan, and the aggregate total of such numbers; and

(5) information as to the assets and liabilities of the issuer or its parent as of the date that the order confirming the plan was entered, or a date as close thereto as practicable.

Instruction to Item 2:

The information called for in paragraph (b)(5) of this item may be presented in the form in which it was furnished to the court or governmental authority.

Item 3. Material Modification to Rights of Securityholders

(a) If the constituent instruments defining the rights of the holders of any class of securities of the issuer that were issued pursuant to Regulation A have been materially modified, disclose the date of the modification, the title of the class of securities involved and briefly describe the general effect of such modification upon the rights of holders of such securities.

(b) If the rights or benefits evidenced by any class of securities issued pursuant to Regulation A have been materially limited or qualified by the issuance or modification of any other class of securities by the issuer, briefly disclose the date of the issuance or modification, the general effect of the issuance or modification of such other class of securities upon the rights or benefits of the holders of the securities issued pursuant to Regulation A.

Instruction to Item 3:

Working capital restrictions and other limitations upon the payment of dividends must be reported pursuant to this item.

Item 4. Changes in Issuer's Certifying Accountant

(a) If an independent accountant who was previously engaged as the principal accountant to audit the issuer's financial statements, or an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary, resigns (or indicates that it declines to stand for re-appointment after completion of the current audit) or is dismissed, disclose the information that would be required under Item 304(a)(1) of Regulation S-K (17 CFR 229.304(a)(1)), including compliance with Item 304(a)(3) of Regulation S-K (17 CFR 229.304(a)(3)) if the issuer were a "registrant."

(b) If a new independent accountant has been engaged as either the principal accountant to audit the issuer's financial statements or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary, the issuer must disclose the information that would be required by Item 304(a)(2) of Regulation S-K (17 CFR 229.304(a)(2)) if the issuer were a "registrant."

Instructions to Item 4:

1. Information under this Item 4 is only required if the issuer's most recent qualified offering statement on Form 1-A or report on Form 1-K, whichever is most recent, contains audited financial statements.

2. The resignation or dismissal of an independent accountant, or its refusal to stand for re-appointment, is a reportable event separate from the engagement of a new independent accountant. On some occasions, two reports on Form 1-U are required for a single change in accountants, the first on the resignation (or refusal to stand for re-appointment) or dismissal of the former accountant and the second when the new accountant is engaged. Information required in the second Form 1-U filing in such situations need not be provided to the extent that it has been reported previously in the first Form 1-U filing.

Item 5. Non-reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

(a) If the issuer's board of directors, a committee of the board of directors or the officer or officers of the issuer authorized to take such action if board action is not required, concludes that any previously issued financial statements, covering one or more years or interim periods for which the issuer is required to provide financial statements under Regulation A, including Form 1-A, should no longer be relied upon because of an error in such financial statements as addressed in FASB Accounting Standards Codification Topic 250 or IAS 8, as may be modified, supplemented or succeeded, disclose the following information:

(1) the date of the conclusion regarding the non-reliance and an identification of the financial statements and years or periods covered that should no longer be relied upon;

(2) a brief description of the facts underlying the conclusion to the extent known to the issuer at the time of filing;
and

(3) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the issuer's independent accountant the matters disclosed in the filing pursuant to this paragraph (a).

(b) If the issuer is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, disclose the following information:

(1) the date on which the issuer was so advised or notified;

(2) identification of the financial statements that should no longer be relied upon;

(3) a brief description of the information provided by the accountant; and

(4) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the independent accountant the matters disclosed in the filing pursuant to paragraph (b) of this item.

(c) If the issuer receives advisement or notice from its independent accountant requiring disclosure under paragraph (b) of this item, the issuer must:

(1) provide the independent accountant with a copy of the disclosures the issuer is making in response to this item and the independent accountant shall receive a copy no later than the day that the disclosures are filed with the Commission;

(2) request the independent accountant to furnish to the issuer as promptly as possible a letter addressed to the Commission stating whether the independent accountant agrees with the statements made by the issuer in response to this item and, if not, stating the respects in which it does not agree; and

(3) amend the issuer's previously filed Form 1-U by filing the independent accountant's letter as an exhibit to the filed Form 1-U no later than two business days after the issuer's receipt of the letter.

Item 6. Changes in Control of Issuer

(a) If, to the knowledge of the issuer's board of directors, a committee of the board of directors, governing body similar to a board of directors, or authorized officer or officers of the issuer, a change in control of the issuer has occurred, furnish the following information:

(1) the identity of the persons who acquired such control;

(2) the date and a description of the transactions which resulted in the change in control;

(3) the basis of the control, including the percentage of voting securities of the issuer now beneficially owned directly or indirectly by the persons who acquired control;

(4) the amount of the consideration used by such persons;

(5) the sources of funds used by the persons, unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Securities Exchange Act of 1934.

(6) the identity of the persons from whom control was assumed; and

(7) any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters.

(b) Describe any arrangements, known to the issuer, including any pledge by any person of securities of the issuer or any of its parents, the operation of which may at a subsequent date result in a change in control of the issuer. It is not necessary to describe ordinary default provisions contained in the charter, trust indentures, or other governing instruments relating to securities of the issuer in response to this paragraph.

Item 7. Departure of Certain Officers

If the issuer's principal executive officer, principal financial officer, principal accounting officer, or any person performing similar functions, retires, resigns or is terminated from that position, disclose the fact that the event has occurred and the date of the event.

Instruction to Item 7:

> *The disclosure requirements of this item do not apply to an issuer that is a wholly-owned subsidiary of an issuer with a class of securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or under Regulation A.*

Item 8. Certain Unregistered Sales of Equity Securities

(a) If the issuer sells equity securities in a transaction that is not registered under the Securities Act or qualified under Regulation A, furnish the information set forth in Item 6 of Part I of Form 1-A. For purposes of determining the required filing date for the Form 1-U under this item, the issuer has no obligation to disclose information under this item until the issuer enters into an agreement enforceable against the issuer, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the issuer must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the equity securities are to be sold.

(b) No report need be filed if the equity securities sold, in the aggregate since its last report filed under this item or its last periodic report containing such disclosure, whichever is more recent, constitute less than 10% of the number of shares outstanding of the class of equity securities sold.

Instructions to Item 8:

> *1. For purposes of this item, "the number of shares outstanding" refers to the actual number of shares of equity securities of the class outstanding and does not include outstanding securities convertible into or exchangeable for such equity securities.*
>
> *2. It is not necessary to follow the format of Item 6 of Part I of Form 1-A when providing the information required by this item.*

Item 9. Other Events

The issuer may, at its option, disclose under this item any events or information, the disclosure of which is not otherwise called for by this Form, that the issuer deems of importance to securityholders.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Exact name of issuer as specified in its charter)______________________________

By (Signature and Title)____

Date____

Note: The text of Form 1-U will not appear in the Code of Federal Regulations.

* * * * *

14. Revise § 239.94 to read as follows:

§ 239.94 Form 1-Z.

This form shall be used to file an exit report under Regulation A (§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-Z

EXIT REPORT UNDER REGULATION A

GENERAL INSTRUCTIONS

(1) The following information must be provided in the XML-based Form 1-Z available through the EDGAR portal. The format shown below may differ from the electronic version available on EDGAR.

(2) An issuer filing this Form pursuant to Rule 257(a) must only complete the Preliminary Information and Part I.

(3) An issuer filing this Form to suspend its duty to file reports under Rule 257(d) must complete the Preliminary Information and Part II. Such issuer must also provide Part I if it has not previously provided the Part I information in a Form 1-K filing.

* * * * * *

PRELIMINARY INFORMATION

Exact name of issuer as specified in the issuer's charter: ______________________

Address of Principal Executive Offices: ______________________________________

____

Phone: (__) ________________________________

Commission File Number(s):________________________________

PART I
Summary Information Regarding the Offering and Proceeds

Date of qualification of the offering statement:________________________

Date of commencement of the offering:________________________

Amount of securities qualified to be sold in the offering:________________

Amount of securities sold in the offering:________________________

Price per security: $________________________

The portion of aggregate sales attributable to securities sold on behalf of the issuer:
$______________

The portion of aggregate sales attributable to securities sold on behalf of selling securityholders:
$______________

Fees in connection with this offering and names of service providers:

	Name of Service Provider	Fees
Underwriters:	______________	$______________
Sales Commissions:	______________	$______________
Finders' Fees:	______________	$______________
Audit:	______________	$______________
Legal:	______________	$______________
Promoters:	______________	$______________
Blue Sky Compliance:	______________	$______________

CRD Number of any broker or dealer listed:________________________

Net proceeds to the issuer: $________________________

Clarification of responses (if necessary): ________________________

PART II
Certification of Suspension of Duty to File Reports

Title of each class of securities covered by this Form________________________

Commission File Number(s)______________________________

Approximate number of holders of record as of the certification date:________________

Pursuant to the requirements of Regulation A, ______________________ *(Name of issuer as specified in charter)* certifies that it meets all of the conditions for termination of Regulation A reporting specified in Rule 257(d) and that there are no classes of securities other than those that are the subject of this Form 1-Z regarding which the issuer has Regulation A reporting obligations. ______________________ *(Name of issuer as specified in charter)* has caused this certification to be signed on its behalf by the undersigned duly authorized person.

By: ______________________________ Date: ______________________________
Title:______________________________

Instruction: This Part II of Form 1-Z is required by Rule 257(d) of Regulation A. An officer of the issuer or any other duly authorized person may sign, and must do so by typed signature. The name and title of the person signing the form must be typed or printed under the signature. The signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this instruction.

Note: The text of Form 1-Z will not appear in the Code of Federal Regulations.

* * * * *

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

15. The general authority for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq.; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

16. § 240.12g5-1 is amended by adding paragraph (a)(7) as follows:

§ 240.12g5-1 Definition of securities "held of record".

* * * * *

(a) * * *

(7) Other than when determining compliance with Rule 257(d)(2) of Regulation A (§ 230.257(d)(2)), the definition of "held of record" shall not include securities issued in a Tier 2 offering pursuant to Regulation A by an issuer that:

(i) Is required to file reports pursuant to Rule 257(b) of Regulation A (§ 230.257(b));

(ii) Is current in filing annual, semiannual and special financial reports pursuant to such rule as of its most recently completed fiscal year end;

(iii) Has engaged a transfer agent registered pursuant to Section 17A(c) of the Act to perform the function of a transfer agent with respect to such securities; and

(iv) Had a public float of less than $75 million as of the last business day of its most recently completed semiannual period, computed by multiplying the aggregate worldwide number of shares of its common equity securities held by non-affiliates by the price at which such securities were last sold (or the average bid and asked prices of such securities) in the principal market for such securities or, in the event the result of such public float calculation was zero, had annual revenues of less than $50 million as of its most recently completed fiscal year. An issuer that would be required to register a class of securities under Section 12(g) of the Act as a result of exceeding the applicable threshold in clause (iv) of this paragraph (a)(7), may continue to exclude the relevant securities from the definition of "held of record" for a transition period ending on the penultimate day of the fiscal year two years after the date it became ineligible. The transition period terminates immediately upon the failure of an issuer to timely file any periodic report due pursuant to Rule 257 (§ 230.257) at which time the issuer must file a registration statement that registers that class of securities under the Act within 120 days.

* * * * *

17. § 240.15c2-11 is amended by revising paragraphs (a)(3) and (d)(2)(i) to read as follows:

§ 240.15c2-11 Initiation or resumption of quotations without specific information.

* * * * *

(a) * * *

(3) A copy of the issuer's most recent annual report filed pursuant to section 13 or 15(d) of the Act or pursuant to Regulation A ((§§ 230.251-230.263 of this chapter), or a copy of the annual statement referred to in section 12(g)(2)(G)(i) of the Act in the case of an issuer required to file reports pursuant to section 13 or 15(d) of the Act or an issuer of a security covered by section 12(g)(2)(B) or (G) of the Act, together with any semiannual, quarterly and current reports that have been filed under the provisions of the Act or Regulation A by the issuer after such annual report or annual statement; *provided, however,* that until such issuer has filed its first annual report pursuant to section 13 or 15(d) of the Act or pursuant to Regulation A, or annual statement referred to in section 12(g)(2)(G)(i) of the Act, the broker or dealer has in its records a copy of the prospectus specified by section 10(a) of the Securities Act of 1933 included in a registration

statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F-6, or a copy of the offering circular specified by Regulation A included in an offering statement filed by the issuer under Regulation A, that became effective or was qualified within the prior 16 months, or a copy of any registration statement filed by the issuer under section 12 of the Act that became effective within the prior 16 months, together with any semiannual, quarterly and current reports filed thereafter under section 13 or 15(d) of the Act or Regulation A; and *provided further,* that the broker or dealer has a reasonable basis under the circumstances for believing that the issuer is current in filing annual, semiannual, quarterly, and current reports filed pursuant to section 13 or 15(d) of the Act or Regulation A, or, in the case of an insurance company exempted from section 12(g) of the Act by reason of section 12(g)(2)(G) thereof, the annual statement referred to in section 12(g)(2)(G)(i) of the Act; or

* * * * *

(d) * * *

(2) * * *

(i) A broker-dealer shall be in compliance with the requirement to obtain current reports filed by the issuer if the broker-dealer obtains all current reports filed with the Commission by the issuer as of a date up to five business days in advance of the earlier of the date of submission of the quotation to the quotation medium and the date of submission of the paragraph (a) information pursuant to the applicable rule of the Financial Industry Regulatory Authority, Inc. or its successor organization; and

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

18. The general authority for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

19. § 249.208(a) is revised by:

a. Revising paragraph (a) and

b. Adding paragraph (e).

The revisions and additions read as follows:

§249.208a Form 8-A, for registration of certain classes of securities pursuant to section 12 (b) or (g) of the Securities Exchange Act of 1934.

* * * * *

(a) Subject to paragraph (b) of this section, this form may be used for registration pursuant to section 12(b) or (g) of the Securities Exchange Act of 1934 of any class of securities of any issuer which:

(1) Is required to file reports pursuant to sections 13 and 15(d) of that Act;

(2) Is concurrently qualifying a Tier 2 offering statement relating to that class of securities using the Form S-1 or Form S-11 disclosure models; or

(3) Pursuant to an order exempting the exchange on which the issuer has securities listed from registration as a national securities exchange.

* * * * *

(e) Notwithstanding the foregoing in paragraphs (c) and (d) of this section, if the form is used for registration of a class of securities being offered under Regulation A, it shall become effective:

(1) For the registration of a class of securities under Section 12(b), upon the latest of the filing of the form with the Commission, the qualification of the Regulation A offering statement or the receipt by the Commission of certification from the national securities exchange listed on the form; or

(2) For the registration of a class of securities under Section 12(g), upon the later of the filing of the form and qualification of that Regulation A offering statement.

* * * * *

20. Amend Form 8-A (referenced in § 249.208a) by revising it to read as follows:

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-A

FOR REGISTRATION OF CERTAIN CLASSES OF SECURITIES PURSUANT TO SECTION 12(b) OR (g) OF THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS

A. Rule as to Use of Form 8-A.

(a) Subject to paragraph (b) below, this form may be used for registration pursuant to Section 12(b) or (g) of the Securities Exchange Act of 1934 of any class of securities of any issuer which is (1) required to file reports pursuant to Section 13 or 15(d) of that Act, (2) is concurrently qualifying a Tier 2 offering statement relating to that class of securities using the Form S-1 or Form S-11 disclosure models that includes financial statements that are audited in accordance with the standards of, and by an accounting firm that is registered with, the Public Company Accounting Oversight Board (United States), or (3) pursuant to an order exempting the exchange on which the issuer has securities listed from registration as a national securities exchange.

(b) If the registrant would be required to file an annual report pursuant to Section 15(d) of the Act for its last fiscal year, except for the fact that the registration statement on this form will become effective before such report is required to be filed, an annual report for such fiscal year shall nevertheless be filed within the period specified in the appropriate annual report form.

(c) If this form is used for the registration of a class of securities under Section 12(b), it shall become effective:

(1) If a class of securities is not concurrently being registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.) ("Securities Act"), upon the later of receipt by the Commission of certification from the national securities exchange listed on this form or the filing of the Form 8-A with the Commission; or

(2) If a class of securities is concurrently being registered under the Securities Act, upon the latest of the filing of the Form 8-A with the Commission, receipt by the Commission of certification from the national securities exchange listed on this form or effectiveness of the Securities Act registration statement relating to the class of securities.

(d) If this form is used for the registration of a class of securities under Section 12(g), it shall become effective:

(1) If a class of securities is not concurrently being registered under the Securities Act, upon the filing of the Form 8-A with the Commission; or

(2) If class of securities is concurrently being registered under the Securities Act, upon the later of the filing of the Form 8-A with the Commission or the effectiveness of the Securities Act registration statement relating to the class of securities.

(e) Notwithstanding the foregoing in paragraphs (c) and (d) of this form, if this form is used for registration of a class of securities being offered under Regulation A, it shall become effective:

(1) For the registration of a class of securities under Section 12(b), upon the latest of the filing of the Form 8-A with the Commission, the qualification of the Regulation A offering statement or the receipt by the Commission of certification from the national securities exchange listed on this form; or

(2) For the registration of a class of securities under Section 12(g), upon the later of the filing of the Form 8-A and qualification of the Regulation A offering statement.

(Note: Registration pursuant to paragraph (e) of this form is not permitted if the filing of the Form 8-A and, where applicable, the receipt by the Commission of certification from the national securities exchange listed on this form occurs more than five calendar days after the qualification of the Regulation A offering statement)

B. Application of General Rules and Regulations.

(a) The General Rules and Regulations under the Act contain certain general requirements which are applicable to registration on any form. These general requirements should be carefully read and observed in the preparation and filing of registration statements on this form.

(b) Particular attention is directed to Regulation 12B which contains general requirements regarding matters such as the kind and size of paper to be used, legibility, information to be given whenever the title of securities is required to be stated, incorporation by reference and the filing of the registration statement. The definitions contained in Rule 12b-2 should be especially noted.

C. Preparation of Registration Statement.

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the registration statement on paper meeting the requirements of Rule 12b-12. The registration statement shall contain the item numbers and captions, but the text of the items may be omitted. The answers to the items shall be prepared in the manner specified in Rule 12b-13.

D. Signature and Filing of Registration Statement.

Eight complete copies of the registration statement, including all papers and documents filed as a part thereof (other than exhibits) shall be filed with the Commission and at least one such copy shall be filed with each exchange on which the securities are to be registered. Exhibits shall be filed with the Commission and with any exchange in accordance with the Instructions as to Exhibits. At least one copy of the registration statement filed with the Commission and one filed with each exchange shall be manually signed. Unsigned copies shall be conformed.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-A

FOR REGISTRATION OF CERTAIN CLASSES OF SECURITIES PURSUANT TO SECTION 12(b) OR (g) OF THE SECURITIES EXCHANGE ACT OF 1934

____
(Exact name of registrant as specified in its charter)

(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
(Address of principal executive offices)	(Zip Code)

Securities to be registered pursuant to Section 12(b) of the Act:

Title of each class to be so registered	Name of each exchange on which each class is to be registered
____________________	____________________
____________________	____________________
____________________	____________________

If this form relates to the registration of a class of securities pursuant to Section 12(b) of the Exchange Act and is effective pursuant to General Instruction A.(c) or (e), check the following box. ☐

If this form relates to the registration of a class of securities pursuant to Section 12(g) of the Exchange Act and is effective pursuant to General Instruction A.(d) or (e), check the following box. ☐

If this form relates to the registration of a class of securities concurrently with a Regulation A offering, check the following box. ☐

Securities Act registration statement or Regulation A offering statement file number to which this form relates:____________________ (if applicable)

Securities to be registered pursuant to Section 12(g) of the Act:

____

(Title of class)

____

(Title of class)

INFORMATION REQUIRED IN REGISTRATION STATEMENT

Item 1. Description of Registrant's Securities to be Registered.

Furnish the information required by Item 202 of Regulation S-K (§229.202 of this chapter), as applicable.

Instruction. If a description of the securities comparable to that required here is contained in any prior filing with the Commission, such description may be incorporated by reference to such other filing in answer to this item. If such description will be included in a form of prospectus or an offering circular subsequently filed by the registrant pursuant to Rule 424(b) under the Securities Act (§230.424(b) of this chapter) or Rule 253(g) of Regulation A (§ 230.253(g) of this chapter), this registration statement shall state that such prospectus or offering circular shall be deemed to be incorporated by reference into the registration statement. If the securities are to be registered on a national securities exchange and the description has not previously been filed with such exchange, copies of the description shall be filed with copies of the application filed with the exchange.

Item 2. Exhibits.

List below all exhibits filed as a part of the registration statement:

Instruction. See the instructions as to exhibits, set forth below.

SIGNATURE

Pursuant to the requirements of Section 12 of the Securities Exchange Act of 1934, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereto duly authorized.

(Registrant) ______________________________________

Date ______________________________________

By ______________________________________

*Print the name and title of the signing officer under such officer's signature.

INSTRUCTIONS AS TO EXHIBITS

If the securities to be registered on this form are to be registered on an exchange on which other securities of the registrant are registered, or are to be registered pursuant to Section 12(g) of the Act, copies of all constituent instruments defining the rights of the holders of each class of such securities, including any contracts or other documents which limit or qualify the rights of such holders, shall be filed as exhibits with each copy of the registration statement filed with the Commission or with an exchange, subject to Rule 12b-32 regarding incorporation of exhibits by reference.

Note: The text of Form 8-A will not appear in the Code of Federal Regulations.

* * * * *

PART 260 - GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

21. The authority citation for Part 260 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77ddd, 77eee, 77ggg, 77nnn, 77sss, 78*ll* (d), 80b-3, 80b-4, and 80b-11, unless otherwise noted.

* * * * *

22. § 260.4a-1 is revised to read as follows:

§ 260.4a-1 Exempted securities under section 304(a)(8).

The provisions of the Trust Indenture Act of 1939 shall not apply to any security that has been or will be issued otherwise than under an indenture. The same issuer may not claim this exemption within a period of twelve consecutive months for more than $50,000,000 aggregate principal amount of any securities.

By the Commission.

Brent J. Fields
Secretary

Dated: March 25, 2015

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74582 / March 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16457

In the Matter of **CRAIG S. LAX,** **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 S. Lax ("Respondent" or "Lax").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. Respondent admits the facts set forth in Section III below, acknowledges that his conduct violated the federal securities laws, admits the Commission's jurisdiction over him and the subject matter of these proceedings, and 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. At all times relevant to these proceedings, Lax was the Chief Executive Officer and an associated person of G-Trade Services LLC ("G-Trade"), a broker-dealer registered with the Commission. Lax, 50 years old, is a resident of New Jersey.

2. On March 11, 2015, a judgment was entered by consent against Lax, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Craig S. Lax, Civil Action Number 2:15-cv-01079-WHW-CLW, in the United States District Court for the District of New Jersey.

3. The Commission's complaint alleged that G-Trade and ConvergEx Global Markets Limited ("CGM Limited"), a broker-dealer formerly registered with the Bermuda Monetary Authority, violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by engaging in a fraudulent scheme to conceal from customers the practice of charging hidden mark-ups and mark-downs, in addition to disclosed commissions, on securities trades. During the period from at least January 2008 through August 2011, Lax was a controlling person of G-Trade and CGM Limited, and with Lax's culpable participation, G-Trade and CGM Limited employees took steps to conceal from customers the practice of taking the hidden mark-ups and mark-downs, which were referred to in the scheme as "trading profits," or more commonly, as "TP."

IV.

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

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

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

with the right to apply for reentry after five years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Disapproved as to
Global Fixed Income, LLC
and Charles P. Kempf

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74586 / March 26, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31537 / March 26, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16460

In the Matter of

GLOBAL FIXED INCOME, LLC, CHARLES PERLITZ KEMPF, AGS CAPITAL GROUP, LLC, ALLEN GABRIEL SILBERSTEIN, BANES CAPITAL MANAGEMENT, LLC, JOEL LEIGH BANES, MICHAEL WARNER KOCHMAN, BIG STAR CAPITAL, LLC, RYAN PATRICK MCGUINNESS, ESSO VENTURES, LLC, MARK LEONARD LECHLER, ETEK INVESTMENT MANAGEMENT, INC., KEVIN GREGORY HALEY, FINMARK RESOURCES, LLC, PETER ERIC BAKER, JOSEPH MICHAEL ARAIZ, PARKER PASCHAL & COMPANY, LLC, ANDREW PARKER SHOOK, PMK CAPITAL MANAGEMENT, LLC, ROGER KUMAR, JR., RLJ FIXED INCOME, LLC, AND COREY ANTWUAN PRINTUP

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

50 of 56

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Global Fixed Income, LLC ("GFI"), Charles Perlitz Kempf ("Kempf"), AGS Capital Group, LLC ("AGS"), Allen Gabriel Silberstein ("Silberstein"), Banes Capital Management, LLC ("Banes Capital"), Joel Leigh Banes ("Joel Banes"), Michael Warner Kochman ("Kochman"), Big Star Capital, LLC ("Big Star"), Ryan Patrick McGuinness ("McGuinness"), Esso Ventures, LLC ("Esso"), Mark Leonard Lechler ("Lechler"), Etek Investment Management, Inc. ("Etek"), Kevin Gregory Haley ("Haley"), Finmark Resources, LLC ("Finmark"), Peter Eric Baker ("Baker"), Joseph Michael Araiz ("Araiz"), Parker Paschal & Company, LLC ("Parker Paschal"), Andrew Parker Shook ("Shook"), PMK Capital Management, LLC ("PMK Capital"), Roger Kumar, Jr. ("Kumar"), RLJ Fixed Income, LLC ("RLJ Fixed Income"), and Corey Antwuan Printup ("Printup") (the "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents 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, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act, 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 finds that:

SUMMARY

These proceedings concern violations of the broker-dealer registration provisions of the Exchange Act by a trading firm, GFI, its principal Kempf, and 20 entities and individuals that acted as unregistered broker-dealers (the "Participants"). The Participants allowed GFI to increase its allocations in new issue corporate bonds ("New Issues"). Before each New Issue purchase, GFI transferred money to the Participants' accounts in the Participants' names but on GFI's behalf. Upon purchase of their respective allocations of the New Issues, the Participants transferred their allocations to GFI, which then sold the allocations into the secondary market, typically at a small profit that was divided between GFI and the particular Participant who obtained the allocation. As GFI's owner, Kempf received all of GFI's net profits.

Between July 2009 and June 2012 ("the Relevant Period"), GFI generally directed the Participants to purchase over $2.5 billion in New Issues on GFI's behalf. Over the Relevant Period, the Participants also purchased over $2.3 billion in securities on the secondary market ("Secondary Trades") on behalf of GFI. Collectively, over the three-year period, the Participants purchased approximately $4.8 billion in securities for GFI without being registered as broker-dealers.

RESPONDENTS

1. Global Fixed Income, LLC is a Delaware corporation with its principal place of business in Lake Bluff, Illinois. GFI primarily buys and sells fixed income securities for its own account. GFI has never been registered with the Commission as a broker-dealer.

2. Charles Perlitz Kempf, age 46, has residences in Lake Forest, Illinois and England. Kempf is GFI's sole owner, chief executive officer and president. Kempf directs GFI's business operations. Kempf held a Series 7 securities license and has not been associated with a registered broker-dealer since January 2007.

3. AGS Capital Group, LLC was formed in June 2009 and is a Nevada corporation with its principal place of business in Florida. AGS has never been registered with the Commission as a broker-dealer.

4. Allen Gabriel Silberstein, age 40, resides in Miami, Florida. Silberstein is AGS's 99% owner, its chief executive officer and sole employee. Silberstein runs AGS's day-to-day operations as its only employee. Silberstein has never been registered with the Commission as a broker-dealer, nor been an associated person of a registered broker-dealer, and does not hold any securities licenses.

5. Banes Capital Management, LLC was formed in 2004 and is a Tennessee limited liability company with its principal place of business in Tennessee. Although Banes Capital is an investment adviser registered with the Commission, it has never been registered with the Commission as a broker-dealer.

6. Joel Leigh Banes, age 53, resides in Memphis, Tennessee. Joel Banes was the chief executive officer, managing member of Banes Capital, and 100% owner of Banes Capital during the relevant time period. Joel Banes holds Series 7, 24, 52, 63 and 65 securities licenses and is a registered representative at a broker-dealer registered with the Commission. Joel Banes' involvement in Banes Capital's buying and selling securities on the behalf of GFI and Kempf, however, was outside the scope of his employment as a registered representative.

7. Michael Warner Kochman, age 38, resides in Springfield, New Jersey. From October 2008 through June 2013, Kochman was an investment adviser at Banes Capital and a registered representative at a broker-dealer. Kochman holds Series 7, 63 and 65 securities licenses. As was the case with Banes, however, Kochman's involvement in the buying and selling of securities on behalf of GFI and Kempf occurred not at the registered broker-dealer, within the scope of Kochman's activities as a registered representative, but at Banes Capital.

8. Big Star Capital, LLC was formed in 1999 in Texas and later reincorporated in Florida with its principal place of business in Florida. Big Star has never been registered with the Commission as a broker-dealer.

9. Ryan Patrick McGuinness, age 31, resides in Tampa, Florida. McGuinness is Big Star's sole owner and runs its day-to-day operations. McGuinness has never been registered with the Commission as a broker-dealer, nor been an associated person of a registered broker-dealer, and does not hold any securities licenses.

10. Esso Ventures, LLC was formed in 2005 and is a Delaware corporation with its principal place of business in California. Esso's primary business activity was buying and selling securities on behalf of GFI. Esso has never been registered with the Commission as a broker-dealer.

11. Mark Leonard Lechler, age 39, resides in Pasadena, California. Lechler owns Esso and, as its managing member and sole employee, runs its day-to-day operations. Although Lechler holds Series 7 and 66 securities licenses and is a registered representative at a broker-dealer registered with the Commission, his involvement in Esso Ventures' buying and selling securities on behalf of GFI and Kempf preceded his employment as a registered representative.

12. Etek Investment Management, Inc. was formed in 2008 and is a New Jersey corporation with its principal place of business in New Jersey. Etek has never been registered with the Commission as a broker-dealer.

13. Kevin Gregory Haley, age 55, resides in Jenkintown, Pennsylvania. Haley owns one-third of Etek. Haley does not hold any securities licenses, and has never been registered with the Commission as a broker-dealer nor been an associated person of a registered broker-dealer.

14. Finmark Resources, LLC was formed in 2004 and is a Delaware corporation with its principal place of business in New Jersey. Finmark has never been registered with the Commission as a broker-dealer.

15. Peter Eric Baker, age 68, resides in New Jersey. Baker owns and operates Finmark. Baker does not hold any securities licenses, and he has never been registered with the Commission as a broker-dealer nor been an associated person of a registered broker-dealer.

16. Joseph Michael Araiz, age 53, resides in New York City. During at least 2009 through 2012, Araiz was the chief executive officer, president and chief operating officer of Further Lane Asset Management, LLC, which was registered with the Commission as an investment adviser until March 2014. Araiz holds Series 7, 24, 63 and 66 securities licenses. Until November 2013, Araiz also owned and operated a registered broker-dealer, Further Lane Securities, LP, which was not involved in buying and selling securities on behalf of GFI. Araiz's involvement in Further Lane Asset Management, LLC's buying and selling securities at the direction of GFI and Kempf was outside the scope of his employment as a registered representative with Further Lane Securities, LP.

17. Parker Paschal & Company, LLC was formed in 2009 and is a Kentucky corporation with its principal place of business in Louisville, Kentucky. Parker Paschal has never been registered with the Commission as a broker-dealer.

18. Andrew Parker Shook, age 45, resides in Louisville, Kentucky. Shook owns 100% of Parker Paschal, is its sole employee, and runs its day-to-day operations. Shook does not hold any securities licenses, has never been registered with the Commission as a broker-dealer and has not been an associated person of a registered broker-dealer since April 2004.

19. PMK Capital Management, LLC was formed in 2004 and is a Florida corporation with its principal place of business in Florida. PMK Capital has never been registered with the Commission as a broker-dealer.

20. Roger Kumar, Jr., age 49, resides in Ocean Ridge, Florida. Kumar owns 71% of PMK Capital and until May 2014 ran its day-to-day operations. From February 2006 until the present, Kumar has been the 71% owner of PMK Securities and Research, Inc. (PMK Securities), a registered broker-dealer, which operates a wholly owned subsidiary, PMK Capital Advisors, Inc. (PMK Advisors), an investment adviser registered with the Commission. PMK Securities and PMK Advisors were not involved in buying and selling bonds with GFI. Kumar's involvement in PMK Capital's buying and selling securities at the direction of GFI and Kempf was outside the scope of his employment as a registered representative with PMK Securities. In approximately May 2014, Kumar ceased his day-to-day involvement with PMK Securities. Kumar holds Series 7, 63 and 65 securities licenses.

21. RLJ Fixed Income, LLC was formed in 2011 and is a Delaware corporation with its principal place of business in Bethesda, Maryland. RLJ's majority owner is The RLJ Companies, LLC. RLJ has never been registered with the Commission as a broker-dealer.

22. Corey Antwuan Printup, age 33, resides in Maryland. Since 2012, Printup has been responsible for RLJ's day-to-day operations and is employed as a vice president at The RLJ Companies, LLC. Printup does not currently hold any securities licenses, has never been registered with the Commission as a broker-dealer and has not been an associated person of a registered broker-dealer since July 2006.

OTHER RELEVANT ENTITY

23. Further Lane Asset Management, LLC was formed in 1997 and is a New York corporation with its principal place of business in New York. Further Lane was an investment adviser registered with the Commission from 2000 to March 31, 2014, but it has never been registered with the Commission as a broker-dealer. Araiz bought and sold securities on behalf of GFI through Further Lane.

BACKGROUND

GFI's Background and Trading Strategy

24. Kempf formed GFI in 2004 and is GFI's sole owner, president and primary decision maker. During the Relevant Period, GFI had five employees, including Kempf, and primarily bought and sold fixed income securities, focusing on corporate securities; however, GFI also bought and sold agency securities (e.g., Fannie Mae and Freddie Mac bonds) and sold government securities as a hedge against interest rate risk. GFI primarily purchased investment grade corporate New Issues. In part, because the New Issues are often oversubscribed, GFI was generally able to sell or "flip" the bonds within a few days for a small profit as compared to the dollar value of the trade.

GFI's Relationships with the Participants

25. Beginning in February 2008, in an attempt to further increase GFI's profitability, GFI and Kempf solicited the Participants to purchase bonds for GFI. In part, GFI used the Participants to increase GFI's allocation in oversubscribed New Issues.

26. Generally, GFI located Participants through word of mouth or through Participants that were compensating others as "finders." Kempf provided some of the Participants with a PowerPoint presentation to market GFI. This presentation described GFI's history, business, investment strategy and profitability. If interested, the Participant met with Kempf to discuss a formal business relationship with GFI. Once the Participant agreed to act as GFI's agent, the Participant created a corporation, if one did not already exist, and all but one entered into a written agreement with GFI (a "Participant Agreement" or "Profit Splitting Agreement") to purchase securities on GFI's behalf. The Participant Agreement or Profit Splitting Agreement (depending on which was used) was signed by Kempf and the Participant's control person. Among other things, the Participant Agreement set forth: (1) the Participant's compensation, generally a splitting of the monthly trading profits with GFI ranging between 10% and 50%; (2) that GFI provided all of the capital for the Participant's trading; and (3) that GFI generally assumed all trading losses. In addition, many of the Participants executed an additional agreement (a "Guaranty of Payment") in which GFI: (1) agreed to pay for all securities; and (2) represented that the Participant did not have to register as a broker or dealer.

GFI's and Kempf's Direction of the Participants' Trading Activity

27. After each Participant signed up with GFI, GFI often directed the Participant's trading activity related to the New Issues. For example, GFI often directed the Participant to open accounts at specific underwriters and provided the Participant with the name and telephone number of a salesperson or contact person at each underwriter. The Participant opened delivery versus payment ("DVP") accounts at the underwriters. A DVP account requires payment when the securities are delivered, meaning that the account maintains no cash or other securities unlike a traditional brokerage account. At trade settlement, GFI directed its clearing firm to transfer money to pay for the trade. After settlement, the Participant, at GFI's direction, instructed the underwriter to immediately transfer the securities to GFI's account at GFI's clearing firm.

GFI's Compensation of the Participants

28. Once GFI obtained the New Issues from the Participants, GFI sold the bonds, usually at a profit. Shortly after each month ended, GFI provided each of the Participants with a monthly profit and loss statement reflecting the results from the previous month's trades. GFI paid the Participants their share of the profits based upon the agreed split set forth in the Participant Agreement or Profit Splitting Agreement, net of any losses GFI incurred on any unprofitable trades. As indicated in the table below, between 2009 and 2012, the Participants received the following payout ratios and compensation from GFI:

Participant	Payout Ratio	2009-2012 Compensation
PMK Capital Management	50%	$4,076,281.36
Finmark	20%	$1,073,982.56
Esso	50%	$1,051,432.56
Further Lane Asset Management, LLC	50%	$726,558.28
Banes Capital	45%	$662,780.40
RLJ	20%-35%	$465,359.92
Etek	20%	$447,475.64
AGS	45%	$446,223.16
Big Star	15%	$415,890.08
Parker Paschal	35%	$377,974.48
Total		**$9,743,958.44**

In sum, GFI paid the Participants approximately $9.7 million in transaction-based compensation.

The Participants' Roles

29. The Participants played an essential role in GFI's profitability by providing additional New Issues allocations to GFI as well as Secondary Trades as described in the paragraphs that follow. The Participants purchased approximately $4.8 billion in New Issues and Secondary Trades on behalf of GFI as indicated in the table below (listed in order of dollar amount purchased for GFI):

July 1, 2009 through June 30, 2012						
Total Amount of Purchases by Participant				Total Number of Transactions by Participant		
Participant	**New Issues**	**Secondary Trades**	**Total New Issues + Secondary Trades**	**New Issues**	**Secondary Trades**	**Total New Issues + Secondary Trades**
PMK Capital	$1.2 billion	$657 million	$1.9 billion	724	254	978
Banes Capital	$440 million	$436 million	$876 million	276	183	459
Finmark	$24 million	$553 million	$577 million	12	61	73
AGS	$191 million	$199 million	$390 million	115	81	196
Further Lane	$216 million	$134 million	$350 million	170	87	257
Etek	$94 million	$181 million	$275 million	62	93	155
Parker Paschal	$77 million	$132 million	$209 million	59	72	131
RLJ	$154 million	0	$154 million	119	0	119
Big Star	$106 million	0	$106 million	137	0	137
Esso	$14 million	$50 million	$64 million	9	18	27
Total	**$2.5 billion**	**$2.3 billion**	**$4.8 billion**	**1683**	**849**	**2532**

30. In 2007, Kumar, the majority owner of PMK Capital, met with Kempf about purchasing securities on behalf of GFI. Kumar understood that PMK Capital could increase GFI's allocation in New Issues. On April 17, 2008, PMK Capital entered into a Profit Splitting Agreement, signed by Kempf and Kumar on behalf of GFI and PMK Capital, respectively, where PMK agreed to buy New Issues for GFI and trading profits were split 50/50 between GFI and PMK Capital. Kempf and another GFI employee directed PMK's New Issues purchases.

31. In 2009, Kochman, a registered investment adviser at Banes Capital, and Joel Banes met with Kempf about Banes Capital purchasing securities on behalf of GFI. Joel Banes understood that Banes Capital could increase GFI's allocation in New Issues. Joel Banes received and signed a Participant Agreement and Guarantee of Payment. Under the Participant Agreement,

trading profits were split 45/55 between Banes Capital and GFI, respectively. Kochman was paid 40% of the amount GFI paid Banes Capital. Kochman executed all the trades by Banes Capital on behalf of GFI. At times, Kempf directed Banes Capital on what purchases to make for GFI, generally through email, and the majority of the purchases were New Issues.

32. In 2008, Baker, the owner of Finmark, communicated with Kempf about purchasing securities on behalf of GFI. On February 28, 2008, Finmark and GFI executed a Profit Splitting Agreement and Guaranty of Payment, which was signed by Baker and Kempf. Under the Profit Splitting Agreement, the profits were split 20/80 between Finmark and GFI, respectively. Generally, GFI emailed instructions to Finmark on which New Issues to purchase.

33. In 2009, Silberstein, the owner of AGS, met with Kempf about purchasing securities on behalf of GFI. On July 23, 2009, GFI and AGS entered into a Participant Agreement, which was signed by Kempf and Silberstein, respectively. Under the Profit Splitting Agreement, the profits were split 45/55 between AGS and GFI, respectively. Generally, GFI directed AGS's New Issues purchases through emails.

34. In 2007, Araiz, the chief executive officer, president, and chief operating officer of registered investment adviser Further Lane, met with Kempf about purchasing securities on behalf of GFI. In June 2009, Kempf and Araiz signed a Participation Agreement under which the profits were split 50/50 between GFI and Further Lane. Generally, GFI directed Further Lane's trading in oversubscribed New Issues through emails.

35. In 2008, Haley met with Kempf about purchasing securities on behalf of GFI. Haley formed Etek to trade securities for GFI. In June 2008, Etek and GFI executed a Profit Splitting Agreement and Guarantee of Payment Agreement. Under the Profit Splitting Agreement, Etek and GFI split the trading profits 20/80, respectively.

36. In late 2008, Shook, the owner of Parker Paschal, met with Kempf about purchasing securities on behalf of GFI. Shortly thereafter, Shook and Kempf signed the Guaranty of Payment Agreement and Profit Splitting Agreement, under which GFI agreed to pay Parker Paschal 35% of any trading profits. At times, Kempf directed Shook's trading on behalf of GFI.

37. In May 2011, RLJ Fixed Income was formed by the RLJ Companies to purchase securities on behalf of GFI. RLJ Fixed Income and GFI executed a Participant Agreement, under which RLJ Fixed Income received $500 for every $1 million in purchases for GFI. In January 2012, when Printup was given day-to-day responsibility for RLJ Fixed Income, he expanded the business relationship with GFI. Printup also renegotiated RLJ Fixed Income's compensation under the Participant Agreement so that RLJ Fixed Income received 20%-35% of trading profits. Printup closed RLJ Fixed Income's existing DVP accounts, opened new DVP brokerage accounts with salespeople he was familiar with, and he increased the trading activity on behalf of GFI. Generally, Printup received purchase instructions from Kempf and GFI regarding New Issues.

38. In 2009, McGuinness met with Kempf about purchasing securities on behalf of GFI. Subsequently, in 2009, McGuinness formed Big Star to purchase securities on behalf of GFI. In September 2009, GFI and Big Star executed a Participant Agreement, which was signed by Kempf and McGuinness. Under the Participant Agreement, GFI agreed to pay Big Star 15% of any trading profits. Generally, GFI directed Big Star's trading.

39. In 2005, Lechler formed Esso. In 2008, Lechler agreed to purchase bonds on behalf of GFI without a written agreement and received 50% of the trading profits. Generally, GFI directed Lechler's trading activity through emails. In addition, Lechler recruited other Participants (i.e., acted as a finder) to purchase securities for GFI and was paid by GFI for the trading related to the referrals. The payment amount was either a percentage of the Participant's monthly profits (i.e., an override commission) or a flat rate.

40. As demonstrated by the conduct described above, the Participants regularly participated in securities transactions for GFI and received transaction-based compensation from GFI for this activity. However, the Participants were not registered as broker-dealers with the Commission while engaged in this activity.

41. As a result of the conduct described above, the Participants committed violations of Section 15(a)(1) of the Exchange Act, which makes it unlawful for any broker or dealer to use the mails or any other means of interstate commerce to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless that broker or dealer is registered with the Commission in accordance with Section 15(b) of the Exchange Act.

42. As a result of the conduct described above, GFI and Kempf caused, and Kempf willfully[1] aided and abetted, violations of Section 15(a)(1) of the Exchange Act, which makes it unlawful for any broker or dealer to use the mails or any other means of interstate commerce to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless that broker or dealer is registered with the Commission in accordance with Section 15(b) of the Exchange Act.

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.

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

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

A. Respondents GFI, Kempf, AGS, Silberstein, Banes Capital, Joel Banes, Kochman, Big Star, McGuinness, Esso, Lechler, Etek, Haley, Finmark, Baker, Araiz, Parker Paschal, Shook, PMK Capital, Kumar, RLJ Fixed Income, and Printup cease and desist from committing or causing any violations and any future violations of Section 15(a)(1) of the Exchange Act.

B. Respondent Kempf be, and hereby is, suspended for a period of twelve months effective on the second Monday following the entry of this Order from association with any broker or 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.

C. Within ten days of the entry of this Order, Respondents GFI and Kempf are jointly and severally liable to pay disgorgement of $1,467,113.04 and within 120 days of the entry of this Order an additional $968,876.57 (for a total disgorgement amount of $2,435,989.61), and, within ten days of the entry of this Order, the Respondents below are jointly and severally liable with GFI and Kempf to pay disgorgement to the Securities and Exchange Commission as follows:

(a) $111,555.79 for Respondents AGS and Silberstein;
(b) $165,695.10 for Respondents Banes Capital, Joel Banes and Kochman;
(c) $103,972.52 for Respondents Big Star and McGuinness;
(d) $262,858.14 for Respondents Esso and Lechler;
(e) $111,868.91 for Respondents Etek and Haley;
(f) $268,495.64 for Respondents Finmark and Baker;
(g) $181,639.57 for Respondent Araiz;
(h) $94,493.62 for Respondents Parker Paschal and Shook;
(i) $1,019,070.34 for Respondents PMK Capital and Kumar; and
(j) $116,339.98 for Respondents RLJ Fixed Income and Printup.

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

(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 Respondents GFI, Kempf, AGS, Silberstein, Banes Capital, Joel Banes, Kochman, Big Star, McGuinness, Esso, Lechler, Etek, Haley, Finmark, Baker, Araiz, Parker Paschal, Shook, PMK Capital, Kumar, RLJ Fixed Income, and/or Printup 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 Ms. Lorraine B. Echavarria, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 444 Flower Street, Ste. 900, Los Angeles, CA 90071.

D. The Respondents shall, within 10 days of the entry of this Order, pay the civil money penalties indicated below to the Securities and Exchange Commission:

(a) $500,000 for Respondent GFI;
(b) $50,000 for Respondent AGS;
(c) $5,000 for Respondent Silberstein;
(d) $50,000 for Respondent Banes Capital;
(e) $5,000 for Respondent Joel Banes;
(f) $5,000 for Respondent Kochman;
(g) $50,000 for Respondent Big Star;
(h) $5,000 for Respondent McGuinness;
(i) $50,000 for Respondent Esso;
(j) $5,000 for Respondent Lechler;
(k) $50,000 for Respondent Etek;
(l) $5,000 for Respondent Haley;
(m) $50,000 for Respondent Finmark;
(n) $5,000 for Respondent Baker;
(o) $5,000 for Respondent Araiz;
(p) $50,000 for Respondent Parker Paschal;
(q) $5,000 for Respondent Shook;
(r) $50,000 for Respondent PMK Capital;
(s) $5,000 for Respondent Kumar;

(t) $50,000 for Respondent RLJ Fixed Income; and
(u) $5,000 for Respondent Printup.

Payment shall be made in the following 12 installments for Respondent Baker for a total of $5,000: (1) within 10 days after the entry of this Order, Respondent Baker shall pay $417; (2) on the first day of the following 10 months after the entry of this Order, Respondent Baker shall pay $417; and (3) on the first day of the 11th month following the entry of this Order, Respondent Baker shall make a final payment of $413.

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

(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:

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6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Respondents GFI, AGS, Silberstein, Banes Capital, Joel Banes, Kochman, Big Star, McGuinness, Esso, Lechler, Etek, Haley, Finmark, Baker, Araiz, Parker Paschal, Shook, PMK Capital, Kumar, RLJ Fixed Income, and/or Printup 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 Ms. Lorraine B. Echavarria, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 444 Flower Street, Ste. 900, Los Angeles, CA 90071.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
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. 74585 / March 26, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16459

In the Matter of **DAVID BOYLE** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against David Boyle ("Boyle" 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, and except as provided herein in Section V, 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 Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

SUMMARY

Between at least January 1, 2008 and June 30, 2012 ("the Relevant Period"), Global Fixed Income, LLC ("GFI") had five employees, including Charles Perlitz Kempf ("Kempf"), and primarily bought and sold fixed income securities, focusing on corporate securities; however, GFI also bought and sold agency securities (e.g., Fannie Mae and Freddie Mac bonds) and sold government securities as a hedge against interest rate risk. GFI primarily purchased investment grade corporate bonds. To increase GFI's allocation in new issue corporate bonds ("New Issues"), during the Relevant Period, GFI entered into agreements with third-parties, including Etek Investment Management, Inc. ("Etek"), to purchase securities on behalf of GFI. Shortly thereafter, the third-parties, including Etek, transferred the securities to GFI, which then sold the securities. Because the New Issues were often oversubscribed, GFI was generally able to sell or "flip" the bonds within a few days for a small profit as compared to the dollar value of the trade. Over the Relevant Period, the third parties, including Etek, also purchased securities on the secondary market ("Secondary Trades") on behalf of GFI.

RESPONDENT

1. David Boyle, age 54, resides in Blackwood, New Jersey. Respondent owns one-third of Etek. Respondent does not hold any securities licenses, and has never been registered with the Commission as a broker-dealer nor been an associated person of a registered broker-dealer.

OTHER RELEVANT PERSONS

2. Etek Investment Management, Inc. was formed in 2008 and is a New Jersey corporation with its principal place of business in New Jersey. Etek has never been registered with the Commission as a broker-dealer.

3. Global Fixed Income, LLC is a Delaware corporation with its principal place of business in Lake Bluff, Illinois. GFI primarily buys and sells fixed income securities for its own account. GFI has never been registered with the Commission as a broker-dealer.

4. Charles Perlitz Kempf, age 46, has residences in Lake Forest, Illinois and England. Kempf is GFI's sole owner, chief executive officer and president. Kempf directs GFI's business operations. Kempf held a Series 7 securities license and has not been associated with a registered broker-dealer since 2007.

FACTS

5. In 2008, Boyle met with Kempf about purchasing securities on behalf of GFI. During a meeting in 2008, Kempf provided Boyle with a PowerPoint presentation to market GFI. This presentation described GFI's history, business, investment strategy and profitability. Subsequently, Boyle and two other persons formed Etek to trade securities on behalf of GFI.

6. In June 2008, Etek and GFI executed a Profit Splitting Agreement and Guarantee of Payment Agreement. Under the Profit Splitting Agreement, Etek and GFI split the trading profits 20/80, respectively. Under the Guarantee of Payment Agreement, GFI agreed to pay for all securities.

7. After the Profit Splitting Agreement and Guarantee of Payment Agreement were executed, GFI generally directed Etek's trading activity related to the New Issues. For example,

GFI often directed Boyle, on Etek's behalf, to open brokerage accounts at specific underwriters. Boyle opened delivery versus payment ("DVP") accounts at the underwriters on Etek's behalf. A DVP account requires payment when the securities are delivered, meaning that the account maintains no cash or other securities unlike a traditional brokerage account. At trade settlement, GFI directed its clearing firm to transfer money to pay for Etek's trade. After settlement, Etek, at GFI's direction, instructed the underwriter to immediately transfer the securities to GFI's account at GFI's clearing firm. Shortly thereafter, GFI sold the securities.

8. Between July 1, 2009 and June 30, 2012, Etek purchased approximately $94 million in New Issues in 62 transactions and approximately $181 million in Secondary Trades in 93 transactions. In connection with these purchases, between 2009 and 2012, GFI paid Etek approximately $447,475.64 in transaction based-compensation under the Profit Splitting Agreement.

9. As demonstrated by the conduct described above, Boyle, on behalf of Etek, regularly participated in securities transactions for GFI and received transaction-based compensation from GFI for this activity. However, Boyle was not registered as a broker-dealer with the Commission while engaged in this activity.

10. As a result of the conduct described above, Boyle committed violations of Section 15(a)(1) of the Exchange Act, which makes it unlawful for any broker or dealer to use the mails or any other means of interstate commerce to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless that broker or dealer is registered with the Commission in accordance with Section 15(b) of the Exchange Act.

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 that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Boyle cease and desist from committing or causing any violations and any future violations of Section 15(a)(1) of the Exchange Act.

B. Within ten days of the entry of this Order, Respondent Boyle shall pay $111,868.91 in disgorgement less any amount paid, by that date, by or on behalf of Etek, in satisfaction of Etek's obligation to pay disgorgement in the same amount.

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 Respondent Boyle 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 Ms. Lorraine B. Echavarria, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 444 Flower Street, Ste. 900, Los Angeles, CA 90071.

C. Respondent Boyle shall pay a $5,000 civil money penalty to the Securities and Exchange Commission. Payment shall be made in the following 12 installments by Respondent for a total of $5,000: (1) within 10 days after the entry of this Order, Respondent shall pay $417; (2) on the first day of the following 10 months after the entry of this Order, Respondent shall pay $417; and (3) on the first day of the 11th month following the entry of this Order, Respondent shall make a final payment of $413.

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:

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6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Respondent Boyle 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 Ms. Lorraine B. Echavarria, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 444 Flower Street, Ste. 900, Los Angeles, CA 90071.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
Municipal Advisor
and NRSRO bars

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 74596 / March 27, 2015

Admin. Proc. File No. 3-15628

In the Matter of

DANIEL IMPERATO

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

Grounds for Remedial Action

Injunction

Respondent was permanently enjoined from violating antifraud, registration, and other provisions of the federal securities laws. *Held*, it is in the public interest to bar him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participation in any penny stock offering.

APPEARANCES:

Daniel Imperato, pro se.

Timothy S. McCole and *B. David Fraser*, for the Division of Enforcement.

Appeal filed: July 28, 2014
Last brief received: November 17, 2014

Daniel Imperato appeals from an initial decision of an administrative law judge barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO") and from participation in any penny stock offering based on his having been enjoined from violating antifraud, registration, and other provisions of the federal securities laws.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

I.

A. Imperato was permanently enjoined for violating antifraud, registration, and other provisions of the federal securities laws.

In January 2012, we filed a civil action alleging that, from 2005 through 2008 (the "Relevant Period"), Imperato defrauded investors in Imperiali, Inc., a Florida corporation that he owned and controlled, in a scheme that raised approximately $2.5 million. In documents distributed to investors and in Imperiali's filings with the Commission, Imperato, along with two other individuals, portrayed Imperiali as a "thriving, multinational corporation" with "multiple, valuable subsidiaries" when, in fact, it was "just a shell corporation" with "virtually no assets or operations," and its subsidiaries were "worthless or, in some cases, even non-existent."[2]

Specifically, the complaint alleged that, during the Relevant Period, Imperato, though neither registered as a broker or dealer nor associated with a registered broker or dealer, offered and sold Imperiali stock in unregistered offerings in several states, hiring a sales team to "cold call" investors and directly soliciting investors himself. According to the complaint, Imperato and his sales team gave investors private placement memoranda ("PPMs") that contained untrue and misleading statements, including that Imperiali's board of directors was comprised of experienced professionals, that Imperiali owned "Imperiali Organization," a company that purportedly was involved in multiple business enterprises, and that Imperiali would use stock offering proceeds to fund a business development company. But, in reality, the complaint alleged, Imperiali had no board of directors and did not own Imperiali Organization, and Imperato used stock offering proceeds to cover personal expenses, including expenses related to his 2008 independent campaign to become president of the United States. The complaint further alleged that Imperato made materially false and misleading statements in press releases that he drafted and disseminated to investors and in Imperiali's registration statements and annual and periodic reports. Those filings, among other things, "falsely described Imperiali's investments, valued Imperiali's virtually worthless assets at amounts ranging from $3.5 million to $269 million, and failed to disclose the issuance of five million shares of restricted stock."[3]

After a tentative settlement agreement with Imperato fell through, the Division of Enforcement (the "Division") filed a motion for summary judgment, arguing that there was "no

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1 *See Daniel Imperato*, Initial Decision No. 628, 2014 WL 3048126 (July 7, 2014).

2 *SEC v. Imperiali, Inc.*, No. 9:12-cv-80021 (S.D. Fla. Jan. 9, 2012), ECF No. 1.

3 *Id.*

genuine issue as to any material fact" and that it was "entitled to judgment as a matter of law."[4] In the motion, the Division requested that the district court enjoin Imperato from future violations of the federal securities laws, order disgorgement, including prejudgment interest, assess a civil money penalty, and impose an officer and director bar. The court referred the motion to a magistrate judge who issued a report and recommendation that summary judgment be granted in favor of the Division.[5]

On October 8, 2013, the district court, after reviewing the magistrate judge's report, Imperato's objections, and pertinent portions of the record, "ratified, affirmed and approved" the report in its entirety.[6] The court granted the Division's motion for summary judgment and adopted the magistrate judge's findings as its own, including the findings that:

- Imperato and Imperiali violated Sections 5(a) and 5(c) of the Securities Act of 1933[7] by selling Imperiali stock in transactions that were not registered with the Commission, resulting in the sale of more than 2,362,500 shares of common stock to at least twenty-six investors in at least eighteen states;

- Imperato violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Securities Act Section 17(a)[8] by "knowingly making blatantly false and deceptive material statements" in PPMs, press releases, and Imperiali's filings with the Commission;

- Imperato acted as an unregistered broker in the offer and sale of Imperiali stock, in violation of Exchange Act Section 15(a)[9] by personally soliciting investors to buy stock, serving as the "closer" to negotiate and complete the stock sales, and receiving the majority of the proceeds from the stock sales;

- Imperato was liable as a controlling person and/or aider and abettor in violating Exchange Act Section 13(a)[10] by participating in the drafting and editing of Imperiali's materially misleading reports filed with the Commission, and Imperiali violated Exchange Act Section 13(b)[11] by failing to keep "even the most rudimentary records" and having "no controls in place to prevent Imperato from arbitrarily booking nonexistent assets on its financial statements and assigning those assets multi-million dollar values without the slightest basis";

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4 Fed. R. Civ. P. 56(c).

5 *SEC v. Imperiali, Inc.*, No. 9:12-cv-80021 (S.D. Fla. Sept. 25, 2013), ECF No. 137.

6 *SEC v. Imperiali, Inc.*, No. 9:12-cv-80021 (S.D. Fla. Oct. 8, 2013), ECF No. 163.

7 15 U.S.C. § 77e(a), (c).

8 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; 15 U.S.C. § 77q(a).

9 15 U.S.C. § 78*o*(a).

10 *Id.* § 78m(a).

11 *Id.* § 78m(b).

- Imperato made materially false statements to Imperiali's accountant and signed false certification statements attesting to the accuracy of reports filed with the Commission, in violation of rules promulgated pursuant to Exchange Act Section 13(a); and

- Imperato violated Section 34(b) of the Investment Company Act of 1940[12] by materially overstating the value of Imperiali's portfolio companies and failing to maintain required company documents.

On November 8, 2013, the district court entered a final judgment enjoining Imperato from future violations of the federal securities laws.[13] In addition, the court ordered him to disgorge \$2,493,785, plus \$640,703 in prejudgment interest, and imposed an officer and director bar.[14] Imperato appealed the district court's judgment to the United States Court of Appeals for the Eleventh Circuit.

B. Imperato's injunction provided the basis for this follow-on administrative proceeding.

On November 27, 2013, while Imperato's appeal in the Eleventh Circuit was pending, we instituted this "follow-on" administrative proceeding, pursuant to Exchange Act Section 15(b)(6).[15] After both parties filed cross-motions for summary disposition under Rule 250(a) of the Commission's Rules of Practice,[16] the law judge determined that there was no genuine issue with regard to any material fact and that the Division was entitled to summary disposition as a matter of law. Concluding that Imperato's conduct was egregious, recurrent, and involved a high degree of scienter, the law judge barred Imperato from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or NRSRO and from participation in any penny stock offering.

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12 *Id.* § 80a-33(b).

13 *SEC v. Imperiali, Inc.*, No. 9:12-cv-80021 (S.D. Fla. Nov. 8, 2013), ECF No. 195.

14 *Id.* The district court declined to impose a civil penalty in light of the "extensive nature of the relief granted." *Id.*

15 15 U.S.C. § 78*o*(b)(6). An administrative proceeding that seeks to impose sanctions after an individual is enjoined from acts involving securities fraud is commonly called a "follow-on" proceeding. *Chris G. Gunderson, Esq.*, Exchange Act Release No. 61234, 2009 WL 4981617, at *5 n.39 (Dec. 23, 2009) (citing *Gibson v. SEC*, 561 F.3d 548, 550 n.1 (6th Cir. 2009)).

16 *See* 17 C.F.R. § 201.250(a) (providing that a motion for summary disposition may be granted "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law"). We have repeatedly upheld the use of summary disposition in circumstances where a respondent has been enjoined and the sole determination concerns the appropriate sanction. *See, e.g.*, *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *5 (Feb. 4, 2008), *petition denied*, 561 F.3d 548 (6th Cir. 2009).

C. During the pendency of this administrative proceeding, the Eleventh Circuit affirmed the injunction.

On December 2, 2014, while this administrative proceeding was pending, the Eleventh Circuit affirmed the district court's grant of summary judgment for the Division.[17] The court found that the issues raised by Imperato did not establish any genuine issues of material fact precluding summary judgment. Among other things, Imperato argued that he did not act as an unregistered broker because he did not "cold call" investors or receive proceeds from securities sales. The Eleventh Circuit found this argument to be unavailing:

> Even if Imperato did not receive proceeds from sales or initiate cold-calls to investors, the Commission presented undisputed evidence that Imperato spoke with investors, acted as the "closer" for his sales team, and drafted memoranda for potential investors. This evidence was sufficient to establish that Imperato acted as a "broker."[18]

Imperato also argued that he did not violate the antifraud provisions because his valuations of Imperiali and its subsidiaries were not false. The Eleventh Circuit rejected this argument as well, stating:

> The record established that Imperato dictated and approved press releases and financial statements that included millions of dollars in false investments, including a $70 million valuation of investments in companies that were never incorporated and that Imperato testified had "no operation." The valuation process for Imperiali and its subsidiaries show[ed] an "extreme departure from the standards of ordinary care," and presented so obvious a danger of misleading buyers that Imperato "must have been aware" of the risk.[19]

Imperato further argued that he was not in "control" of Imperiali and therefore could not be held liable as a control person under Exchange Act Section 20(a). But the Eleventh Circuit found that the record refuted Imperato's argument and established as a matter of law that he was the controlling shareholder of Imperiali and controlled corporate decisions.[20]

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17 *SEC v. Imperiali, Inc.*, ___ F. App'x ___, 2014 WL 6765525 (11th Cir. Dec. 2, 2014) (per curiam).

18 *Id.* at *3.

19 *Id.* at *2-3 (quoting *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)).

20 *Id.* at *4. The Eleventh Circuit considered and rejected various other procedural challenges to the district court's decision, including that the district court erred when it reopened the case after an administrative closure; that the district court erred when it denied his motion to amend or alter the judgment under Rule 59 of the Federal Rules of Civil Procedure; that the

(continued...)

II.

A. The Exchange Act predicates exist for determining whether remedial sanctions against Imperato are warranted.

Exchange Act Section 15(b)(6) authorizes us to determine whether it is "in the public interest" to impose remedial sanctions, including a bar from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO, if a person has been enjoined from any conduct or practice in connection with the purchase or sale of a security, and, at the time of the alleged misconduct, the person was associated with a broker.[21] We find that the statutory predicates for considering whether to impose sanctions have been satisfied. Imperato was permanently enjoined from violating antifraud, registration, and related provisions of the federal securities laws, and those violations stemmed from his conduct as an unregistered broker and involved his participation in a penny stock offering. Although Imperato was not registered as a broker or dealer or associated with a registered broker or dealer, we have authority to sanction persons, such as Imperato, who act as unregistered brokers.[22]

Imperato does not deny that he was enjoined or that he participated in a penny stock offering, but rather asserts that he did not act as a broker in the securities transactions between Imperiali and investors. This assertion is nothing more than an attempt to relitigate the district court's determination, upheld by the Eleventh Circuit, that Imperato acted as an unregistered broker in violation of Exchange Act Section 15(a). The doctrine of collateral estoppel precludes Imperato from attacking in this proceeding the injunction and factual and procedural issues actually litigated and necessary to the district court's decision.[23] The only means of challenging

(...continued)
district court erred when it denied his requests for documents; and that the district court erred when it denied his motion for a change of venue. *See id.* at *4-5.

21 15 U.S.C. § 78*o*(b)(6). It also authorizes us to bar a person from participation in any offering of penny stock based on the same considerations. *Joseph Contorinis*, Exchange Act Release No. 72031, 2014 WL 1665995, at *1 n.4 (Apr. 25, 2014).

22 *See Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1998) (affirming Commission's authority to bar persons from association with investment advisers, whether registered or unregistered); *see also, e.g., Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *8 (July 26, 2013) (stating that "[i]t is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding"); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 WL 3299148, at *6 (Dec. 2, 2005) (barring unregistered associated person of an unregistered broker-dealer from association with a broker or dealer and from participation in any penny stock offering, based on injunction prohibiting securities law violations).

23 *See, e.g., Sherwin Brown*, Advisers Act Release No. 3217, 2011 WL 2433279, at *4 (June 17, 2011) (stating that "[t]he doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as the factual and procedural issues that were actually litigated and necessary to the court's decision to issue the injunction").

those issues was through an appeal to the Eleventh Circuit, which Imperato has already unsuccessfully pursued.[24]

B. The public interest requires that Imperato be barred.

We next turn to what sanctions, if any, are in the public interest. In analyzing the public interest, we consider, among other things, the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (the "*Steadman* factors").[25] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[26] We also consider the extent to which sanctions will have a deterrent effect.[27]

We have stated that conduct that violates the antifraud provisions of the federal securities laws is "subject to the severest of sanctions."[28] "'Fidelity to the public interest' requires a severe sanction when a respondent's misconduct involves fraud because the 'securities business is one in which opportunities for dishonesty recur constantly.'"[29] We have held that "ordinarily, and in the absence of evidence to the contrary," it will be in the public interest to bar from participation in the securities industry a respondent enjoined from violating antifraud provisions.[30] In this case, based on our consideration of the *Steadman* factors, we conclude that a lifetime collateral bar is in the public interest.

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24 *Id.* (stating that, to the extent respondents dispute findings made by the court in the underlying proceeding, their remedy is to challenge them on appeal from the injunctive action).

25 *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 & n.18 (Apr. 20, 2012) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

26 *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam).

27 *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *8 (Jan. 31, 2006) (stating that "[w]e also consider the extent to which the sanction will have a deterrent effect"); *see also PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (noting that "'[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry'") (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)); *Steadman*, 603 F.2d at 1142 (stating that "the Commission also may consider the likely deterrent effect its sanctions will have on others in the industry").

28 *Gunderson*, 2009 WL 4981617, at *5 (quoting *Justin F. Ficken,* Exchange Act Release No. 58802, 2008 WL 4610345, at *3 (Oct. 17, 2008)).

29 *Id.* (quoting *Ficken*, 2008 WL 4610345, at *3).

30 *Ficken*, 2008 WL 4610345, at *3.

Imperato's conduct was egregious, recurrent, and involved a high degree of scienter.[31] He engaged in a scheme to defraud numerous investors in multiple states, generating substantial illegal proceeds. His unlawful actions included the drafting and dissemination of offering materials and press releases in which he knowingly made blatant, material misrepresentations about the value of Imperiali and its subsidiaries and the filing of registration statements, periodic reports, and current reports in which he knowingly overvalued Imperiali's virtually worthless assets. Imperato's misconduct was not isolated, but occurred over a period of years. He acted with a high degree of scienter, which "exacerbates the egregiousness of his misconduct."[32]

Moreover, Imperato has not provided assurances against future violations or acknowledged his wrongful conduct,[33] but continues to deny wrongdoing and attempts to shift blame to others by arguing that he was not the "ultimate decisionmaker" for Imperiali, despite the determination in the injunctive proceeding that he controlled the company.[34] Imperato's failure to acknowledge his misconduct or seemingly appreciate the seriousness of that misconduct is highly troubling and indicates there is a significant risk that, given the opportunity, he would commit misconduct in the future.[35] And Imperato's assertion in his brief that he wants the "freedom to be a consultant and adviser to any type of start-up company with aspirations of becoming public" suggests that he is likely to return to the securities industry in some capacity and thereby threaten the public interest, if so permitted.[36] We believe that, under all the circumstances, collaterally

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31 "Scienter is a mental state consisting of an intent to deceive, manipulate, or defraud, and includes recklessness, commonly defined as 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *10 n.67 (July 12, 2013) (quoting *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 704 (7th Cir. 2008)).

32 *James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *5 (July 23, 2010).

33 Even if Imperato had made some assurances against future violations, his high degree of scienter would cause us to doubt the sincerity of those assurances. *See Korem*, 2013 WL 3864511, at *6 (stating that "although Korem vowed not to repeat his misdeeds or work in the securities industry again, his past criminal history, the degree of scienter involved in the misconduct at issue, and his efforts to conceal his misconduct cause us concern about the sincerity of Korem's assurances").

34 Under the doctrine of collateral estoppel, that determination binds Imperato. *See supra* notes 23 and 24 and accompanying text (discussing collateral estoppel).

35 *See Christopher A. Lowry*, Advisers Act Release No. 2052, 2002 WL 1997959, at *5 (Aug. 30, 2002) (stating that "Lowry's refusal to recognize his wrongdoing and his public posture that his behavior was appropriate demonstrate that his conduct poses a future threat of harm"), *aff'd*, 340 F.3d 501 (8th Cir. 2003).

36 *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *6 (Oct. 29, 2014) (stating that respondent's asserted involvement in "founding" a start-up company and "helping that company grow," coupled with his admitted "fascination" with the markets, indicated

(continued...)

barring Imperato serves the public interest by protecting investors and the markets from the threat that he poses and deterring others from engaging in the same serious misconduct.[37]

C. Imperato's arguments against the imposition of a collateral bar lack merit.

Although a respondent in a follow-on administrative proceeding may put forward mitigating evidence concerning the circumstances surrounding his underlying misconduct, the bulk of Imperato's arguments consist of impermissible collateral attacks on the factual findings and legal conclusions of the district court (*e.g.*, that he was the "closer" of the securities sales, that the press releases contained false statements, and that he acted with scienter) and the fairness of the injunctive proceeding (*e.g.*, that he did not consent to the referral of the case to the magistrate judge, that the district judge was "hoodwinked with falsehoods," that the district judge should have considered certain newly discovered evidence, that Division counsel acted improperly in connection with the failed settlement agreement, and that "the judgments were entered under ex [post] facto laws"). As discussed, a follow-on administrative proceeding is not the proper forum for addressing those issues.[38]

Imperato further contends that this proceeding was unfair because he was entitled to a hearing and an opportunity to cross-examine witnesses, which he was denied when the law judge granted the Division's motion for summary disposition. Rule 250(b) of the Rules of Practice provides that the law judge may grant such a motion, without a hearing, if "there is no genuine issue with regard to any material fact."[39] In challenging a motion for summary disposition, the opposing party may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing.[40] Here, the Division established that the existence of Imperato's injunction was undisputed, and Imperato was given the opportunity to identify specific evidence creating genuine issues of material fact that could not

(...continued)
that he would likely return to the securities industry in some capacity and thereby threaten the public interest).

[37] *See, e.g.*, *Anthony Fields, CPA*, Advisers Act Release No. 4028, 2015 WL 728005, at *23 (stating that imposing a collateral bar "serves the public interest and will protect investors from the threat that [the respondent] poses"); *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *12 (Dec. 13, 2012) (imposing a collateral bar based on conduct that threatens investors and the markets).

[38] *See supra* notes 23 and 24 and accompanying text.

[39] 17 C.F.R. § 201.250(b).

[40] *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013).

be resolved without a hearing. But Imperato failed to produce such evidence.[41] As a result, an in-person hearing was not required, and summary disposition was appropriate.[42]

Imperato next contends that this proceeding was time-barred by the five-year statute of limitations in 28 U.S.C. § 2462. But that five-year statute of limitations applies only to "an action or proceeding for the enforcement of any civil fine, penalty, or forfeiture,"[43] and we have held that "a follow-on proceeding seeking an industry-wide bar is not for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" within the meaning of § 2462, and thus is not subject to § 2462's limitations period.[44] Moreover, even if § 2462 did apply, this follow-on action was instituted less than one month after the permanent injunction was entered against Imperato, well within the five-year limitations period.[45]

Finally, Imperato contends that imposition of a bar was unfair because it "ties [his] hands in involuntary servitude for the rest of [his] life," deprives him of his "freedom to be a consultant and adviser to any type of start-up company with aspirations of becoming public," and destroys his "income, reputation, and the abilities for the shareholders to ever receive their well-deserved rewards and recover their investments." But we have stated that the likelihood that a respondent may suffer adverse consequences as a result of the violation or from the disciplinary proceeding that followed—including such significant consequences as the loss of income, employment opportunities, or adverse reputational impact—is not a mitigating factor.[46]

In sum, we find no mitigating factors that would lead us to impose on Imperato any sanction less than a full collateral bar, which is amply warranted by the facts and circumstances

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41 *See, e.g., Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 WL 4320146, at *11 & n.62 (Sept. 20, 2012) (finding that respondent's submissions before law judge did not raise existence of genuine issues of material fact).

42 Imperato also contends that this proceeding was unfair because the Commission acted as "prosecutor, judge, and jury." But, as our precedent makes clear, the combination of investigatory, prosecutorial, and quasi-judicial functions in one agency does not violate due process. *See, e.g., Thomas C. Kocherhans*, Exchange Act Release No. 36556, 1995 WL 723989, at *3 (Dec. 6, 1995) (stating "[w]hile the NASD as a whole, like this Commission, exercises investigatory, prosecutory and quasi-judicial functions, the combination of such functions in one agency does not violate due process").

43 28 U.S.C. § 2462 (providing that "any proceeding for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued").

44 *See Contorinis*, 2014 WL 1665995, at *3 (holding that 28 U.S.C. § 2462 does not apply to follow-on proceedings).

45 *Id.* (stating that "any applicable statute of limitations for a follow-on proceeding . . . runs from either the date of the criminal conviction or the injunction upon which the action is based, not from the date of the underlying conduct").

46 *See Clifton*, 2013 WL 3487076, at *16 n. 116.

discussed above. Given his egregious misconduct and troubling attitude towards future compliance, we find that the public interest clearly warrants barring Imperato from any future role in the securities industry.

An appropriate order will issue.[47]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations because those bars are based on conduct predating the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).[48]

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

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47 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion. The Division's request for summary affirmance is denied.

48 *E.g.*, *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *9 (Oct. 29, 2014) (Commissioners Gallagher and Piwowar concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 74596 / March 27, 2015

Admin. Proc. File No. 3-15628

In the Matter of DANIEL IMPERATO

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Daniel Imperato be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participation in any offering of penny stock.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

Commissioner Gallagher
Commissioner Piwowar
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4053 / March 30, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31539 / March 30, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3644 / March 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16462

In the Matter of LYNN TILTON; PATRIARCH PARTNERS, LLC; PATRIARCH PARTNERS VIII, LLC; PATRIARCH PARTNERS XIV, LLC; AND PATRIARCH PARTNERS XV, LLC, 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 pursuant to 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 Lynn Tilton ("Tilton"); Patriarch Partners, LLC ("Patriarch"); Patriarch Partners VIII, LLC ("Patriarch VIII"); Patriarch Partners XIV, LLC ("Patriarch XIV"); and Patriarch Partners XV, LLC ("Patriarch XV") (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Since 2003, Respondents have defrauded three Collateralized Loan Obligation ("CLO") funds they manage and these funds' investors by providing false and misleading information, and engaging in a deceptive scheme, practice and course of business, relating to the values they reported for these funds' assets. Lynn Tilton, who controls and makes relevant decisions on behalf of each of the Respondents, is responsible for all of these violations.

2. The three CLO funds, collectively known as the "Zohar Funds," raised more than $2.5 billion from investors and used these investments to make loans to distressed companies. These loans to distressed companies are the primary assets of the Zohar Funds. However, many of the distressed companies have performed poorly and have not made interest payments, or have made only partial payments, to the Funds over several years.

3. As required under the relevant deal documents, through the trustee, Tilton's entities regularly provide information to the Funds and their investors about the performance of the Funds. This information includes valuation categorizations of the Funds' assets and financial statements purportedly reflecting the financial position of each Fund.

4. Despite the poor performance of many of the Funds' assets, Tilton has intentionally and consistently directed that nearly all valuations of these assets be reported as unchanged from their valuations at the time the assets were originated.

5. These actions are inconsistent with the categorization methodology set forth in documents governing the Funds. This methodology turns on, among other factors, whether a distressed company has timely made interest payments to the Funds. Instead of applying this methodology, Tilton instead substitutes her own, independent discretion when categorizing the Funds' investments. At Tilton's direction, Respondents will not assign a lower valuation category to an asset unless and until Tilton subjectively decides to stop "supporting" the distressed company.

6. If Respondents had applied the categorization methodology set forth in the documents, certain valuation ratio tests derived from the categorizations would have failed by at least 2009. As a result, based on other provisions in the documents, management fees and other payments to Tilton and her entities would have been reduced by almost $200 million, and investors would have gained more control over the Funds' activities, among other consequences. By applying her own discretion rather than the valuation methodology set forth in the governing documents, Tilton has avoided these consequences and taken

excessive fees from the Funds. As a result, Respondents' practices were inconsistent with disclosures and created a clear conflict of interest.

7. Respondents also prepare quarterly financial statements for the Funds, which are provided to investors. These financial statements include disclosures about the Funds' loan impairment policy and portfolio fair value. Tilton certifies these financial statements and represents that they are prepared in conformity with generally accepted accounting principles ("GAAP").

8. However, contrary to these statements, Respondents do not prepare the financial statements in conformity with GAAP. Significantly, rather than applying a GAAP-compliant impairment methodology, Respondents impair assets only when Tilton decides to withdraw support for a distressed company. This approach mirrors the discretionary approach Tilton uses to categorize assets and does not conform with GAAP. It is also inconsistent with other disclosures in the financial statements that falsely indicate that Respondents assess and consider impairment issues and the fair value of the Funds' loan assets.

9. Respondents have never disclosed Tilton's discretionary valuation approaches to the Funds or their investors, much less the conflict of interest these approaches created. As a result, Respondents also breached their fiduciary duties and their contractual standard for managing the Zohar Funds as set forth in the relevant deal documents.

B. RESPONDENTS

10. **Lynn Tilton**, age 55, is a resident of Rumson, New Jersey and Highland Beach, Florida. Tilton manages each of the Patriarch entities described below. She also controls their decisions.

11. **Patriarch Partners, LLC** is a Delaware limited liability company with a principal place of business in New York, New York. Patriarch's employees, including Tilton, run the businesses of Patriarch VIII, Patriarch XIV, and Patriarch XV (collectively, the "Patriarch Collateral Managers"). Patriarch is indirectly owned 100% by Tilton.

12. **Patriarch Partners VIII, LLC** is a Delaware limited liability company with a principal place of business in New York, New York. Patriarch VIII has been registered as a relying investment adviser with the Commission since March 2012 and is the collateral manager for Zohar CDO 2003-1, Limited ("Zohar I"). Patriarch VIII is indirectly owned 100% by Tilton and a trust for the benefit of Tilton's daughter.

13. **Patriarch Partners XIV, LLC** is a Delaware limited liability company with a principal place of business in New York, New York. Patriarch XIV has been registered as a relying investment adviser with the Commission since March 2012 and is the collateral manager for Zohar II 2005-1, Limited ("Zohar II"). Patriarch XIV is indirectly owned 100% by Tilton and a trust for the benefit of Tilton's daughter.

14. **Patriarch Partners XV, LLC** is a Delaware limited liability company with a principal place of business in New York, New York. Patriarch XV has been registered as an investment adviser with the Commission since March 2012 and is the collateral manager for Zohar III, Limited ("Zohar III"). Patriarch XV is indirectly owned 100% by Tilton and a trust for the benefit of Tilton's daughter.

C. FACTS

Structure, Strategy, and Performance of the Zohar Funds

15. Tilton structured the Zohar Funds as CLO funds. A CLO fund is a securitization vehicle in which a special purpose entity, the issuer, raises capital through the issuance of secured notes and uses the proceeds to purchase a portfolio of commercial loans. A collateral manager, typically an investment adviser, determines what loans to purchase or originate on behalf of the CLO fund. Cash flows and other proceeds from the collateral are used to repay the investor noteholders in the CLO fund.

16. The Zohar Funds' investors invested in the Zohar CLO Funds in return for the promise of regular interest payments and the repayment of their principal on a specified maturity date. The three Zohar CLO deals have the following details:

Name of Deal	Date of Issuance	Approximate Principal Amount of Notes	Maturity Date
Zohar I	2003	$532 million	November 2015
Zohar II	2005	$1 billion	January 2017
Zohar III	2007	$1 billion	April 2019

17. Each Zohar deal is governed by various deal documents, including the indenture and the collateral management agreement ("CMA"). Tilton signed each indenture and each CMA as Manager of the collateral manager.

18. The indenture describes the terms of the offering, including the maturity date of the notes, information reporting requirements, and priority of payments. The indenture also describes the rights of the parties and responsibilities of the collateral manager.

19. The CMA, a contract between the issuer and the respective Patriarch Collateral Manager, engages Patriarch VIII, XIV, or XV as the collateral manager for the deal and describes that entity's obligations and compensation.

20. The CMA for each deal allows the Patriarch Collateral Manager to select and manage the collateral to be held by the fund. Through the Patriarch Collateral Managers, Tilton used the funds raised from investors to buy or make loans to primarily private, mid-sized distressed companies (the "Portfolio Companies"). Tilton typically directed more than one of the Zohar Funds to extend loans to the same Portfolio Company.

Every quarter, the investors receive an interest payment, generated from the collective interest payments made by the Portfolio Companies.

21. In connection with the loans made to distressed companies, the Zohar Funds obtained equity in the Portfolio Companies. Tilton also obtained equity in many of the Portfolio Companies through other entities she owned.

22. Tilton's management strategy for the Zohar Funds is and has been to improve the operations of the distressed Portfolio Companies so that the companies can pay off their debt, increase in value, and eventually be sold for additional profit. However, the Portfolio Companies as a whole have performed worse than expected.

23. As a result, Tilton has now informed the investors in Zohar I that, without an extension on the maturity date, they will suffer significant losses when their notes in the CLO fund mature in November 2015. Because of the tremendous overlap in the investments across the three deals, any default in Zohar I would have significant ramifications for Zohar II and Zohar III as well.

Tilton's Management and Control of the Zohar Funds and the Portfolio Companies

24. Tilton is the chief executive officer ("CEO") and sole principal of Patriarch Partners, LLC, which employs individuals in various roles to support the Zohar Funds.

25. Tilton and entities under her control own all of the Patriarch Collateral Managers. The Patriarch Collateral Managers have no employees of their own, but instead rely on the employees of Patriarch to conduct business. Tilton makes all significant decisions relating to management of the collateral. She also signs all transaction documents on behalf of the Patriarch Collateral Managers.

26. The Patriarch Collateral Managers are entitled to a Senior Collateral Management Fee of 1% of the amount of assets in the deal, paid quarterly, and a Subordinated Collateral Management Fee (the "Subordinated Fee") of 1% of the amount of assets in the deal, also paid or accrued quarterly. As discussed below, payment or accrual of the Subordinated Fee is dependent on the performance of a valuation test.

27. Entities controlled by Tilton hold preference shares in the Zohar Funds. Distributions on those preference shares are also contingent on the outcome of the valuation test.

28. Tilton actively manages the business of the Portfolio Companies. She hires and fires their senior employees and provides input on their major operating decisions. Tilton requires that the companies report regularly to her regarding their financial condition and business prospects. Tilton is the CEO of some of the Portfolio Companies. In other instances, Tilton is the sole manager of the Portfolio Companies that are LLCs.

Tilton Is Improperly Valuing Fund Assets and Improperly Collecting the Subordinated Fee and Other Payments.

The Purpose, Calculation, and Publication of the OC Ratio Test

29. The indenture for each of the Zohar CLOs contains certain numeric tests that must be met on a monthly basis. If those tests are not met, the indenture outlines certain consequences, which include increased rights by the investors to control the fund and/or remove the collateral manager, and elimination of the Funds' obligations to pay the Subordinated Fee. Failure of these tests also changes the waterfall distribution for each Fund, such that investors receive earlier repayments on their principal.

30. One of those tests is the Overcollateralization Ratio (the "OC Ratio") test. The OC Ratio is a numeric formula that, in this case, divides the total value of the loans the relevant Zohar Fund has made to Portfolio Companies by the outstanding principal balance of the notes due to the Fund's investors.

$$\text{OC Ratio} = \frac{\text{Value of Funds' Loan Assets}}{\text{CLO Investors' Principal}}$$

31. The higher the OC Ratio, the greater the cushion between the value of the Fund's collateral and the principal amount of investors' notes. As the numerator and denominator in the OC Ratio approach the same level, the chance of an investor suffering losses in its principal grows.

32. The OC Ratio test is satisfied if the resulting percentage is at least equal to the threshold percentage defined in the indenture. For the three Zohar Funds, that percentage varies, ranging from 105% to 112%. If the OC Ratio falls below these levels, then the consequences outlined in the indenture would be triggered. Patriarch consistently monitors the OC Ratio test percentage. However, based on Tilton's inputs, the OC Ratio test has never failed, despite the substantial decline in value of the Zohar Funds' assets.

33. Under the terms of the indentures, the trustee for each of the Zohar Funds is required to prepare and distribute a monthly report to noteholders that contains various information about the fund and its assets, including the outstanding balance of the notes, interest received, a description of the loans in the portfolio, and the outcome of tests relating to the collateral, including the OC Ratio test.

34. The indenture for each Zohar CLO also requires the collateral manager to categorize each loan that the fund makes or acquires. The category of each asset, which is published in the trustee reports, determines its value for calculating the numerator of the OC Ratio. Therefore, a change in categorization of an asset results in a change to the ratio.

35. In the case of Zohar I and Zohar II, asset categories are numbered 1 through 4. Category 4 assets are the strongest and are typically valued at the principal amount

outstanding on the loan to the Portfolio Company. Category 1 assets are the weakest and are valued at a lower amount.

36. For Zohar III, the numeric category designations were replaced with just two categories: "Defaulted Investment" and "Collateral Investment." These are equivalent to Categories 1 and 4, respectively.

<u>Tilton's Control Over Improper Asset Categorizations</u>

37. Each indenture contains a very specific definition for each asset category. Under the Zohar I and II indentures, an asset may be categorized as a Category 4 only if it meets specific criteria, most notably that the asset is "Current." A loan is "Current" when it is not "Non-Current." A "Non-Current" loan is a "Defaulted Obligation" which has "previously deferred and/or capitalized as principal any interest due." A "Defaulted Obligation" is a loan "with respect to which a default as to the payment of principal and/or interest has occurred (without regard to any applicable grace period or any waiver of such default) but only so long as such default has not been cured."

38. The Zohar III indenture approaches categorization slightly differently, but the result is the same. Under the Zohar III indenture, a loan is a "Defaulted Investment" when "a default as to the payment of principal and/or interest has occurred, but only so long as the default has not been cured."

39. Based on these contractual definitions, the assets in the Zohar Funds should be reclassified as Category 1 or Defaulted Investments when they are no longer Current, i.e., when the Portfolio Company has failed to make interest payments and has not cured these non-payments.

40. However, instead of following the definitions set forth in the indentures, Tilton has consistently and intentionally used her own discretion to determine how an asset should be categorized. Respondents do not lower an asset's valuation category unless and until Tilton decides that she will no longer "support" the Portfolio Company. By "support," Tilton means that she will continue to provide financial and managerial support to the Portfolio Company.

41. Loans originated or acquired by the Zohar Funds were generally initially assigned the highest valuation category -- a Category 4 or Collateral Investment. Over the life of the Funds, Respondents have recategorized a Portfolio Company's loans as a Category 1 or Defaulted Asset only if and when Tilton decided she would no longer "support" the Portfolio Company.

42. As a result of Tilton's discretionary approach to the categorization of the collateral, she has classified very few Portfolio Companies as a Category 1 or Defaulted Asset at any point. For example, as of January 2014, out of 122 loans in the Zohar II portfolio, only 16 were classified as Category 1. The same pattern exists over the life of all three Zohar Funds.

Consequences of Tilton's Improper Categorization

43. Had Tilton followed the methodology for categorization set out in the indenture, the number of Category 1 or Defaulted Investments reported in the monthly trustee reports would have looked very different. In fact, many Portfolio Companies had large sums of unpaid interest, beginning by at least 2008. Certain Portfolio Companies have failed to pay as much as 90% of the interest that they owe to the Zohar Funds, yet remain classified as a Category 4 or a Collateral Investment.

44. Had Respondents appropriately classified the Zohar Funds' assets, Zohar II and Zohar III would have failed the OC Ratio test by at least the summer of 2009. Tilton's approach allowed Respondents to collect or accrue almost $200 million in Subordinated Fees and preference share distributions to which she was not entitled.

45. Moreover, investors were not informed about the decline in value of the Funds' assets, regardless of whether the changes caused the OC Ratio test to fail.

Tilton's Control Over Interest Payments By Portfolio Companies

46. Tilton has been aware of the interest payments made by the Portfolio Companies and their financial condition since the Funds' inceptions. Tilton regularly receives a quarterly interest projection, in which she is notified of the amount of interest on loans a company expects to pay that quarter.

47. Numerous emails show Tilton directing the amount of interest that a Portfolio Company should pay, which may or may not equal the amount that the company wishes to pay. For example, in a 2011 email chain, a Patriarch employee asked Tilton for guidance on interest payments from several different companies. In response, Tilton directed that one company should pay $50,000, one company should pay $142,000, and one should pay $12,800. None of these amounts matched the amount of interest due on the loans to these Portfolio Companies.

48. Tilton makes the ultimate decision on when to accept less than the contractual rate of interest from the Portfolio Companies.

Investors Do Not Know About Tilton's Approach

49. Respondents have not at any time disclosed Tilton's discretionary approach to categorization to the Funds or their investors. They have not disclosed that they fail to consider past due interest when conducting categorization analyses and performing the OC Ratio test. Investors have not been told that the OC Ratio test would have failed at various points if Tilton had performed the categorization analyses in the method anticipated by the indentures.

50. Other parties to the transaction were similarly unaware of Tilton's approach. For example, an email from an employee at the trustee to a Patriarch employee questions why there are "multiple uncollected interest payments for Zohar II and III for assets we

have flagged as Performing." Similarly, a rating agency employee emailed in 2010, inquiring why certain Portfolio Companies were not considered defaulted in light of unpaid interest. At the time the investments were structured, the insurer for certain of the Fund investments described its understanding of the meaning of Category 4 as "[c]ompanies will pay current interest and most will have an amortization schedule. . . ." Respondents also have not provided information to any of these parties about Tilton's actual, discretionary categorization approach.

51. Respondents' approach to categorization, and the resulting impact on the OC Ratio test, were important to investors and rendered statements about asset categories and OC Ratio test results false or misleading. Respondents' discretionary approach to categorization, which was contrary to disclosures made, also represents a fraudulent and deceptive scheme, practice, and course of business.

Tilton and the Patriarch Entities Breached Their Fiduciary Duties and Failed to Meet Their Contractual Standard of Conduct in Disclosing Their Conflict of Interest

The Patriarch Collateral Managers Are Fiduciaries and Have Agreed to a Contractual Standard of Conduct

52. Patriarch, the Patriarch Collateral Managers and Lynn Tilton all acted as investment advisers to the Zohar Funds they managed. As such, they owed fiduciary duties to these Funds.

53. In addition, the CMA defines a contractual standard of conduct required by the collateral manager. Specifically, the CMA requires that the relevant Patriarch Collateral Manger, "in rendering its services as Collateral Manager use reasonable care and the same degree of skill and attention . . . exercised by institutional investment managers of national standing generally in respect to assets of the nature and character of the Collateral and for clients having similar investment objectives and restrictions."

Tilton and Her Entities Have Not Disclosed The Facts Giving Rise To A Conflict Of Interest

54. Tilton's undisclosed approach to categorization creates a significant conflict of interest. Respondents are making decisions in a way that allows Respondents to collect more money from the Funds and retain absolute control over their management, regardless of the performance of the Funds' assets.

55. As noted above, Tilton decides when to accept less than the full interest due from Portfolio Companies. Tilton also determines the categories for portfolio assets. As long as Tilton follows her self-designed approach to categorization, which gives her absolute discretion, Respondents can keep classifying assets in the highest valuation categories and prevent triggering the consequences for failure of the OC Ratio test. In light of these consequences, Tilton's conflict of interest is and has at all times been material.

56. In breach of their fiduciary duties and contractual standard of conduct, Patriarch, Tilton, and the Patriarch Collateral Managers have not disclosed Tilton's actual method of categorization or the conflict of interest that arose from use of that method. They also have not given the Funds or investors a choice as to whether to consent to this conflict.

The Zohar Funds' Financial Statements Are Also False and Misleading.

Preparation of the Financial Statements

57. Each of the Zohar Funds is required under the terms of the indenture to provide GAAP-compliant financial statements on a quarterly basis. These financial statements are prepared by Patriarch's accounting department, approved by Tilton on behalf of the Patriarch Collateral Managers, and then provided to the trustee, which makes them available to investors. Information in the financial statements about the value of the Funds' assets was important to investors.

58. Each financial statement contains a cover page and certification, signed by Tilton. The certification provides, in part, that the balance sheet and income statements provided are prepared in accordance with U.S. GAAP. Tilton also certifies that she has reviewed the balance sheet and income statements and that those documents fairly present the financial position of the relevant Zohar Fund in all material respects.

59. Since the inception of the Zohar Funds, Tilton has signed about fifty of these certifications on behalf of the relevant Patriarch Collateral Manager, each time attesting to the GAAP compliance and fair presentation of the financial statements.

60. However, the financial statements are not GAAP-compliant, nor do they present a fair picture of the Zohar Funds' financial conditions.

Misleading Information Relating to Asset Value and Impairment

61. Loans to Portfolio Companies are recorded on the Zohar Funds' financial statements at cost and make up the vast majority of assets on the balance sheet, with a corresponding payable to investors in the Zohar Funds.

62. Under GAAP, a loan is impaired, and must be measured for impairment when, based on all available information, it is probable that the creditor will be unable to collect all amounts due for interest and principal based on the contract with the debtor.

63. Patriarch did not analyze the Zohar Funds' loan assets for impairment in accordance with GAAP or follow this required impairment methodology.

64. At Tilton's direction, Patriarch does not write down loans for impairment purposes but, instead, writes them off if and when Tilton determines that she will no longer support a Portfolio Company.

65. The impairment decision is driven by Tilton's categorization—when she decides to change the category of an asset from a 4 to a 1, that asset will be impaired in the financial statements.

66. Even though Patriarch does not conduct an impairment analysis that complies with GAAP, Respondents tell investors that it does. For example, under the heading "Carrying Value of Collateral Debt Obligations" in the footnotes to the Zohar II financial statements, the financial statements disclose:

> In the event the Company's expected realization of principal under a [loan asset] is impaired, such that the anticipated future collections are determined to be less than the carrying value of the loan, the Company will record an impairment loss equal to the amount of the anticipated shortfall and will thereafter carry the loan at the reduced amount.[1]

67. However, Patriarch has no procedures in place to analyze future collections and no such analysis occurred.

68. This disclosure is misleading because it tells investors that assets would be analyzed for impairment, including an assessment of anticipated collections. Further, all loans that were modified to provide a concession to a Portfolio Company that was under financial duress should have been identified and measured as impaired in the Zohar Funds' financial statements. Instead, as with categorization, Tilton decided when an asset was impaired using her own discretion and did not communicate this approach to investors.

Misleading Disclosures Regarding Fair Value of Loans

69. The footnotes to the Zohar Funds' financial statements also were and are misleading in their disclosure of how loan assets are valued.

70. These footnotes have consistently stated that the fair value of the loans in the portfolio is approximately equal to their carrying value on the balance sheet. This statement is unsupportable and misleading.

71. The footnotes have also consistently and misleadingly disclosed that, "[f]or substantially all of the" loans, "fair values are based on estimates using present value of anticipated future collections or other valuation techniques."

72. In reality, there was never any analysis of present value of anticipated future collections, and no analysis at all was conducted to determine fair value. Instead, at Tilton's direction, Patriarch at all times carried these assets at cost unless and until Tilton decided to stop supporting the relevant Portfolio Company.

73. Because Patriarch did not conduct fair value analyses, there was never any basis for the affirmative assertion that cost and fair value were the same. Moreover, these

[1] The financial statements for Zohar I and Zohar III contain similar disclosures.

disclosures indicate that Patriarch does conduct an analysis of the reported fair values, which is not true.

E. VIOLATIONS

74. As a result of the conduct described above, Respondents willfully violated Sections 206(1), 206(2), and 206(4) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

75. As a result of the conduct described above, Respondents willfully violated Advisers Act Rule 206(4)-8, which prohibits fraudulent conduct by advisers to "pooled investment vehicles" with respect to investors or prospective investors in those pools.

76. As a result of the conduct described above, Patriarch alternatively willfully aided and abetted and caused violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, by Tilton and the Patriarch Collateral Managers.

III.

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

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

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

C. What, if any, remedial action is appropriate and 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

D. 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), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, whether Respondents 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 Respondents should be ordered to pay disgorgement pursuant to Section 203(j) and 203(k)(5) of the Advisers Act and Section 9(e) 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 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 as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
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. 74608 / March 30, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4054 / March 30, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31541 / March 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16463

In the Matter of **AEGIS CAPITAL, LLC, CIRCLE ONE WEALTH MANAGEMENT, LLC, DIANE W. LAMM, STRATEGIC CONSULTING ADVISORS, LLC, and DAVID I. OSUNKWO,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b)(6) 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**

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 Aegis Capital, LLC ("Aegis Capital") and Circle One Wealth Management, LLC ("Circle One") (collectively, "Registrants") pursuant to Section 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 Aegis Capital pursuant to Section 203(e) of the Advisers Act, against Diane W. Lamm ("Lamm"), Strategic Consulting Advisors, LLC ("SC Advisors"), and David I. Osunkwo ("Osunkwo"), pursuant to Sections 203(f) and 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act, and against Osunkwo pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"). Registrants, Lamm, SC Advisors, and Osunkwo are collectively referred to herein as "Respondents."

II.

After an investigation, the Division of Enforcement alleges:

SUMMARY

1. Aegis Capital and Circle One failed to file timely and accurate reports with the Commission and to maintain required books and records. In Forms ADV filed with the Commission in March 2010 and March 2011, Registrants, affiliated because of common control, grossly overstated their assets under management ("AUM") and total number of client accounts. Indeed, in March 2011, Registrants overstated their AUM by over $119 million, or 190%, and total number of client accounts by at least 1,000 accounts, or over 340%. Moreover, from 2009 to 2011, Registrants' books and records were unsegregated and mixed together with affiliated entities at the level of the parent holding company. Registrants were unable to provide adviser-specific books and records in response to examination staff's queries in a timely manner, if at all.

2. Registrants outsourced their compliance responsibilities to SC Advisors, a firm that offered compliance consulting and Chief Compliance Officer ("CCO") services to investment management firms. Osunkwo, an attorney and principal at SC Advisors, was designated as Registrants' CCO. In this role, he was responsible for preparing, reviewing, and filing Registrants' Forms ADV. Osunkwo reported to and worked closely with Lamm, Registrants' Chief Operating Officer ("COO"), who provided information to Osunkwo to include in Aegis Capital's Form ADV filings, signed Aegis Capital's Form ADV, and otherwise was responsible for Registrants' books and records. As a direct consequence of Osunkwo's and Lamm's failures, Registrants failed to file accurate and timely reports with the Commission and failed to make and keep required books and records.

RESPONDENTS

3. Aegis Capital is a North Carolina limited liability company with its principal place of business in Mount Pleasant, South Carolina. Aegis Capital terminated its Commission registration on or about March 27, 2012, and is currently registered with the state of North Carolina. In a December 31, 2009 Form ADV, filed with the Commission on March 31, 2010, Aegis Capital claimed to have nearly $165 million in AUM and 1,540 client accounts. In fact, Aegis Capital overstated these amounts.

4. Circle One is a Florida limited liability company, formerly an investment adviser and currently listed as "Inactive" in the records of the Florida Department of State Division of Corporations. According to a December 31, 2010 Form ADV, filed March 31, 2011, Circle One had $182 million in AUM and 1,289 client accounts. In fact, Circle One overstated these amounts. On March 28, 2012, Circle One withdrew its Commission registration by filing a partial withdrawal on Form ADV-W. On May 7, 2012, Circle One filed a Form ADV-W, declaring that it was no longer in business and terminating its registration status with state regulators.

5. Lamm, 54 years of age, is a resident of Highlands, North Carolina. She served as the COO for Aegis Capital, Circle One, and Capital L Group, LLC ("Capital L"), Registrants' parent holding company, beginning in October 2009. She remains listed as the COO for Aegis Capital in its most recent filing with the Commission.

6. SC Advisors is an Illinois limited liability company with its principal place of business in Naperville, Illinois. SC Advisors offers consulting services to investment management firms, registered and unregistered funds, and private equity firms on a wide range of business and regulatory compliance matters, and also offers outsourced CCO services for Commission-registered entities. Osunkwo is one of the principals of SC Advisors. During 2010 and 2011, SC Advisors contracted with Capital L and agreed to provide CCO services to Registrants.

7. Osunkwo, 53 and a resident of Charlotte, North Carolina, is self-employed. He provides business and compliance consulting services through affiliations with other firms, including SC Advisors. From January 2011 to March 2012, Osunkwo was registered with a broker-dealer registered with the Commission. Osunkwo is an attorney at law licensed by the state of New York. During 2010 and 2011, Osunkwo was a principal of SC Advisors and was designated, and served as, Registrants' CCO.

REGISTRANTS' FALSE FORM ADV FILINGS

8. Between January 2010 and December 2011, SC Advisors was contractually obligated to provide compliance services to Registrants, including preparing, reviewing, and filing Forms ADV, and to make available a principal of its firm to be appointed and serve as Registrants' CCO. Pursuant to this agreement, SC Advisors designated Osunkwo as CCO for Registrants.

9. Throughout the same time period, Lamm was Registrants' COO and Osunkwo's direct supervisor.

10. On March 31, 2010, Aegis Capital filed its Form ADV for the December 31, 2009 year end. In that Form ADV, Aegis Capital reported that it had $164,994,972 in AUM and 1,540 advisory accounts.

11. Aegis Capital's Form ADV for that year was filed by Osunkwo based on information obtained from Lamm. Lamm provided inaccurate information concerning AUM and the number of client accounts of Aegis Capital to Osunkwo, who included that information in the Form ADV filed with the Commission. Lamm signed Aegis Capital's Form ADV as of December 31, 2009, certifying that the information therein was "true and correct."

12. Aegis Capital did not file an annual update for the December 31, 2010 year end. On March 27, 2012, Aegis Capital filed a Form ADV-W to withdraw its registration status with the Commission.

13. In March 2011, pursuant to the contract with SC Advisors, Osunkwo was responsible for, among other compliance-related matters, preparing, reviewing, and filing a Form ADV for Circle One for the year ended December 31, 2010.

14. On March 31, 2011, Osunkwo filed a Form ADV for Circle One for the December 31, 2010 year end. In that Form ADV, Circle One reported that it had $182,000,000 in AUM and 1,289 advisory accounts.

15. When preparing and filing the 2010 Form ADV for Circle One, Osunkwo did not personally review Circle One's records to determine Circle One's AUM and number of advisory accounts. Instead, Osunkwo relied exclusively on information provided to him by Circle One's Chief Investment Officer ("CIO"), whom Osunkwo knew had little to no involvement with Registrants' investment advisory client accounts. Osunkwo collected the information from the CIO only hours before the filing deadline, and knew from the CIO's message that the information was only intended to be an estimate.

16. When Osunkwo filed Circle One's 2010 Form ADV, he misrepresented that the CIO certified the contents of Circle One's Form ADV to be true and correct, and forged the CIO's electronic signature on the filing.

17. As a result of Osunkwo's and Lamm's conduct, the AUM and number of advisory accounts claimed by Aegis Capital and Circle One, as described above in Paragraphs 10 and 14, were false. In fact, Registrants' combined AUM as of December 31, 2010 was $62,862,270.28—an overstatement of AUM of $119,137,728.72. Registrants also overstated their total client accounts by at least 1,000 accounts as of December 31, 2010. Registrants' AUM and the number of client accounts as of December 31, 2009, were similarly overstated.

REGISTRANTS FAILED TO MAINTAIN REQUIRED BOOKS AND RECORDS

18. Between 2009 and 2011, Aegis Capital failed to keep books and records in a segregated fashion, but instead created and maintained such records in the name of Capital L. Thus, Aegis Capital's records were unsegregated and mixed together with affiliated entities at the level of the parent holding company. Specifically, Aegis Capital failed to make and keep advisory-specific trial balances, financial statements, and internal working papers; journals, including cash receipts and disbursements, and any other records of original entry forming the basis of entries into ledgers; general ledgers reflecting asset, liability reserve, capital, income and expense accounts; checkbooks, bank statements, cancelled checks and cash reconciliations; and bills or statements, paid or unpaid.

19. Between 2010 and 2011, Circle One similarly failed to keep books and records in a segregated fashion, but instead created and maintained such records in the name of Capital L. Specifically, Circle One failed to make and keep separate, advisory-specific trial balances, financial statements, and internal working papers; journals, including cash receipts and disbursements, and any other records of original entry forming the basis of entries into ledgers; general ledgers reflecting asset, liability reserve, capital, income and expense accounts;

checkbooks, bank statements, cancelled checks and cash reconciliations; and bills or statements, paid or unpaid.

20. In August 2011, Commission staff requested that Registrants produce the following books and records: Registrants' balance sheet, trial balance, income statement, and cash flow statements as of the end of its most recent fiscal year and the most current year to date; Registrants' cash receipts and disbursements journal; Registrants' general ledger and chart of accounts; and any loans from clients to the Registrants or sales of Registrants' stock to clients.

21. Registrants were not able to comply with the Commission staff's requests, and Registrants did not produce the requested books and records.

22. As COO, Lamm was responsible for Capital L's Operations Department, which included accounting and keeping and maintaining Registrants' books and records.

VIOLATIONS

23. As a result of the conduct described above, Aegis Capital willfully violated, and SC Advisors and Osunkwo caused violations of, Section 204 of the Advisers Act and Rule 204-1(a)(1) thereunder, which require registered investment advisers to amend their Form ADV "[a]t least annually, within 90 days of the end of [their] fiscal year … [and] [m]ore frequently, if required by the instructions to Form ADV."

24. As a result of the conduct described above, Aegis Capital and Circle One willfully violated, and Lamm willfully aided and abetted and/or caused violations of, Section 204 of the Advisers Act and Rule 204-2(a) thereunder. Section 204 of the Advisers Act requires an investment adviser to "make and keep … such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors," and further provides that such records are subject to periodic examinations by the Commission. Rule 204-2(a) promulgated thereunder requires than an investment adviser "make and keep true, accurate and current" books and records relating to its advisory business including, among others: a journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger (Rule 204-2(a)(1)); general and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income, and expense accounts (Rule 204-2(a)(2)); all check books, bank statements, cancelled checks, and cash reconciliations of the investment adviser (Rule 204-2(a)(4)); all bills or statements (or copies thereof), paid or unpaid, relating to the business of the investment adviser (Rule 204-2(a)(5)); and all trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser (Rule 204-2(a)(6)).

25. As a result of the conduct described above, Aegis Capital, Circle One, Lamm, SC Advisors, and Osunkwo 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 under Section 203, or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

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 Aegis Capital pursuant to Section 203(e) of the Advisers Act and Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Circle One pursuant to Section 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Lamm, SC Advisors, and Osunkwo pursuant to Section 203(f) of the Advisers Act and Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

E. What, if any, remedial action is appropriate in the public interest against Osunkwo pursuant to Section 15(b)(6) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 21B of the Exchange Act;

F. Whether, pursuant to Section 203(k) of the Advisers Act, Aegis Capital should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 204 and 207 of the Advisers Act and Rules 204(1)(a)(1) and 204-2(a) thereunder;

G. Whether, pursuant to Section 203(k) of the Advisers Act, Circle One should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 204 and 207 of the Advisers Act and Rule 204-2(a) thereunder;

H. Whether, pursuant to Section 203(k) of the Advisers Act, Lamm should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 204 and 207 of the Advisers Act and Rule 204-2(a) thereunder; and

I. Whether, pursuant to Section 203(k) of the Advisers Act, SC Advisors and Osunkwo should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 204 and 207 of the Advisers Act and Rule 204-1(a)(1) thereunder.

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 as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
Secretary

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

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
penalty

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74613 / March 31, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3645 / March 31, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16464

In the Matter of **POLYCOM, INC.,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Polycom, Inc. ("Polycom" 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, and except as provided herein in Section IV, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

1. **Polycom, Inc.**, a Delaware corporation with its principal place of business in San Jose, California, sells communications and collaboration technology. Polycom's stock is registered under Section 12(b) of the Exchange Act and is quoted on the Nasdaq Global Select Market under the ticker symbol "PLCM."

2. Andrew M. Miller ("Miller") was Polycom's CEO from approximately May 2010 and a Polycom Director from approximately June 2010, positions which he held until July 19, 2013, when he resigned both positions.

3. From approximately May 2010 until July 2013, Polycom paid for at least approximately $190,000 worth of Miller's personal expenses without disclosing the expenses as compensation to Miller on the company's definitive proxy statements. Among others, these expenses included reimbursement for personal meals, clothing, entertainment and travel.

4. Miller charged some of those personal expenses to his credit card and then, in order to obtain reimbursement from Polycom, submitted expense reports with false business descriptions.

5. Miller directed his administrative assistants to pay for certain other of his personal expenses with their company purchasing cards ("P-Cards"), and he provided them with false business descriptions that were recorded as support for the charges. Polycom policy permitted Miller to review and approve the P-Card charges incurred by his administrative assistants, even though they had been incurred at his direction and on his behalf, allowing him to dispose of company assets without supervision.

6. Miller also charged Polycom for certain of his personal air travel, which cost Polycom at least approximately $16,000. Polycom permitted Miller to book and charge flights without providing any description of their purpose, allowing him to improperly use company funds without supervision.

7. At least approximately $80,000 of Miller's personal expenses were incurred and paid for by Polycom in connection with the company's "CEO Circle" program, an annual incentive trip offered to Polycom's top-performing sales people. More than $65,000 in Polycom

[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.

funds were used to pay for Miller's travel to Indonesia and South Africa with a friend and girlfriend, respectively, to purportedly conduct "site inspections" for the CEO Circle program. Polycom paid for Miller and his guests to enjoy luxury accommodations, food, entertainment and activities during these purported "site inspections." In addition, during the actual CEO Circle events, Polycom paid for more than $13,000 worth of personal side-trips, spa treatments, and other "incidentals" for Miller and his girlfriend, who attended as his guest. Miller hid certain of his personal CEO-Circle-related costs by directing a Polycom vendor to falsify invoices and bury the charges in fake event budget line items.

8. Polycom thus omitted from its compensation disclosures at least the following amounts of Miller's personal expenses, by year: $15,345 in 2010; $28,478 in 2011; $115,683 in 2012; and $30,474 in 2013. Polycom also omitted from its compensation disclosures any description of the nature of the personal expenses that Miller had obtained.

9. In its 2013 proxy statement, which disclosed 2012 compensation, Polycom highlighted perquisites as a metric of its corporate governance and pay-for-performance goals and stated that it provided "no excessive perquisites" to its executives.

10. Polycom incorporated its definitive proxy statements into its annual reports by reference.

11. As a result of the conduct described above, Polycom violated Section 14(a) of the Exchange Act and Rules 14a-3 and 14a-9 thereunder. Rule 14a-3 prohibits issuers with securities registered pursuant to Section 12 of the Exchange Act from soliciting proxies without furnishing proxy statements containing the information specified in Schedule 14A, including executive compensation disclosures pursuant to Item 402 of Regulation S-K. Item 402 of Regulation S-K requires disclosure of the total value of all perquisites provided to Named Executive Officers (including CEOs) who receive more than $10,000 in perquisites in a given year. Item 402 of Regulation S-K also requires disclosure of all perquisites by type, and specific identification of any perquisite greater than $25,000 or 10% of total perquisites. Rule 14a-9 prohibits the use of proxy statements containing materially false or misleading statements or materially misleading omissions.

12. Also as a result of the conduct described above, Polycom violated Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission annual reports as the Commission may require, and mandate that the reports contain such further material information as may be necessary to make the required statements not misleading.

13. Because Polycom incorrectly recorded Miller's personal charges as business expenses, and not compensation, its books, records and accounts did not, in reasonable detail, accurately and fairly reflect its dispositions of assets.

14. In addition, Polycom failed to implement adequate internal accounting controls relating to its company-issued P-Cards and air travel booking that were sufficient to maintain the accountability of its assets.

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

16. Lastly, as a result of the conduct described above, Polycom violated Section 13(b)(2)(B), which requires reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management's general or specific authorization and are recorded as necessary to maintain accountability for assets, and that access to assets is permitted only in accordance with management's general or specific authorization.

Undertakings

17. Respondent undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Respondent undertakes:

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

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

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

d. In connection with any interviews of Respondent's current and former employees, officers and directors to be conducted pursuant to this undertaking, requests for such interviews may be provided by the Commission's staff by regular or electronic mail to: Caz Hashemi, Esq.; Wilson, Sonsini, Goodrich & Rosati; 650 Page Mill Road, Palo Alto, CA 94304; chashemi@wsgr.com, or such other counsel that may be substituted by Respondent.

In determining whether to accept the Offer, the Commission has considered the Undertakings.

Polycom'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 Polycom's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Polycom cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 14a-3 and 14a-9 thereunder.

B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $750,000 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) 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 Polycom 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 Jina Choi, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104.

By the Commission.

Brent J. Fields
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. 74615 / March 31, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16465

In the Matter of LEONARD ERIC BURD, 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 Leonard Eric Burd ("Burd" 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 admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.3 and III.5 below, and 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 October 1997 through October 2013, Burd was a registered representative associated with multiple broker-dealers, including UBS Financial Services, Inc. and LPL Financial LLC. Most recently, from February 2012 through October 2013, Burd was a registered representative associated with Summit Brokerage Services, Inc. ("Summit"), a registered broker-dealer. Summit terminated Burd on October 31, 2013 as a result of allegations connected to the bank robberies discussed below. Burd is not currently associated with a registered broker-dealer.

2. Burd is 45 years old. He is presently incarcerated at MCI Plymouth in Plymouth, MA. Prior to his incarceration, Burd resided in Dover, MA.

3. On August 20, 2014, Burd pleaded guilty and was convicted of: (i) Armed & Masked Robbery (M.G.L. c. 265 §17); (ii) Threats of an Explosive Device to Cause Serious Public Alarm (M.G.L. c. 269 §14(c)); and (iii) Intimidation of a Witness (M.G.L. c. 268 §13B) before the Middlesex Superior Court for the Commonwealth of Massachusetts in Commonwealth v. Burd, No. MICR2014-00081.

4. The indictment indicates Burd, while masked or disguised, robbed a Citizen's Bank in Natick, MA of US currency while armed with a dangerous weapon (a gun or C4 explosives). He was sentenced to 3-5 years at MCI-Cedar Junction and three years of probation, from and after his prison sentence.

5. On August 27, 2014, Burd pleaded guilty and was convicted of: (i) Armed Robbery (M.G.L. c. 265 §17) and (ii) Possession or Use of an Explosive or Hoax Explosive Device (M.G.L. c. 266 §102(b)) before the Norfolk Superior Court for the Commonwealth of Massachusetts in Commonwealth v. Burd, No. NOCR2013-01092.

6. The indictment indicates that Burd robbed a Citizen's Bank in Dedham, MA of money while armed with a gun and/or explosive or incendiary device. He was sentenced to 3-4 years at MCI-Cedar Junction to be served concurrently with his sentence in Commonwealth v. Burd, No. MICR2014-00081.

IV.

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

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

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

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

By the Commission.

Brent J. Fields
Secretary

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