SECURITIES AND EXCHANGE COMMISSION

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

MARY JO WHITE, CHAIR

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

KARA M. STEIN, COMMISSIONER

MICHAEL S. PIWOWAR, COMMISSIONER

(57 Documents)

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75340 / July 1, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4136 / July 1, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31701 / July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16671

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted, pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 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 Richard Lawrence Evans ("Evans" or "Respondent").

II.

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

III.

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

SUMMARY

These proceedings arise out of Respondent's role in a scheme orchestrated by a registered investment adviser to inflate the valuations of certain mortgage-backed securities held in the portfolio of private investment funds managed by the adviser.

1. Since the funds' inception in 2001, the adviser purported to obtain independent market-based price quotes for the securities at issue from two registered representatives of registered broker-dealers, one of whom was Respondent. However, as time went on, the process of providing monthly price quotes to the adviser became increasingly time-consuming and complex. By 2010, the adviser offered to abbreviate the process by providing its valuations to Respondent, which Respondent cursorily reviewed and then passed on to the funds' administrator and auditor as if they were Respondent's own price quotes. Respondent also played a role in responding to certain inquiries from the funds' auditor in connection with year-end audits for 2011 and 2012 without informing the auditor that the adviser had crafted the responses. The adviser's scheme boosted the funds' net asset values and thus increased the management and performance fees that the adviser collected from the funds. Based on the foregoing, Respondent aided and abetted and caused the adviser's violations of various antifraud provisions of the Advisers Act.

RESPONDENT

2. Richard Lawrence Evans ("Evans") is 62 years old and resides in Houston, Texas. Between at least 2000 and 2013, Evans was a registered representative of a succession of Commission-registered broker-dealers. In May 2013, Evans was terminated from his employment at a broker-dealer for violating its policy. Since his termination, Evans has not worked in the securities industry. Evans previously held Series 7, 24, 63, and 65 licenses. Evans obtained a real estate license from the State of Texas in July 2013 and has since been working as a real estate agent.

RELATED ENTITIES AND INDIVIDUALS

3. AlphaBridge Capital Management, LLC ("AlphaBridge") is a Delaware limited liability company with its principal place of business in Greenwich, Connecticut. Since November 2000, AlphaBridge has been registered with the Commission as an investment adviser (File No. 801-58162). Since February 2001, AlphaBridge has provided investment advisory services to three

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

unregistered private funds, the AlphaBridge Fixed Income Master Fund, Ltd. and its onshore and offshore feeder funds, the AlphaBridge Fixed Income Fund, Ltd. and AlphaBridge Fixed Income Partners, LP (collectively, "AlphaBridge Funds" or "Funds").

4. Thomas T. Kutzen ("Kutzen") is AlphaBridge's founder, majority owner, managing member, president, chief executive officer, and chief investment officer. Kutzen is 61 years old and resides in Riverside, Connecticut.

5. Michael J. Carino ("Carino") is AlphaBridge's chief compliance officer and minority owner. Carino is 43 years old and resides in Greenwich, Connecticut.

FACTS

Evans' Background and Experience

6. Between 2000 and 2013, Evans was a registered representative (typically in a salesperson role) at several different Commission-registered broker-dealers in succession.

7. AlphaBridge first became Evans' customer in 2000. Beginning in at least 2001, Evans arranged for the execution of the purchases and sales of various securities by AlphaBridge and the AlphaBridge Funds. Other than his brokerage commissions, Evans did not receive any compensation or remuneration from AlphaBridge.

8. Between 2000 and 2013, AlphaBridge was consistently one of Evans' largest customers. Commissions from trades for AlphaBridge accounted for at least 10% of Evans' commissions in most years, more than 30% in some years, and nearly 60% in 2011.

9. Evans had experience with, among other things, a range of fixed income securities, including mortgage-backed securities and U.S. Treasury securities. Specifically, Evans had familiarity and experience with securities known as interest-only ("IO") and inverse, interest-only ("IIO") floaters. The AlphaBridge Funds held IOs and IIOs in its portfolio.

10. IOs and IIOs are strips or tranches of collateralized mortgage obligations ("CMOs"). CMOs are pools of mortgage loans that receive cash flows from the underlying mortgages and are organized into different payment classes based on the varying characteristics of the underlying mortgages. The IO and IIO classes of a CMO receive a coupon payment that fluctuates based on changes in prevailing interest rates.

11. IOs and IIOs are unlisted, thinly-traded securities and are commonly valued based on discounted future cash flows. Determining future cash flows for IOs and IIOs depends heavily on the conditional prepayment rate ("CPR"), which is the percentage of a CMO pool that is or is expected to be prepaid within a given period. Lower interest rates tend to correlate with higher prepayment rates (because more borrowers tend to refinance in a lower interest rate environment), and higher interest rates tend to correlate with lower prepayment rates. Historical CPR is an actual past prepayment percentage. Projected CPR is an estimate of a future prepayment percentage.

12. The projected CPR is an important factor for valuing IOs and IIOs. All other factors being equal, the greater the number of loans in a CMO pool that have been prepaid, the lower the overall income stream, and the lower the payment to the IO and IIO holder. Thus, all other factors being equal, higher projected CPRs (or faster prepayment rates) tend to correlate with lower projected cash flows and lower IO and IIO values, while lower projected CPRs (or slower prepayment rates) tend to correlate with higher projected cash flows and higher IO and IIO values.

Evans' Role in Fund Pricing

13. From at least 2001 through at least April 2013, AlphaBridge represented to the Funds' investors, administrator ("Administrator"), and auditor ("Auditor") that its process for valuing the IOs and IIOs in the Funds' portfolio was to obtain monthly price quotes from two registered representatives at independent and reputable broker-dealers and to use the arithmetic average of these quotes as AlphaBridge's price for these securities.

14. Since the Funds' inception in 2001, AlphaBridge purported to obtain price quotes from the same two registered representatives, one of whom was Evans, whose written price quotes were provided monthly to the Administrator and annually to the Auditor.

15. From approximately 2001 to 2008, each month Evans received a list of the securities in the Funds' portfolio from Carino. Evans asked the traders at his respective broker-dealers for price quotes for these securities. Evans in turn provided these quotes to Carino and, at Carino's request, thereafter sent them to the Administrator and/or Auditor.

16. Between 2008 and 2010, as the number of IOs and IIOs in the Funds' portfolio grew to over 100 securities, Evans encountered resistance from the traders at his respective broker-dealers because the pricing process for AlphaBridge was becoming increasingly time-consuming and subjective. Evans told Carino of the traders' resistance.

17. Sometime during this period between 2008 and 2010, to expedite the monthly pricing process, Carino suggested to Evans that he share AlphaBridge's prices for the IO and IIO securities in the Funds' portfolio with Evans. Carino told Evans that he generated AlphaBridge's prices by using his own valuation model.

18. After Carino began sharing AlphaBridge's prices with Evans, he did so strictly orally. Carino would email a spreadsheet listing the Funds' holdings to Evans and then would read aloud AlphaBridge's prices to Evans over the telephone. At Carino's direction, Evans wrote down the prices, then typed them into the spreadsheet, and later sent them on to the Administrator and/or Auditor.

19. After Carino began sharing AlphaBridge's prices with Evans, Carino told Evans to review the prices and, if Evans agreed, to pass along those prices to the Administrator and the Auditor. Evans raised few objections with Carino concerning the prices, and any questions Evans raised were generally resolved in AlphaBridge's favor. As time went on, Evans took minimal steps to review or check the validity of AlphaBridge's prices, which Carino knew or was reckless in not knowing.

20. In approximately mid-2010, Evans told Carino that AlphaBridge's prices were not in line with prices that Evans was seeing in actual or potential transactions in the same or comparable securities. Carino told Evans that AlphaBridge was switching to a long-term valuation model for the Funds' portfolio, as opposed to a fair value standard, and that the Auditor had approved this change. Evans accepted Carino's explanation and agreed to continue to pass along Carino's prices, as if they were Evans' prices, to the Administrator and the Auditor until April 2013.

21. Evans never told the Administrator or Auditor that Carino was sharing his prices with Evans or that the prices that Evans transmitted to the Administrator and Auditor, as if they were Evans' own prices, in fact were generated by Carino.

22. In May 2013, Evans was terminated for providing price quotes for the AlphaBridge Funds in contravention of the policies and procedures of Evans' employer. Evans informed both Carino and Kutzen of his termination in telephone calls.

Evans' Role in Fund Audits

23. From at least 2006 through 2013, the Auditor conducted an annual audit of the Funds' financial statements, and the Auditor requested and received a list of year-end prices from Evans.

24. Beginning with the 2008 year-end audit of the AlphaBridge Funds, the Auditor requested and received the assistance of a team of valuation professionals ("Valuation Group") to assess the validity of AlphaBridge's methodology for pricing the IIOs in the Funds' portfolio.

25. In connection with the 2011 year-end audit of the AlphaBridge Funds, the Auditor noted a greater disparity than in past years between AlphaBridge's IIO prices and the prices reflected in the Auditor's internal pricing database (which contained inputs from various industry pricing vendors). The Auditor requested that AlphaBridge allow the Auditor and Valuation Group to speak to AlphaBridge's pricing sources. Carino arranged a telephone call with Evans.

26. Carino spent a significant amount of time preparing Evans for the call and coaching Evans on what Evans should say on particular topics, including Evans' view on CPRs. Evans did not tell the Auditor about this preparation.

27. After the telephone call with Evans, the Valuation Group posed a series of questions for Carino to pass on to Evans. These questions included requests for trade data (including bids) on securities in the Funds' portfolio or, alternatively, trade data for purportedly comparable securities and the reasoning as to why such securities were comparable to those in the Funds' portfolio.

28. Carino emailed the Auditor's questions to Evans along with Carino's proposed responses. Evans made slight edits to the responses that Carino drafted. Evans ultimately sent the responses, largely as Carino had drafted them, to the Auditor and Valuation Group. Evans did not tell the Auditor about Carino's role in drafting the responses.

29. The responses included CPR projections for a sample of securities in the Funds' portfolio and information on trades, bids and offers for IIOs that were purportedly comparable to those in the Funds' portfolio. Some of the transaction data provided by Carino for two purportedly comparable securities contained certain inaccuracies. Evans did not tell the Auditor that the CPR projections and other data were derived from Carino and not from Evans.

30. After receiving the responses from Evans, the Auditor and Valuation Group posed more questions for Carino to pass along to Evans, including asking why CPR forecasts from various industry sources were substantially higher than AlphaBridge's CPR assumptions. Carino again emailed the Auditor's questions to Evans, along with Carino's suggested responses. Carino copied Kutzen on this email. As with the prior round of questions, Carino and Evans exchanged drafts of the responses. Ultimately, Carino indicated by email that Evans' revision "looks fine to send," after which Evans sent the responses—again, largely drafted by Carino—to the Auditor and Valuation Group. In substance, the responses urged the Auditor to rely on the previously submitted data for the purportedly comparable securities and expressed the opinion that dealer CPR forecasts were not reliable. Evans did not tell the Auditor about Carino's role in drafting the responses.

31. Only after speaking with and receiving the written responses from Evans, the Valuation Group accepted AlphaBridge's prices, and the Auditor completed the 2011 year-end audit.

32. As the Valuation Group began its work on the 2012 year-end audit, it observed that AlphaBridge's IIO prices had diverged even further from the prices in the Auditor's internal pricing database. Of particular concern to the Auditor and the Valuation Group was the fact that, although actual historical CPRs remained relatively-high (at least in part because of sustained low interest rates) during the course of 2012, AlphaBridge continued to use the same lower CPR assumptions that it had used the year before.

33. The Auditor and Valuation Group again posed a series of questions for, and asked to speak to, AlphaBridge's pricing sources. Similar to what occurred in connection with the 2011 audit, AlphaBridge made Evans available, and Carino formulated Evans' oral and written responses to the Auditor's and Valuation Group's questions. However, the responses were not sufficient to address the Auditor's concerns. Evans did not tell the Auditor about Carino's role in formulating the responses.

VIOLATIONS

34. Based on the conduct described above, Evans willfully[2] aided and abetted and caused AlphaBridge's violations of Section 206(2) of the Advisers Act, which prohibits an

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

investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud upon any client or prospective client.

35. Based on the conduct described above, Evans willfully aided and abetted and caused AlphaBridge's violations of Section 206(4) of the Advisers Act, which prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative, and Rule 206(4)-8 promulgated thereunder, which makes it unlawful for any investment adviser to a pooled investment vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading to any investor or potential investor in the pooled investment vehicle, or otherwise to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or potential investor in the pooled investment vehicle.

COOPERATION

36. In determining to accept the Offer, the Commission considered the cooperation the Respondent afforded the Commission staff.

IV.

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

Accordingly, pursuant to Section 15(b)(6) of the Exchange Act, Section 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

B. Respondent shall be and hereby is:

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

(ii) 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; and

(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;

with the right to apply for reentry after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. 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 the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall pay a civil money penalty in the total amount of $15,000 to the Securities and Exchange Commission. Payment shall be made in the following installments: $7,500 within ten (10) days of the entry of this Order; and $7,500 within ninety (90) days of the entry of this Order. If timely payment of either installment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

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

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

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

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

Payments by check or money order must be accompanied by a cover letter identifying Respondent by name as a Respondent in these proceedings, and the file number of these proceedings; and a copy of the cover letter and check or money order must be sent to Robert B. Baker, Assistant Regional Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110.

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, Respondent agrees that in any Related Investor Action, Respondent shall not argue that Respondent is entitled to, nor shall Respondent benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that Respondent 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, "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

F. Respondent acknowledges that the Commission is not imposing a civil penalty in excess of $15,000 based upon Respondent's cooperation in a Commission investigation and/or related enforcement action. If at any time following the entry of this Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay an additional civil penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether Respondent knowingly provided materially false or misleading information, but may not: (1) contest the findings in this Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

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
Disapproved

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229, 240, 249 and 274

[RELEASE NOS. 33-9861; 34-75342; IC-31702; File No. S7-12-15]

RIN 3235-AK99

Listing Standards for Recovery of Erroneously Awarded Compensation

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing a new rule and rule and form amendments to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which added Section 10D to the Securities Exchange Act of 1934. Section 10D requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with Section 10D's requirements for disclosure of the issuer's policy on incentive-based compensation and recovery of incentive-based compensation that is received in excess of what would have been received under an accounting restatement. The proposed rule and rule amendments would direct the national securities exchanges and national securities associations to establish listing standards that would require each issuer to develop and implement a policy providing for the recovery, under certain circumstances, of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers, and require the disclosure of the policy. A listed issuer would be required to file the policy as an exhibit to its annual report.

DATES: Comments should be received on or before [insert date 60 days after date of publication in the Federal Register].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov; or
- Use the Federal Rulemaking ePortal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-12-15. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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 SEC'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: Anne Krauskopf, Senior Special Counsel, or Carolyn Sherman, Special Counsel at (202) 551-3500, in the Office of Chief Counsel, Division of Corporation Finance, or Joel K. Levine, Associate Chief Accountant at (202) 551-3400, in the Office of Chief Accountant, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to add new Rule 10D-1[1] under the Securities Exchange Act of 1934.[2] We also are proposing amendments to Items 402,[3] 404[4] and 601[5] of Regulation S-K,[6] Item 22 of Schedule 14A,[7] Exchange Act Forms 20-F[8] and 40-F,[9] and Form N-CSR[10] under the Exchange Act and the Investment Company Act of 1940.[11]

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[1] 17 CFR 240.10D-1.

[2] 15 U.S.C. 78a et seq.

[3] 17 CFR 229.402.

[4] 17 CFR 229.404.

[5] 17 CFR 229.601.

[6] 17 CFR 229.10 et seq.

[7] 17 CFR 240.14a-101.

[8] 17 CFR 249.220f.

[9] 17 CFR 249.240f.

[10] 17 CFR 249.331 and 274.128.

[11] 15 U.S.C.80a-1 et seq.

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I. BACKGROUND AND SUMMARY

We are proposing a new rule, and rule and form amendments to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act"),[12] which added Section 10D to the Securities Exchange Act of 1934 (the "Exchange Act"). Specifically, Section 10D(a) of the Exchange Act requires the Commission to adopt rules directing the national securities exchanges[13] (the "exchanges") and the national securities associations[14] (the "associations") to prohibit the listing of any security of an issuer that is not in compliance with the requirements of Section 10D(b). Section 10D(b) requires the Commission to adopt rules directing the exchanges to establish listing standards to require each issuer to develop and implement a policy providing:

(1) for the disclosure of the issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws; and

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[12] Pub. L. No. 111-203, 124 Stat. 1900 (2010).

[13] A "national securities exchange" is an exchange registered as such under Section 6 of the Exchange Act [15 U.S.C. 78f]. There are currently eighteen exchanges registered under Section 6(a) of the Exchange Act: BATS Exchange, BATS Y-Exchange, BOX Options Exchange, C2 Options Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, EDGA Exchange, EDGX Exchange, International Securities Exchange ("ISE"), ISE Gemini, Miami International Securities Exchange, NASDAQ OMX BX, NASDAQ OMX PHLX, The NASDAQ Stock Market, National Stock Exchange, New York Stock Exchange ("NYSE"), NYSE Arca and NYSE MKT. Certain exchanges are registered with the Commission through a notice filing under Section 6(g) of the Exchange Act for the purpose of trading security futures. As discussed in Section II.A.2, below, we propose to exempt security futures products and standardized options from the scope of the proposed rule. To the extent that our final rule exempts the listing of security futures products and standardized options from its scope, any registered national securities exchange that lists and trades only security futures products or standardized options would not be required to file a rule change in order to comply.

[14] A "national securities association" is an association of brokers and dealers registered as such under Section 15A of the Exchange Act [15 U.S.C. 78o-3]. The Financial Industry Regulatory Authority ("FINRA") is the only association registered with the Commission under section 15A(a) of the Exchange Act. Because FINRA does not list securities, generally we refer only to the exchanges in this release. However, if any associations were to list securities, the rule proposals would apply to them also.

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

(2) that, in the event that the issuer is required to prepare an accounting restatement due to the issuer's material noncompliance with any financial reporting requirement under the securities laws, the issuer will recover from any of the issuer's current or former executive officers who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date the issuer is required to prepare the accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.

Other statutes and rules currently administered by the Commission also address the recovery of executive compensation:

- Section 304 of the Sarbanes-Oxley Act of 2002 ("SOX")[15] provides that if an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct,[16] with any financial reporting requirements under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and any profits realized from the sale of securities of the issuer during that 12-month period; and
- Item 402(b) of Regulation S-K includes, as an example of the kind of information that should be addressed, if material, in the company's Compensation Discussion and

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[15] 15 U.S.C. §7243.

[16] The CEO or CFO need not personally engage in misconduct for recovery to be required under Section 304. See SEC v. Jenkins, 718 F.Supp. 2d 1070, 1074-75 (D. Ariz. 2010) ("[T]he misconduct of the issuer is the misconduct that triggers the reimbursement obligation of the CEO and the CFO."); SEC v. Baker, 2012 U.S. Dist. LEXIS 161784 (W.D. Tex 2012).

Analysis ("CD&A"), company policies and decisions regarding the adjustment or recovery of awards or payments to named executive officers[17] if the relevant company performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment.[18]

The proposed rule and rule amendments would supplement these existing provisions by directing the exchanges to establish listing standards that require listed issuers to:

- adopt and comply with written policies for recovery of incentive-based compensation based on financial information required to be reported under the securities laws, applicable to the listed issuers' executive officers, over a period of three years; and
- disclose those recovery policies in accordance with Commission rules.

To assure that issuers listed on different exchanges are subject to the same disclosure requirements regarding compensation recovery policies, we are proposing amendments to the disclosure rules that would require all issuers listed on any exchange to file their written recovery policy as an exhibit to their annual reports and, if they have taken actions pursuant to that policy, to disclose those actions.

Under the proposed rule and rule amendments, an issuer would be subject to delisting if it does not:

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[17] As defined in Item 402(a)(3) of Regulation S-K, "named executive officers" are all individuals serving as the company's principal executive officer during the last completed fiscal year, all individuals serving as the company's principal financial officer during that fiscal year, the company's three other most highly compensated executive officers who were serving as executive officers at the end of that year, and up to two additional individuals who would have been among the three most highly compensated but for not serving as executive officers at the end of that year.

[18] Item 402(b)(2)(viii). Item 402(b) contains the requirements for CD&A, which is intended to be a narrative overview that puts into context the executive compensation disclosure provided in response to the other requirements of Item 402. The CD&A disclosure requirement is principles-based, in that it identifies the disclosure concept and provides several non-exclusive examples. Under Item 402(b)(1), companies must explain all material elements of their named executive officers' compensation by addressing mandatory principles-based topics in CD&A. Item 402(b)(2) sets forth nonexclusive examples of the kind of information that should be addressed in CD&A, if material.

- adopt a compensation recovery policy that complies with the applicable listing standard;
- disclose the policy in accordance with Commission rules, including providing the information in tagged data format; or
- comply with the policy's recovery provisions.

Listed issuers could, of course, adopt policies more extensive than those called for by the listing standards, so long as those policies at a minimum satisfied the listing standards, and exchanges and associations could adopt listing standards with requirements that are more extensive than those of proposed Rule 10D-1.

II. DISCUSSION OF THE PROPOSALS

We are proposing new Exchange Act Rule 10D-1 to set forth the listing requirements that exchanges would be directed to establish pursuant to Section 10D of the Exchange Act. We also are proposing rule amendments to Regulation S-K, to the forms by which foreign private issuers file their Exchange Act annual reports, and for certain investment companies, to Form N-CSR and Schedule 14A. These amendments would require disclosure of the listed issuer's policy on recovery of incentive-based compensation and information about actions taken pursuant to such recovery policy. In developing these proposals, we considered the comment letters we received on Section 10D pursuant to our initiative to receive advance public comment in implementing the Act.[19]

[19] In connection with all of the Dodd-Frank Act rulemakings, we sought comment from the public prior to the issuance of a proposing release. Comments related to the executive compensation provisions of the Dodd-Frank Act are available at http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml. Regarding Section 10D, we received pre-proposal letters from AFL-CIO, Americans for Financial Reform, As You Sow, Center for Effective Government, Demos, Institute for Policy Studies/Global Economy Project, International Brotherhood of Teamsters, Other98.org, Public Citizen and Service Employees International Union ("AFL-CIO Joint Letter"); American Benefits Council; Baker, Donelson, Bearman, Caldwell & Berkowitz, PC; Brian Foley & Company, Inc.; Center on Executive Compensation; Clark Consulting, LLC; Committee on Federal Regulation of

A. Issuers and Securities Subject to Proposed Exchange Act Rule 10D-1

1. General

Section 10D of the Exchange Act provides that the Commission shall, by rule, direct the exchanges "to prohibit the listing of any security of an issuer that does not comply with the requirements of [Section 10D]." Commenters raised questions as to whether the rule should apply to all issuers with listed securities, such as foreign private issuers[20] and issuers of listed debt whose stock is not also listed.[21]

For the reasons discussed below, the rule and rule amendments we propose would require exchanges to apply the disclosure and recovery policy requirements to all listed issuers, with only limited exceptions. As a preliminary matter, we read the language of Section 10D as generally calling for a broad application of the mandated listing standards. Section 10D does not distinguish among issuers or types of securities, and does not specifically instruct the Commission to exempt any particular types of issuers or securities or direct the Commission to permit the exchanges to provide such exemptions in listing them.[22] We recognize, however,

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Securities of the Section of Business Law of the American Bar Association ("ABA Business Law Section"); Compensia, Inc.; Davis Polk & Wardwell LLP; Frederic W. Cook & Co., Inc.; Mai Datta, Ph.D., Professor of Finance, Wayne State University; Stuart R. Lombardi; Meridian Compensation Partners, LLC; PGGM Investments; Pay Governance LLC; Protective Life Corporation; Robert E. Scully Jr., Member, Stites Harbison, PLLC; Society of Corporate Secretaries and Governance Professionals; Towers Watson; and Sheila Waddell.

[20] See letters from ABA Business Law Section (noting that foreign private issuers are not required to comply with the proxy rules or Item 402 executive compensation disclosure, and that home countries may have a greater interest in determining whether companies should have recourse against their executives) and Brian Foley & Company, Inc. (seeking clarification whether Section 954 applies to foreign private issuers).

[21] See letter from Brian Foley & Company, Inc.

[22] In this regard, Section 10D differs from the Act's other governance-related provisions, such as Section 951 Shareholder Vote on Executive Compensation Disclosure (amending the Exchange Act to add Section 14A) and Section 952 Compensation Committee Independence (amending the Exchange Act to add Section 10C), which include specific direction for either the Commission or the exchanges to consider exemptions for classes of issuers, or to provide exemptions. Additionally, Section 951 instructs the Commission to take into account whether Section 951's requirements disproportionately burden small issuers.

that we could use our general exemptive authority under the Exchange Act[23] to exempt specific categories of issuers or securities to the extent that doing so would be necessary or appropriate in the public interest and consistent with the protection of investors. In evaluating whether to exempt specific categories of issuers and securities, though, we have considered whether providing exemptions from the requirements of Section 10D would be consistent with what we understand to be the purpose of this statutory provision. In this regard, we note that a report by the Senate Committee on Banking, Housing and Urban Affairs stated that "[t]his proposal will clarify that all issuers must have a policy in place to recover compensation based on inaccurate accounting so that shareholders do not have to embark on costly legal expenses to recoup their losses or so that executives must return monies that should belong to the shareholders."[24] As discussed below, we propose to exempt security futures products, standardized options, and the securities of certain registered investment companies from the proposed listing standards because we believe the compensation structures of issuers of these securities render application of the rule and rule amendments unnecessary.[25] We are not proposing otherwise to exempt categories of listed issuers, such as emerging growth companies,[26] smaller reporting companies,[27] foreign

[23] Section 36(a) of the Exchange Act (15 U.S.C. 78mm(a)).

[24] See Report of the Senate Committee on Banking, Housing, and Urban Affairs, S.3217, Report No. 111-176 at 135-36 (April 30, 2010) ("Senate Report").

[25] See Sections II.A.2 and 3, below.

[26] Section 2(a)(19) of the Securities Act of 1933 (the "Securities Act") and Exchange Act Section 3(a)(80) define "emerging growth company" as "an issuer that had total annual gross revenues of less than $1,000,000,000 . . . during its most recently completed fiscal year." An issuer shall continue to be deemed an emerging growth company until the earliest of (1) the last day of the fiscal year during which it had total annual gross revenues of $1 billion; (2) the last day of the fiscal year following the fifth anniversary of the first sale of its common equity securities; (3) the date on which it has issued more than $1 billion in non-convertible date during the previous three years; or (4) the date on which it is deemed a large accelerated filer.

[27] Exchange Act Rule 12b-2 defines "smaller reporting company" as "an issuer that is not an investment company, an asset-backed issuer . . ., or a majority-owned subsidiary of a parent that is not a smaller reporting company and

private issuers,[28] and controlled companies,[29] because we believe the objective of recovering excess incentive-based compensation is as relevant for these categories of listed issuers as for any other listed issuer. In reaching this conclusion, we also considered the relative burdens of compliance on these categories of issuers. As discussed more fully in the Economic Analysis, while we recognize that the proposed listing standards could, in certain respects, impose a disproportionate burden on these categories of issuers, there is also reason to believe that these issuers, as well as investors and the markets in general, may derive benefits from being subject to the proposed listing standards.[30]

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that: (1) had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or (2) in the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or (3) in the case of an issuer whose public float as calculated under paragraph (1) or (2) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available." Whether or not an issuer is a smaller reporting company is determined on an annual basis.

[28] Exchange Act Rule 3b-4(c) defines "foreign private issuer" as "any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) (i) the majority of the executive officers or directors are United States citizens or residents, (ii) more than 50 percent of the assets of the issuer are located in the United States, or (iii) the business of the issuer is administered principally in the United States." Exchange Act Rule 3b-4(b) defines "foreign issuer" as "any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country."

[29] Under New York Stock Exchange Rule 303A.00 and NASDAQ Stock Market LLC Rule 5615(c) a "controlled compan[y]" is defined as a company of which more than 50% of the voting power for the election of directors is held by an individual, group or another company.

[30] See Section III, below.

In our determination of whether to propose exemptions for foreign private issuers we considered the views of commenters that submitted comments before this proposal[31] as well as the incidence of restatements among this category of listed issuers. We are aware of studies that indicate that these issuers, from time to time, restate their financial statements to correct accounting errors.[32] For example, during 2012 and 2013 foreign private issuers, which are approximately 10 percent of all registrants, accounted for over 10 percent of all restatements.[33]

Although some exchange listing standards permit foreign private issuers to follow home country practice in lieu of certain corporate governance requirements,[34] our proposed rule and rule amendments would not permit the exchanges to exempt foreign private issuers from compliance with Section 10D's disclosure and recovery requirements. Consistent with a comment we received,[35] our proposal would, however, allow exchanges to permit foreign private issuers to forgo recovery as impracticable if the recovery of erroneously awarded compensation pursuant to Section 10D would violate the home country's laws so long as certain other conditions are met.[36]

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[31] See letters from Brian Foley & Company, Inc. (seeking clarification of whether Section 954 would apply to foreign private issuers and listed debt where the issuer's equity is not listed); ABA Business Law Section(recommending the Commission exercise its authority to exempt foreign private issuers from Section 954 rulemaking).

[32] See 2013 Financial Restatements: A Thirteen Year Comparison, Audit Analytics (2014) ("A Thirteen Year Comparison") (addressing accelerated foreign filers, non-accelerated foreign filers, accelerated U.S. filers, and non-accelerated U.S. filers), and Financial Restatement Trends in the United States: 2003-2012, Professor Susan Scholz, University of Kansas, Study Commissioned by the Center for Audit Quality (comparing U.S. and foreign issuers).

[33] See A Thirteen Year Comparison.

[34] See, e.g., New York Stock Exchange Rule 303A.00 and NASDAQ Stock Market LLC Rule 5615(a)(3).

[35] See letter from ABA Business Law Section.

[36] See Section II.C.3.b, below, for a discussion of proposed board discretion in these circumstances.

We also considered the incidence of restatements for smaller reporting companies, emerging growth companies and controlled companies in determining not to exclude such companies from these requirements. For example, during 2012 and 2013, U.S. issuers who are not accelerated filers[37] accounted for approximately 55 percent of total U.S. issuer restatements.[38]

We believe that smaller reporting companies constitute a substantial majority of U.S. non-accelerated filers. We also believe that at least some of these categories of issuers use incentive-based compensation arrangements that are based on achievement of financial reporting measures that may be affected by accounting restatements. As a result, we believe that shareholders of these listed issuers would benefit from a policy to recover excess incentive-based compensation and that applying the proposed rule and rule amendments to these issuers will further the statutory goal of assuring that executive officers do not retain incentive-based compensation that they received erroneously. For similar reasons, we are not proposing to grant the exchanges discretion to decide whether additional categories of issuers should be exempted from the proposed listing standards.

Further, Section 10D refers to "any security" of an issuer, which would include not only common equity securities, but also debt and preferred securities. Accordingly, apart from the proposed exemptions discussed below, we are proposing that the listing standards and other requirements of the proposed rule and rule amendments apply without regard to the type of securities issued, including to issuers of listed debt or preferred securities that do not have listed

[37] As defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2].

[38] See A Thirteen Year Comparison.

equity. As described in the Economic Analysis,[39] the potential benefits of a recovery policy would likely accrue to the holders of debt and preferred securities as well as to equity holders. For the same reasons, we do not propose to grant the exchanges discretion to decide whether certain categories of securities should be exempted from the proposed listing standards.

Request for Comment

1. Should the listing standards and other requirements of the proposed rule and rule amendments apply generally to all listed issuers, as proposed? If not, what types of issuers should be exempted, and why? Please explain the rationale that justifies exempting any particular category of issuer.
2. Should we distinguish among listed issuers based on the types of securities listed? Please explain the rationale for any such exemption. For example, do issuers with listed non-convertible debt or preferred stock that do not have listed common equity raise the same concerns as issuers with listed common equity? For listed issuers that do not have listed common equity, do the different residual claims against the cash flows of the issuer warrant a different treatment?
3. Would the proposed listing standards conflict with any home country laws, stock exchange requirements, or corporate governance arrangements that apply to foreign private issuers? If so, please explain the nature of those conflicts. Should the proposed rule and rule amendments allow exchanges to permit foreign private issuers to forego recovery of erroneously awarded compensation if recovery would violate the home country's laws and certain conditions were met, as proposed? Is such an exception

[39] See Section III, below.

necessary or appropriate? If no, why not? If not, are there more appropriate or effective means to address such conflicts?

4. In the event that a foreign private issuer's home country has a law that like Section 10D requires the issuer to disclose its policies on incentive-based compensation and recover erroneously awarded incentive-based compensation from current or former executive officers,[40] should the foreign private issuer be permitted to comply with its home country law instead of complying with the listing standard of the U.S. exchange that lists the foreign private issuer's securities? Please explain why or why not.

5. Should there be a mechanism to determine whether additional categories of issuers and/or securities should be exempted from the proposed listing standards? If so, what mechanism would be appropriate? Should new financial products that may be developed in the future be subject to the proposed requirements? Why or why not? What principles or requirements, if any, should apply to any mechanism? In the absence of a discretionary mechanism for future exemptions, would the proposed rule potentially hinder competition? If so, how?

2. Securities Futures Products and Standardized Options

[40] See, e.g., the UK Corporate Governance Code, September 2014, available at https://frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf. Under Section D. of the Corporate Governance Code, a company's remuneration scheme for executive directors for performance-related remuneration should "include provisions that would enable the company to recover sums paid or withhold the payment of any sum, and specify the circumstances in which it would be appropriate to do so." See also, e.g., Directive 2013/36/EU of the European Parliament and of the Council of June 26, 2013, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0036. The EU Capital Requirements Directive IV includes specific requirements on compensation, including a bonus cap up to 100% of variable remuneration or, with shareholder approval, 200% of total fixed pay, which must be subject to "malus or clawback" arrangements.

The Exchange Act's definition of "equity security" includes any security future on any stock or similar security.[41] Exchanges registered under Section 6 of the Exchange Act and associations registered under Section 15A(a) of the Exchange Act may trade futures on individual securities and on narrow-based security indexes ("securities futures products")[42] without such securities being subject to the registration requirements of the Securities Act of 1933 ("Securities Act") and the Exchange Act so long as they are cleared by a clearing agency that is registered under Section 17A of the Exchange Act or that is exempt from registration under Section 17A(b)(7) of the Exchange Act.[43] In December 2002, we adopted rules to provide comparable regulatory treatment for standardized options.[44]

The role of a clearing agency as the issuer for security futures products and standardized options is fundamentally different from that of other listed issuers.[45] The purchaser of security futures products and standardized options does not, except in the most formal sense, make an

[41] Exchange Act Section 3(a)(11).

[42] Exchange Act Section 3(a)(56) [15 U.S.C. 78c(a)(56)], and Commodities Exchange Act Section 1a(32) [7 U.S.C. 1a(32)] define "security futures product" as any security future or any put, call, straddle, option or privilege on any security future.

[43] See Securities Act Section 3(a)(14) [15 U.S.C. 77c(a)(14)], Exchange Act Section 12(a) [15 U.S.C. 78l(a)], and Exchange Act Rule 12h-1(e) [17 CFR 240.12h-1(e)].

[44] See Release No. 33-8171 (Dec. 23, 2002) [68 FR 188]. In that release, we exempted standardized options issued by registered clearing agencies and traded on a registered exchange or on a registered association from all provisions of the Securities Act, other than the antifraud provision of Section 17, as well as the Exchange Act registration provisions. Standardized options are defined in Exchange Act Rule 9b-1(a)(4) [17 CFR 240.9b-1(a)(4)] as option contracts trading on an exchange, an automated quotation system of a registered association, or a foreign securities exchange which relate to option classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.

[45] See Fair Administration and Governance of Self-Regulatory Organizations; Disclosure and Regulatory Reporting by Self-Regulatory Organizations; Recordkeeping Requirements for Self-Regulatory Organizations; Ownership and Voting Limitations for Members of Self-Regulatory Organizations; Ownership Reporting Requirements for Members of Self-Regulatory Organizations; Listing and Trading of Affiliated Securities by a Self-Regulatory Organization, Release No. 34-50699 (Nov. 18, 2004) [69 FR 71126], at n. 260 ("Standardized options and security futures products are issued and guaranteed by a clearing agency.")

investment decision regarding the clearing agency. As a result, information about the clearing agency's business, its officers and directors and their compensation, and its financial statements is less relevant to investors in these securities than information about the issuer of the underlying security.[46] Moreover, the investment risk in security futures products and standardized options is largely determined by the market performance of the underlying security rather than the performance of the clearing agency, which is a self-regulatory organization subject to regulatory oversight.

In recognition of such fundamental differences, the Commission provided exemptions for security futures products and standardized options when it adopted the audit committee listing requirements in Exchange Act Rule10A-3[47] and the compensation committee listing requirements in Exchange Act Rule 10C-1.[48] Specifically, these rules exempt the listing of a security futures product cleared by a clearing agency that is registered pursuant to Section 17A of the Exchange Act or that is exempt from registration pursuant to Section 17A(b)(7)(A) and the listing of a standardized option issued by a clearing agency that is registered pursuant to Section 17A of the Exchange Act. For the reasons that we exempted these securities from Rules 10A-3 and 10C-1, and because any relationship between any incentive-based compensation that the clearing agency pays its executive officers and its financial statements would not be significant to investors in these futures and options, we propose to exempt these securities from the requirements of proposed Rule 10D-1.[49]

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[46] See Listing Standards for Compensation Committees, Release No. 33-9199 (Mar. 30, 2011) at Section II.B.2.b.

[47] See Exchange Act Rules 10A-3(c)(4) and (5).

[48] See Exchange Act Rules 10C-1(b)(5)(iii) and (iv).

[49] For these same reasons, we believe exempting such securities from Rule 10D-1 would be in the public interest and consistent with the protection of investors. See Exchange Act Section 36(a).

Request for Comment

6. Are our proposed exemptions for listing securities futures products and standardized options appropriate? Why or why not?

7. Are there other types of securities that we should consider exempting from Rule 10D-1? If so, please explain which securities we should exempt and why.

3. Registered Investment Companies

In some cases, registered investment companies list their securities on an exchange. These registered investment companies generally include closed-end management investment companies and certain open-end management investment companies and unit investment trusts ("UITs") that operate as exchange-traded funds ("ETFs").[50] Listed registered management investment companies, unlike most other issuers, are generally externally managed and often have few, if any, employees that are compensated by the registered management investment companies, (i.e., the issuers). Instead, registered management investment companies typically rely on employees of the investment adviser to manage fund assets and carry out other related business activities. Such employees are typically compensated by the investment adviser of the registered management investment company as opposed to the fund. There are a small number of listed registered management investment companies that are internally managed. Such internally managed registered management investment companies might pay executive officers incentive-based compensation, as defined in proposed Rule 10D-1.

[50] See Investment Company Act Sections 5(a)(1) (definition of open-end management investment company) and 5(a)(2) (definition of closed-end management investment company) [15 U.S.C. 80a–5(a)]. See also Investment Company Act Section 4(2) (definition of UIT). ETFs are open-end management investment companies or UITs that offer redeemable securities that are listed and trade on an exchange. Since the investment portfolio of a UIT is generally fixed, UITs are not management investment companies. See text following note 48 below.

We believe that a listed registered management investment company[51] should be subject to the requirements of proposed Rule 10D-1 only to the extent that it pays executive officers incentive-based compensation. Accordingly, we propose to exempt the listing of any security issued by a registered management investment company if such management company has not awarded incentive-based compensation to any executive officer of the registered management investment company in any of the last three fiscal years or, in the case of a company that has been listed for less than three fiscal years, since the initial listing.[52] Management investment companies that have paid incentive-based compensation in that time period, however, would be subject to the rule and rule amendments and be required to have implemented a compensation recovery policy like other listed issuers. The conditional exemption would avoid causing management investment companies that do not pay incentive-based compensation to develop recovery policies they may never use.

We are also proposing to exempt the listing of any security issued by a UIT from the requirements of proposed Rule 10D-1.[53] Unlike management investment companies, UITs are pooled investment entities without a board of directors, corporate officers, or an investment adviser to render investment advice during the life of the UIT. In addition, because the

[51] We note that, as proposed, business development companies, which are a category of closed-end management investment company that are not registered under the Investment Company Act, would be subject to proposed Rule 10D-1. [15 U.S.C. 80a-2(a)(48) and 80a-53-64]. The purpose of business development companies is to fund small and developing businesses. In discussing the amendments to the Investment Company Act that established business development companies, the House Report noted such companies' special purpose and specifically recognized the need for such companies to be able to offer incentive-based compensation to their officers. See H.R. Rep. No. 1341, 96th Cong., 2d Sess. 21 (1980). We therefore see no reason to exempt business development companies that list their securities for trading on an exchange from the general requirements of the proposed rule.

[52] Proposed Rule 10D-1(b)(2)(iv). We expect that each exchange and association would adopt the necessary listing standards to ensure that those registered management investment companies that qualify for the exemption have complied with the proposed rule's exemption requirements.

[53] Proposed Rule 10D-1(b)(2)(iii).

investment portfolio of a UIT is generally fixed, UITs are not actively managed. Also, unlike registered management investment companies, UITs do not file a certified shareholder report. Accordingly, we believe that due to their particular structure and characteristics, the requirements of proposed Rule 10D-1 would be inapplicable to UITs.[54]

We are also proposing to amend Form N-CSR to redesignate Item 12 as Item 13[55] and to add new paragraph (a)(3) to that Item. The new paragraph would require any registered management investment company that would be subject to the requirements of proposed Rule 10D-1 to include as an exhibit to its annual report on Form N-CSR its policy on recovery of incentive-based compensation.

We are also proposing to add new Item 12 to Form N-CSR as well as to amend Item 22 of Schedule 14A of the Exchange Act. Both amendments would require registered management investment companies that would be subject to proposed Rule 10D-1 to provide information that would mirror the disclosure requirements of Item 402(w) of Regulation S-K.[56]

Request for Comment

8. Are the exemptions for registered management investment companies and UITs as described above appropriate? Why or why not?
9. Should we conditionally exempt business development companies from the proposed listing standards, to the same extent as we propose to do with registered management investment companies? If so, please explain why.

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[54] For similar reasons, the Commission exempted UITs when it adopted the audit committee listing requirements in Exchange Act Rule 10A-3. See Exchange Act Rules 10A-3(c)(6).

[55] We are also proposing a conforming amendment to General Instruction D to Form N-CSR to refer to redesignated Item 13(a)(1).

[56] See Section II.D.1, below.

10. Should we unconditionally exempt registered management investment companies from the proposed listing standards, as we propose to do with UITs? Should we unconditionally exempt registered open-end management investment companies that list their securities on an exchange, and only apply the conditional exemption to closed-end management investment companies? Please explain why.

11. Should we require listed registered management investment companies to disclose in annual reports on Form N-CSR or elsewhere whether or not the registered management investment company has in fact awarded incentive-based compensation to executive officers in the last three fiscal years, or in the case of a registered management investment company that has been listed for less than three fiscal years, since the listing of the registered management investment company? Should a similar disclosure requirement apply to UITs?

B. Restatements

1. Restatements Triggering Application of Recovery Policy

Sections 10D(a) and 10D(b)(2) require exchanges and associations to adopt listing standards that require issuers to adopt and comply with policies that require recovery "in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws." The Senate Report indicated that Section 10D was intended to result in "public companies [adopting policies] to recover money that they erroneously paid in incentive compensation to executives as a result of material noncompliance with accounting rules. This is money that the executive would not have received if the accounting was done properly."[57] Commenters

[57] Senate Report at 135.

requested guidance regarding the definition of material noncompliance generally.[58] One commenter recommended that the Commission either identify the circumstances that would constitute material noncompliance with financial reporting requirements or, at a minimum, provide examples of such circumstances as a guide for making such a determination, since the determination of whether or not any noncompliance is material would be based on the facts and circumstances of each situation.[59] In addressing who must make the material noncompliance determination, one commenter noted that Section 10D was unclear as to who must make this determination[60] and others recommended that the determination be left to the issuer.[61]

Two commenters noted that because a restatement would have to be the result of material noncompliance with financial reporting requirements, Congress recognized that not all accounting restatements would require recovery.[62] Several commenters recommended that the Commission exclude restatements based on changes in generally accepted accounting principles from the types of restatements that trigger recovery.[63] Another commenter observed that a change in accounting standards would appear not to trigger recovery, but a change in how an

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[58] See letters from Frederic W. Cook & Co., Inc., Towers Watson, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC and Compensia, Inc.

[59] See letter from Compensia, Inc.

[60] See letter from Compensia, Inc.

[61] See letters from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC and Davis Polk & Wardwell LLP.

[62] See letters from Towers Watson and Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

[63] See letters from Center on Executive Compensation, Frederic W. Cook & Co., Inc. and Protective Life Corporation.

auditor interprets accounting standards may trigger recovery, even absent issues regarding whether the issuer had adequate controls in place over its financial reporting system.[64]

We believe that an error that is material to previously issued financial statements constitutes "material noncompliance" by the issuer with a financial reporting requirement under the securities laws, as contemplated by Section 10D. Accordingly, proposed Rule 10D-1 would provide that issuers adopt and comply with a written policy providing that in the event the issuer is required to prepare a restatement[65] to correct an error[66] that is material to previously issued financial statements,[67] the obligation to prepare the restatement would trigger application of the recovery policy.[68] In connection with this, proposed Rule 10D-1 would define an accounting

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[64] See letter from Towers Watson.

[65] Under U.S. Generally Accepted Accounting Principles ("GAAP"), a restatement is "the process of revising previously issued financial statements to reflect the correction of an error in those financial statements." See FASB ASC Topic 250, Accounting Changes and Error Corrections (formerly SFAS No. 154, Accounting Changes and Error Corrections) ("ASC Topic 250"). Under International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS"), a retrospective restatement is "correcting the recognition, measurement and disclosure of amounts of elements of financial statements as if a prior period error had never occurred." See IAS 8, Accounting Policies, Changes in Accounting Estimates and Errors, paragraph 5.

[66] Under GAAP, an error in previously issued financial statements is "[a]n error in recognition, measurement, presentation, or disclosure in financial statements resulting from mathematical mistakes, mistakes in the application of generally accepted accounting principles (GAAP), or oversight or misuse of facts that existed at the time the financial statements were prepared. A change from an accounting principle that is not generally accepted to one that is generally accepted is a correction of an error." See ASC Topic 250. Under IFRS, prior period errors are "omissions from, and misstatements in, the entity's financial statements for one or more prior periods arising from a failure to use, or misuse of, reliable information that: (a) was available when financial statements for those periods were authorised for issue; and (b) could reasonably be expected to have been obtained and taken into account in the preparation and presentation of those financial statements. Such errors include the effects of mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, and fraud." See IAS 8, Accounting Policies, Changes in Accounting Estimates and Errors, paragraph 5.

[67] When we refer to financial statements, we mean the statement of financial position (balance sheet), income statement, statement of comprehensive income, statement of cash flows, statement of owners' equity, and accompanying footnotes, as required by Commission regulations. When we refer to financial statements for registered investment companies and business development companies, we mean the statement of assets and liabilities (balance sheet) or statement of net assets, statement of operations, statement of changes in net assets, statement of cash flows, schedules required by Rule 6-10 of Regulation S-X, financial highlights, and accompanying footnotes, as required by Commission regulations.

[68] Proposed Rule 10D-1(c)(5).

restatement as the result of the process of revising previously issued financial statements to reflect the correction of one or more errors that are material to those financial statements.[69] We do not propose to describe any type or characteristic of an error that would be considered material for purposes of the listing standards required by proposed Rule 10D-1 because materiality is a determination that must be analyzed in the context of particular facts and circumstances. Moreover, materiality has received extensive and comprehensive judicial and regulatory attention.[70] We note that issuers should consider whether a series of immaterial error corrections, whether or not they resulted in filing amendments to previously filed financial statements, could be considered a material error when viewed in the aggregate.

As indicated in the accounting standards, the following types of changes to an issuer's financial statements do not represent error corrections, and therefore would not trigger application of the issuer's recovery policy under the proposed listing standards:

- Retrospective application of a change in accounting principle;[71]
- Retrospective revision to reportable segment information due to a change in the structure of an issuer's internal organization;[72]
- Retrospective reclassification due to a discontinued operation;[73]

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[69] Proposed Rule 10D-1(c)(1)

[70] See, e.g., TSC Industries, Inc. v. Northway, 426 U.S. 438 (1976); Basic v. Levinson, 485 U.S. 224 (1988).

[71] A change in accounting principle is "[a] change from one generally accepted accounting principle to another generally accepted accounting principle when there are two or more generally accepted accounting principles that apply or when the accounting principle formerly used is no longer generally accepted. A change in the method of applying an accounting principle also is considered a change in accounting principle." See ASC Topic 250. IAS 8 has similar guidance. A change from an accounting principle that is not generally accepted to one that is generally accepted, however, would be a correction of an error.

[72] If an issuer changes the structure of its internal organization in a manner that causes the composition of its reportable segments to change, the corresponding information for earlier periods, including interim periods, should be revised unless it is impracticable to do so. See ASC Topic 280-10-50-34. IFRS 8 has similar guidance.

- Retrospective application of a change in reporting entity, such as from a reorganization of entities under common control;[74]
- Retrospective adjustment to provisional amounts in connection with a prior business combination;[75] and
- Retrospective revision for stock splits.

Request for Comment

12. For purposes of proposed Rule 10D-1, an accounting restatement would be defined as the result of the process of revising previously issued financial statements to correct errors that are material to those financial statements. Rather than including this definition in our proposed rule, should we refer to the definition of "restatement" in GAAP?[76] If we do not refer to the definition in GAAP, is it appropriate to include in the proposed definition the phrase "errors that are material" or might it be confusing or redundant? Is our proposed approach the appropriate means to implement Section 10D, including its "material noncompliance" provision?

13. If an issuer evaluates whether certain errors are material, and concludes that such errors are immaterial or are not the result of material noncompliance, should the issuer disclose its evaluation? If so, what should be disclosed and where should such disclosure be required?

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[73] See ASC Topic 205-20. IFRS 5 has similar guidance.

[74] See ASC Topic 250-10-45-21. IFRS does not have specific guidance addressing this reporting matter.

[75] See ASC Topic 805-10-25-13. IFRS 3 has similar guidance.

[76] See n.65, above.

14. Should any revision to previously issued financial statements that results in a reduction in incentive-based compensation received by an executive officer always trigger application of an issuer's recovery policy under the proposed listing standards? Why or why not?

15. As noted above, certain changes to the financial statements would not trigger recovery because they do not represent error corrections under the accounting standards. Are there any other types of changes to an issuer's financial statements that should not be deemed to trigger application of the issuer's recovery policy?

16. Should the proposed listing standards contain any anti-evasion language regarding the circumstances in which recovery would be triggered? If so, what should the language provide?

2. Date the Issuer Is Required to Prepare an Accounting Restatement

Section 10D(b)(2) requires exchanges and associations to adopt listing standards that require issuers to adopt and comply with policies that require the recovery of excess incentive-based compensation "during the 3-year period preceding the date on which the issuer is required to prepare an accounting restatement." Section 10D does not specify when a listed issuer is "required to prepare an accounting restatement" for purposes of this recovery provision.

Several commenters requested clarification on how to determine the date on which the issuer is "required to prepare an accounting restatement" and provided suggestions in this regard.[77] One commenter asked whether a restatement would be "required" for purposes of Section 10D as of the date the financial statements are stated incorrectly.[78] Another commenter

[77] See letters from Center on Executive Compensation, Compensia, Inc., Davis Polk & Wardwell LLP, Meridian Compensation Partners, LLC, and Towers Watson.

[78] See letter from Towers Watson.

expressed the view that the date of the erroneous statement should be the date on which a new statement must be prepared.[79] Other commenters recommended that the recovery trigger should be the date the issuer files an accounting restatement due to the issuer's material noncompliance with a financial reporting requirement under the securities laws.[80] A different commenter suggested using the date the decision to undertake the restatement is made, providing as examples the date an issuer's board of directors authorizes the preparation of an accounting restatement or the date a court or regulatory authority orders or requires an issuer to prepare an accounting restatement.[81] Another commenter recommended that the issuer be deemed "required to prepare an accounting restatement" when a Current Report on Form 8-K is filed disclosing non-reliance on the issuer's financial statements, or, if no Form 8-K is required, the date that either the board of directors or management determines that a restatement is required.[82]

We considered the alternatives identified by commenters for when an issuer is "required to prepare an accounting restatement" for purposes of the proposed listing standards, and are concerned that some of these alternatives would not operate effectively with the three-year look-back period for recovery prescribed by Section 10D. While the issuer has an obligation to file materially complete and accurate financial statements, which could support using the date the erroneous financial statements were filed as the triggering date for Section 10D, we believe this approach would not fully effectuate Section 10D's purpose. If the date of filing of the erroneous financial statements were used as the starting point for the look-back period, recovery would not

[79] See AFL-CIO Joint Letter.

[80] See letters from Center on Executive Compensation and Protective Life Corporation.

[81] See letter from Compensia, Inc.

[82] See letter from Davis Polk & Wardwell LLP.

apply to any incentive-based compensation received after that date, even when the amount was affected by the erroneous financial statements. For example, if 2014 net income was materially misstated, and a 2014—2016 long-term incentive plan had a performance measure of three-year cumulative net income, a look-back period that covered only the three years before the erroneous filing would not capture the compensation earned under that plan. While the date of the erroneous filing is easily discernible, using this date may result in listed issuers recovering only incentive-based compensation that was received during the fiscal year preceding the filing date of the financial statements that included the subsequently restated financial reporting measure. We believe this result would be inconsistent with the three-year look-back period that the statute specifies.

We also considered using the date the issuer files the accounting restatement for triggering the three-year look-back period. However, we believe this approach also would not appropriately implement Section 10D because the issuer necessarily would have been required to prepare an accounting restatement at some point before it actually filed the restatement.[83] Moreover, an issuer might improperly delay filing a restatement after determining that restatement was necessary, and by doing so could affect the amounts of compensation subject to recovery.

In considering how best to craft a trigger for recovery under the proposed listing standards, we have sought to define the date on which an accounting restatement is required in a way that provides reasonable certainty for issuers, shareholders and exchanges while not permitting issuers to avoid recovery when a material error has occurred. To that end, we are

[83] As noted in Section II.C.2.b, below, the three-year look-back period is not meant to limit or designate the reporting periods for which an accounting restatement is required, or to limit which restated financial statements may be filed with the Commission.

proposing a definition that would be triggered by the occurrence of certain issuer or third-party determinations about the need for a restatement. Specifically, under the proposed listing standards, the proposed rule would state that the date on which an issuer is required to prepare an accounting restatement is the earlier to occur of:

- The date 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, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error; or
- The date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements to correct a material error.[84]

A note to the proposed rule would indicate that the first proposed date generally is expected to coincide with the occurrence of the event described in Item 4.02(a) of Exchange Act Form 8-K, although neither proposed date is predicated on a Form 8-K having been filed.[85] For the first proposed date to occur, the issuer merely needs to have concluded that previously issued financial statements contain a material error, which we expect may occur before the precise amount of the error has been determined. While we recognize that listed issuers must apply judgment before concluding that previously issued financial statements contain a material error, we believe this judgment should be applied on an objective basis, which is when a reasonable issuer, based on the facts available, would have concluded that the previously issued financial

[84] Proposed Rule 10D-1(c)(2).

[85] Note to proposed Rule 10D-1(c)(2). For example, if a listed issuer files an Item 4.02(b) Form 8-K because it 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 that contain a material error, the triggering event for the recovery policy occurs when the listed issuer decides to restate its financial statements even if it subsequently neglects to file an Item 4.02(a) Form 8-K to report that decision.

statements contain a material error. In this regard, while not dispositive, we believe that an issuer would have to consider carefully any notice received from its independent auditor that previously issued financial statements contain a material error.

We recognize that the second proposed date on which an issuer would be required to prepare a restatement for purposes of Section 10D may occur earlier than the board's determination if a court or other legally authorized body, such as a regulator, directs the issuer to restate.

We believe a definition that incorporates the proposed triggering events rather than leaving the determination solely to the discretion of the issuer would better realize the objectives of Section 10D while providing clarity about when a recovery policy, and specifically the determination of the three-year look-back period, will be triggered for purposes of the proposed listing standards. In this regard, we note that the proposed rule also states that an issuer's obligation to recover excess incentive-based compensation is not dependent on if or when the restated financial statements are filed. Further, we note that issuers that knowingly, recklessly or negligently misreport materially false or misleading financial information would be subject to liability under existing antifraud provisions.[86]

Request for Comment

17. Is it appropriate to treat the earlier of the two proposed dates as "the date on which an issuer is required to prepare an accounting restatement" for purposes of triggering the Section 10D recovery obligation? If not, why not? Would using these dates provide sufficient certainty and transparency for issuers, investors and exchanges to determine

[86] See Securities Act Section 17(a) [15 U.S.C. 77q(a)], Exchange Act Section 10(b) [15 U.S.C. 78j(b)] and Exchange Act Rule 10b-5 [17 CFR 240.10b-5].

when recovery would be triggered for purposes of compliance with the proposed listing standards? Are there additional triggers we should consider including?

18. Should receipt of a notice from a company's independent auditor that previously issued financial statements contain a material error constitute a date when the issuer "reasonably should have concluded" that such statements contain a material error? Why or why not? What if the issuer disagrees with the auditor's conclusion?

19. Are there other means of defining the date on which an issuer is required to prepare an accounting restatement that would provide clear benchmarks that do not inject subjectivity into when recovery would be triggered? If so, how should the date on which the issuer is required to prepare a restatement be defined?

C. Application of Recovery Policy

1. Executive Officers Subject to Recovery Policy

Section 10D(b)(2) requires exchanges and associations to adopt listing standards that require issuers to adopt and comply with policies that provide for recovery of excess incentive-based compensation from "any current or former executive officer of the issuer who received incentive-based compensation." Section 10D does not define "executive officer" for purposes of the recovery policy.[87]

Several commenters requested guidance on the definition of executive officer.[88] One commenter[89] indicated that the Section 10D's reference to executive officer appears to use the

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[87] The Senate Committee on Banking, Housing, and Urban Affairs noted that "[t]his policy is required to apply to executive officers, a very limited number of employees, and is not required to apply to other employees." Senate Report at 136.

[88] See letters from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Towers Watson and Robert E. Scully Jr.

[89] See letter from Towers Watson.

executive officer definition in Exchange Act Rule 3b-7.[90] Another commenter[91] questioned whether the recovery policy would cover officers subject to Exchange Act Section 16[92] or only the named executive officers.[93] Another specifically recommended using the Section 16 definition of "officer," and stated that executive officers of subsidiaries should be included in the definition.[94] A different commenter requested guidance regarding how the recovery policy should apply to persons who are executive officers during only a portion of the recovery period.[95]

We believe that Section 10D's mandatory recovery policy was intended to apply, at a minimum, to all executive officers of the issuer, rather than a more limited category such as the

[90] Exchange Act Rule 3b-7 provides that "[t]he term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant." Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant." 17 CFR 240.3b-7.

[91] See letter from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

[92] 15 U.S.C. §78p. As defined in Exchange Act Rule 16a-1(f) [17 CFR 240.16a-1(f)], the term "officer" means "an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer." The rule also contains specific provisions with respect to limited partnerships and trusts, and a note providing that "policy-making function" is not intended to include policy making functions that are not significant and that persons identified as "executive officers" pursuant to Item 401(b) of Regulation S-K [17 CFR 229.401(b)] are presumed to be officers for purposes of Section 16, as are other persons enumerated in Rule 16a-1(f) but not in Item 401(b). 15 U.S.C. §78p.

[93] See Item 402(a)(3) of Regulation S-K. For smaller reporting companies and emerging growth companies, named executive officers include the following: all individuals serving as the issuer's principal executive officer or acting in similar capacities during the last completed fiscal year, regardless of compensation level; the issuer's two most highly compensated executive officers other than the principal executive officer who were serving as executive officers at the end of the last completed fiscal year; and up to two additional individuals for whom disclosure would have been provided based on highest compensation but for the fact that the individual was not serving as an executive officer of the issuer at the end of the last completed fiscal year. See Item 402(m)(2) of Regulation S-K and Section 102(c) of the Jumpstart Our Business Startups Act ("JOBS Act").

[94] See AFL-CIO Joint Letter.

[95] See letter from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

named executive officers for whom executive compensation disclosure is required under Item 402 of Regulation S-K. The Senate Report accompanying the statute indicates that "[t]his policy is required to apply to executive officers[.]"[96] Moreover, we believe applying the recovery policy to all executive officers would more effectively realize the statutory goal of Section 10D because officers with policy making functions and important roles in the preparation of financial statements set the tone for and manage the issuer. In this regard, we do not believe that a listed issuer should be unable to recover unearned compensation from an executive officer simply because he or she was not one of the individuals identified for purposes of Item 402's disclosure requirements.

The proposed listing standards would include a definition of "executive officer" in Rule 10D-1 that is modeled on the definition of "officer" in Rule 16a-1(f). For purposes of Section 10D, an "executive officer" would be the issuer's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parents or subsidiaries would be deemed executive officers of the issuer if they perform such policy making functions for the issuer.[97]

In particular, the proposed definition would expressly include the principal financial officer and the principal accounting officer (or if there is no such accounting officer, the

[96] See Senate Report.

[97] Proposed Rule 10D-1(c)(3), which also would specify who would be executive officers if the issuer is a limited partnership or trust.

controller) among the officers specified. We believe that their responsibility for financial information justifies their inclusion in the definition of "executive officer" for this purpose, just as these officers were specifically included in the Rule 16a-1(f) definition of "officer.[98] Although the compensation recovery provisions of Section 10D apply without regard to an executive officer's responsibility for preparing the issuer's financial statements, we believe that it is clearly appropriate for officers with an important role in financial reporting to be subject to the recovery policy. The proposed definition, like Rule 16a-1(f), provides that executive officers of the issuer's parents or subsidiaries may be deemed executive officers of the issuer if they perform policy making functions for the issuer. As is the case for Section 16 officer determination, if pursuant to Item 401(b) of Regulation S-K the issuer identifies a person as an "executive officer," it would be presumed that the board of directors has made that judgment and the persons so identified are executive officers for purposes of proposed Rule 10D-1.[99]

Section 10D(b)(2) calls for the recovery policy to apply to "any current or former executive officer of the issuer who received incentive-based compensation [during the three-year look-back period]." We believe that the statute was designed to require recovery of excess incentive-based compensation provided for service as an executive officer. Accordingly, the rule and rule amendments we propose would require recovery of excess incentive-based compensation received by an individual who served as an executive officer of the listed issuer at

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[98] 17 CFR 240.16a-1(f). In proposing their inclusion in the Rule 16a-1(f) definition of "officer," the Commission noted that principal financial officers and principal accounting officers are required to sign an issuer's Securities Act registration statements and Exchange Act annual reports on Form 10-K. Release No. 34-27148 (Aug. 18, 1989) [54 FR 35667] at n. 31. Subsequently, Section 302 of SOX required the principal financial officer, as well as the principal executive officer, to certify the information contained in each annual or quarterly report filed under Section 13(a) or 15(d) of the Exchange, and the effectiveness of the issuer's internal controls. Listed companies could, of course, adopt policies that applied to a larger group of employees so long as the policy at a minimum applied to executive officers.

[99] See proposed Note to Rule10D-1(c)(3), modeled on the Note to Rule 16a-1(f).

any time during the performance period for that incentive-based compensation.[100] This would include incentive-based compensation derived from an award authorized before the individual becomes an executive officer, and inducement awards granted in new hire situations, as long as the individual served as an executive officer of the listed issuer at any time during the award's performance period. As proposed, recovery would not apply to an individual who is an executive officer at the time recovery is required if that individual had not been an executive officer at any time during the performance period for the incentive-based compensation subject to recovery.

Request for Comment

20. Consistent with the Rule 16a-1(f) definition of "officer", should we define "executive officers" to expressly include the principal financial officer and the principal accounting officer (or if there is no such accounting officer, the controller), as proposed?
21. Are there any other officers, such as the chief legal officer, chief information officer, or such other officer, who by virtue of their position should be specifically named as executive officers subject to the issuer's recovery policy? If so, which additional officers should be subject to the issuer's recovery policy and why?
22. Are there any other officers who should be included in the group of executive officers subject to the issuer's recovery policy, but who may not fall within the proposed definition? Is the definition of executive officer appropriate? If not, how else should executive officer be defined?
23. Alternatively, is the proposed definition of "executive officer" too broad? Should we instead limit the recovery policy to "named executive officers," as defined in Items

[100] Proposed Rule 10D-1(b)(1)(i)(B).

402(a)(3) and 402(m)(2) of Regulation S-K or otherwise define a more narrow set of officers subject to recovery?

24. Will the scope of the term "executive officer" for purposes of Section 10D affect issuers' practices in identifying executive officers for other purposes? If so, how, and what if anything should we do to address that? Are there other means of simplifying the identification of "executive officers" for purposes of Rule 10D-1 that would promote consistency with identifying executive officers for other purposes, such as Item 401(b) of Regulation S-K? Is there another, more appropriate definition?

25. Is it consistent with the purposes of Section 10D to apply recovery to any incentive-based compensation earned during the three completed fiscal years immediately preceding the date that the issuer is required to prepare a restatement if that person served as an executive officer at any time during the performance period? Alternatively, should an individual be subject to recovery only for incentive-based compensation earned during the portion of the performance period during which the individual was serving as an executive officer? Should an individual who is an executive officer at the time recovery is required be subject to recovery even if that individual did not serve as an executive officer of the issuer at any time during the performance period for the affected incentive-based compensation? If a different standard should govern the circumstances when an executive officer or former executive officer is subject to recovery, what should that standard be, and why should it apply?

2. Incentive-Based Compensation

a. Incentive-Based Compensation Subject to Recovery Policy

Section 10D(b)(2) requires exchanges and associations to adopt listing standards that require issuers to adopt and comply with recovery policies that apply to "incentive-based compensation (including stock options awarded as compensation)" that is received, based on the erroneous data, in "excess of what would have been paid to the executive officer under the accounting restatement." Implicit in these statutory requirements is that the amount of such compensation received in the three-year look-back period would have been less if the financial statements originally had been prepared as later restated.

Several commenters recommended that the Commission clarify the types of compensation to which the listing standards' recovery policy would apply.[101] To that end, some commenters suggested potential standards that focused on the compensation being based on or related to publicly reported financial statements.[102] For example, one commenter stated that any form of compensation that is contingent upon the achievement of one or more pre-determined and objective performance goals "that expressly relate to and are derived from one or more financial or stock price metric set forth in an issuer's financial statements filed with the Commission" should be incentive-based compensation for purposes of Section 10D.[103] In some cases, commenters suggested we look to the existing definitions of "incentive plan," "equity

[101] See, e.g., letters from ABA Business Law Section, American Benefits Council, Center on Executive Compensation, Meridian Compensation Partners, LLC, Protective Life Corporation, Robert E. Scully Jr, and Society of Corporate Secretaries and Governance Professionals.

[102] See, e.g., letters from ABA Business Law Section, American Benefits Council, Center on Executive Compensation, Davis Polk, and Meridian Compensation Partners, LLC.

[103] See letter from Meridian Compensation Partners, LLC.

incentive plan award" and "non-equity incentive plan award" in Item 402(a)(6)(iii) of Regulation S-K in defining incentive-based compensation subject to recovery.[104]

To identify compensation that is awarded or vests based on financial performance measures, some commenters[105] provided various examples of financial information required to be reported under the securities laws, such as revenue, net income and earnings per share, and examples of related non-GAAP measures, such as EBITDA.[106] Commenters also recommended that awards based solely on satisfaction of non-financial measures – for example, operational measures such as market share and customer satisfaction, subjective measures such as leadership, and strategic measures such as consummation of a merger – should not be subject to an issuer's recovery policy.[107] Generally, commenters who specifically addressed stock price and total shareholder return[108] measures recommended excluding them from recovery policies,[109] or expressed the view that any connection between the erroneous data relating to an accounting restatement and the fluctuating value of the issuer's stock would be tangential and speculative.[110]

One commenter who addressed the statute's inclusion of "stock options awarded as compensation" questioned whether recovery should apply to the extent the enhancement in an

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104 See letters from ABA Business Law Section and Davis Polk.

105 See, e.g., letters from Center on Executive Compensation, Meridian Compensation Partners, LLC and Protective Life Corporation.

106 Earnings before interest, taxes, depreciation and amortization.

107 See, e.g., letters from Center on Executive Compensation, Meridian Compensation Partners, LLC, Protective Life Corporation, and Society of Corporate Secretaries and Governance Professionals.

108 "Total shareholder return" or "TSR" is a measure based on the change in stock price plus dividends over a period of time.

109 See letters from Center on Executive Compensation and Protective Life Corporation.

110 See letter from American Benefits Council.

award's value is solely attributable to increases in the fair market value of the underlying shares.[111] Other commenters recommended excluding from recovery equity awards that are not granted upon achievement of one or more pre-determined and objective financial metrics, and that vest solely upon the passage of time, continued service or satisfaction of non-financial metrics.[112]

Commenters also raised questions whether other forms of compensation, such as discretionary bonuses, future benefits under supplemental retirement benefit plans calculated based on incentive compensation awards and investment returns on incentive-based compensation deferred pursuant to deferred compensation plans, would be incentive-based compensation subject to recovery.[113] In particular, some commenters requested guidance concerning bonuses paid pursuant to "pool plans," where achievement of financial performance measures establishes the overall size of the bonus pool, but discretion is exercised in determining the amount of individual bonuses.[114]

In considering how best to define incentive-based compensation for purposes of the proposed rule,[115] we have considered the statutory language of Section 10D, the views of commenters, and the administrability of any mandatory recovery policy that encompasses such compensation. Rather than identifying each type or form of compensation to which a recovery

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[111] See letter from American Benefits Council.

[112] See letters from Center on Executive Compensation, Compensia, Meridian Compensation Partners, LLC and Protective Life Corporation.

[113] See, e.g., letter from Robert E. Scully, Jr.

[114] See letters from Center on Executive Compensation and Protective Life Corporation.

[115] The proposed definition would be applicable only to recovery of incentive-based compensation under proposed Rule 10D-1, and would not apply to the recovery of incentive-based compensation pursuant to SOX Section 304.

policy required under the listing standards would apply, for purposes of proposed Rule 10D-1 we propose to define "incentive-based compensation" in a principles-based manner, which we believe would enable the rule and rule amendments to operate effectively as new forms of compensation and new measures of performance upon which compensation is based are developed. As proposed, "incentive-based compensation" would be defined as "any compensation that is granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure."[116]

The proposed definition would further provide that "financial reporting measures" are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements,[117] any measures derived wholly or in part from such financial information,[118] and stock price and total shareholder return. Such measures would be encompassed by the definition of financial reporting measures whether or not included in a filing with the Commission,[119] and may be presented outside the financial statements, such as in Management's Discussion and Analysis of Financial Conditions and Results of Operations

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[116] See proposed Rule 10D-1(c)(4). "In part," is included in the definition to clarify that incentive-based compensation need not be based solely upon attainment of a financial reporting measure. An example of compensation that is based in part upon the attainment of a financial reporting measure would include an award in which 60 percent of the target amount is earned if a certain revenue level is achieved, and 40 percent of the target amount is earned if a certain number of new stores are opened. Similarly, an award for which the amount earned is based on attainment of a financial reporting measure but is subject to subsequent discretion by the compensation committee to either increase or decrease the amount would be based in part upon attainment of the financial reporting measure.

[117] For foreign private issuers whose financial statements are based upon a comprehensive body of accounting principles other than GAAP or IFRS, the restatement would relate to amounts reported using such other accounting principles but not the reconciliation to GAAP. We would not consider the reconciliation to GAAP to be within the meaning of financial reporting measures for purposes of this proposed rule.

[118] The proposed definition is broader than a "non-GAAP financial measure" for purposes of Exchange Act Regulation G [17 CFR 244.100 et seq.] and Item 10 of Regulation S-K [17 CFR 229.10].

[119] For example, same store sales or regional sales volume may not be disclosed in a filing with the Commission, but nevertheless could be affected by an accounting restatement for revenue recognition.

(“MD&A”)[120] or the performance graph.[121] Accordingly, examples of financial reporting measures would include, but would not be limited to, the following accounting-based measures (including measures derived therefrom):

- Revenues;
- Net income;
- Operating income;
- Profitability of one or more reportable segments;[122]
- Financial ratios (e.g., accounts receivable turnover and inventory turnover rates);
- Net assets or net asset value per share (for registered investment companies and business development companies that are subject to the rule);
- EBITDA;[123]
- Funds from operations (“FFO”)[124] and adjusted funds from operations (“AFFO”);
- Liquidity measures (e.g., working capital, operating cash flow);
- Return measures (e.g., return on invested capital, return on assets);
- Earnings measures (e.g., earnings per share);
- Sales per square foot or same store sales, where sales is subject to an accounting restatement;

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[120] 17 CFR 229.303. See also Item 5, Form 20-F. Examples of this could be accounts receivable turnover, EBITDA, or sales per square foot.

[121] 17 CFR 229.201(e).

[122] As disclosed in a financial statement footnote. See ASC Topic 280.

[123] Earnings before interest, taxes, depreciation and amortization.

[124] FFO is a non-GAAP financial measure commonly used in the real estate industry.

- Revenue per user, or average revenue per user, where revenue is subject to an accounting restatement;
- Cost per employee, where cost is subject to an accounting restatement;
- Any of such financial reporting measures relative to a peer group, where the issuer's financial reporting measure is subject to an accounting restatement; and
- Tax basis income.

In addition to measures that are derived from the financial statements, the proposed definition of financial reporting measures would include performance measures based on stock price or total shareholder return. Section 10D(b) requires disclosure of an issuer's policy with respect to "incentive-based compensation that is based on financial information required to be reported under the securities laws" and recovery of compensation awarded "based on the erroneous data." Although the phrase "financial information required to be reported under the securities laws" might be interpreted as applying only to accounting-based metrics, we believe that it also includes performance measures such as stock price and total shareholder return that are affected by accounting-related information and that are subject to our disclosure requirements.[125] Further, Congress' direction to include compensation that is <u>based on</u> financial information and to recover compensation <u>based on</u> the erroneous accounting data suggests that we should include incentive compensation tied to measures such as stock price and total shareholder return to the extent that improper accounting affects such measures, and in turn results in excess

[125] In this regard, we note that Item 201 of Regulation S-K requires issuers with common equity the principal market for which is an exchange, to disclose the high and low sales prices "for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included . . . ." In addition, Item 201(e) of Regulation S-K requires issuers that are not smaller reporting companies to disclose stock price information and a performance graph comparing the company's cumulative total shareholder return with a performance indicator of the overall stock market and either a published industry index or company-determined peer comparison.

compensation. We also recognize that total shareholder return is a frequently used performance metric for executive compensation,[126] and that excluding it might not promote the goals we believe Congress intended. Moreover, we are concerned that not including TSR could incentivize issuers to alter their executive compensation arrangements in ways that would avoid application of the mandatory recovery policy and result in less efficient incentive alignment.[127]

In proposing that the statutory language should be interpreted to encompass incentive-based compensation tied to stock price and total shareholder return, as well as accounting-based metrics, we have considered potential administrative burdens that could be imposed on issuers in determining the amount of compensation to be recovered. In some cases, issuers may need to engage in complex analyses that require significant technical expertise and specialized knowledge, and may involve substantial exercise of judgment in order to determine the stock price impact of a material restatement. Due to the presence of confounding factors, it sometimes may be difficult to establish the relationship between an accounting error and the stock price. We recognize these potential challenges and, as discussed more fully below,[128] are proposing that issuers be permitted to use reasonable estimates when determining the impact of a restatement on stock price and total shareholder return and to require them to disclose the estimates.[129] We believe that being able to use reasonable estimates to assess the effect of the accounting restatement on these performance measures in determining the amount of erroneously awarded compensation should help to mitigate these potential difficulties.

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[126] See Section III, below.

[127] See Section III, below.

[128] See Section II.C.3.a, below.

[129] See Section II.D.1, below.

While the definition we are proposing is intended to be applied broadly and flexibly, it does not encompass all forms of incentive compensation.[130] An incentive plan award that is granted, earned or vested based solely upon the occurrence of certain non-financial events, such as opening a specified number of stores, obtaining regulatory approval of a product, consummating a merger or divestiture, completing a restructuring plan or financing transaction, would not be "incentive-based compensation" because these measures of performance are not financial reporting measures. Although these non-financial metrics are not included in the proposed definition, we are soliciting comment below on whether the definition of "incentive-based compensation" should include additional performance measures.

The statute further specifies that incentive-based compensation to which recovery should apply under the recovery policy required by the listing standard "includ[es] stock options awarded as compensation." Accordingly, as proposed, "incentive-based compensation" would include options and other equity awards whose grant or vesting is based wholly or in part upon the attainment of any measure based upon or derived from financial reporting measures.[131] Applying the proposed Rule 10D-1 definition, compensation that would be subject to the recovery policy required by the proposed listing standards would include, but not be limited to:

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[130] In this regard we note that the proposed definition of "incentive-based compensation" is narrower in scope than the definition of "incentive plan," in Item 402(a)(6)(iii) of Regulation S-K, which is "any plan providing compensation intended to serve as an incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other performance measure." Item 402(a)(6)(iii) of Regulation S-K [17 CFR 229.402(a)(6)(iii)]. The proposed Rule 10D-1 definition would not include "other performance measures" in light of Section 10D's reference to incentive-based compensation based on financial information required to be reported under the federal securities laws.

[131] This would be the standard for purposes of proposed Rule 10D-1 even though time-vested stock options are generally considered "performance-based" for purposes of exclusion from the Internal Revenue Code Section 162(m) $1 million cap on tax-deductible executive compensation if the amount of compensation attributable to the options is based solely on an increase in company stock price, assuming the exercise price is no less than fair market value of the underlying stock on the date of grant. See 26 CFR 1.162-27(e)(2)(vi).

- Non-equity incentive plan awards that are earned based wholly or in part on satisfying a financial reporting measure performance goal;
- Bonuses paid from a "bonus pool," the size of which is determined based wholly or in part on satisfying a financial reporting measure performance goal;
- Restricted stock, restricted stock units ("RSUs"), performance share units ("PSUs"), stock options, and stock appreciation rights ("SARs") that are granted or become vested based wholly or in part on satisfying a financial reporting measure performance goal; and
- Proceeds received upon the sale of shares acquired through an incentive plan that were granted or vested based wholly or in part on satisfying a financial reporting measure performance goal.

Examples of compensation that would not be "incentive-based compensation" for this purpose would include, but not be limited to:

- Salaries;[132]
- Bonuses paid solely at the discretion of the compensation committee or board that are not paid from a "bonus pool," the size of which is determined based wholly or in part on satisfying a financial reporting measure performance goal;
- Bonuses paid solely upon satisfying one or more subjective standards (e.g., demonstrated leadership) and/or completion of a specified employment period;
- Non-equity incentive plan awards earned solely upon satisfying one or more strategic measures (e.g., consummating a merger or divestiture), or operational measures (e.g.,

[132] However, to the extent that an executive officer receives a salary increase earned wholly or in part based on the attainment of a financial reporting measure, such a salary increase would be subject to recovery as a non-equity incentive plan award for purposes of proposed Rule 10D-1.

opening a specified number of stores, completion of a project, increase in market share); and

- Equity awards for which the grant is not contingent upon achieving any financial reporting measure performance goal and vesting is contingent solely upon completion of a specified employment period and/or attaining one or more non-financial reporting measures.

Request for Comment

26. Is the scope of incentive-based compensation subject to recovery under Section 10D(b) properly defined by reference to compensation that is granted, earned or vested based wholly or in part upon attainment of any measure that is determined or presented in accordance with applicable accounting principles? If not, please explain what other forms of compensation should be covered and why.

27. Is the proposed definition of "incentive-based compensation" the best means to capture all forms of compensation that could be subject to reduction if recalculated based on an accounting restatement? If not, please explain what other forms of compensation, which would not be covered by the proposed definition, should be covered.

28. Are there circumstances in which compensation that is received upon completion of a specified employment period or upon the attainment of any other goal that is not covered by our proposed definition should be considered incentive-based compensation subject to recovery? Why or why not? If so, how would an issuer calculate the recoverable amounts in the event of an accounting restatement? Are there any other measures of compensation that should be included in the definition of incentive-based compensation? If so, which ones and why?

29. Should compensation that is based upon stock price performance or total shareholder return be considered incentive-based compensation subject to recovery? If not, please explain why not. If compensation that is based on stock price performance or total shareholder return is included as incentive-based compensation subject to recovery, what calculations would need to be made to determine the recoverable amount? What are the costs and technical expertise required to prepare these calculations? Who would make these calculations for issuers? Would the costs be greater than for calculations tied to other financial reporting measures, which would be subject to mathematical recalculation directly from the information in an accounting restatement? Would the exchanges be able to efficiently assess these calculations for purposes of enforcing compliance with their listing standards? Why or why not? Should we require an independent third party to assess management's calculations?

30. Should incentive-based compensation be defined to include compensation that is based on satisfying one or more subjective standards (such as demonstrated leadership) to the extent that such subjective standards are satisfied in whole or in part by meeting a financial reporting measure performance goal (such as stock price performance or revenue metrics)? If so, how could this approach be implemented? Is it sufficient that the current proposal encompasses "any compensation that is granted, earned or vested based wholly or in part upon the attainment of a financial reporting measure"? If not, why not?

31. Should the proposed rule or listing standards contain any anti-evasion language that would treat as incentive-based compensation amounts received purportedly based on one or more subjective standards but that are in fact based on financial information metrics,

total shareholder return or stock price performance? If so, what should the language provide?

32. Should the definition of "incentive-based compensation" included in Rule 10D-1 be principles-based, as proposed? Alternatively, should the definition specify performance measures that may be affected by an accounting restatement? If so, please explain which examples should be included and why.

33. Regarding the statutory provision that incentive-based compensation subject to recovery "includ[es] stock options awarded as compensation," does the proposed definition provide a basis by which issuers can identify equity awards that would be covered? If not, please explain why not. If all options should be subject to recovery, how should the amount subject to recovery following an accounting restatement be computed for time-vested options that are not granted based on satisfaction of a financial reporting measure performance goal?

34. Regarding bonuses granted from a "bonus pool," the size of which is based wholly or in part upon satisfying a financial reporting measure performance goal, does the proposed definition properly subject this form of compensation to recovery? If not, how should we treat such compensation for purposes of Rule 10D-1?

35. Is further guidance needed as to how the proposed definition would apply to forms of compensation that may be paid out on a deferred basis, such as employee or employer contributions of incentive-based compensation to nonqualified deferred compensation plans and earnings thereon, and future retirement benefits payable under pension plans,

such as supplemental retirement benefit plans, that are calculated based on incentive-based compensation?[133] If so, what further guidance should we provide?

b. Time Period Covered by Recovery Policy

Section 10D(b)(2) requires exchanges and associations to adopt listing standards that require issuers to adopt and comply with recovery policies that apply to excess incentive-based compensation received "during the three-year period preceding the date on which the issuer is required to prepare an accounting restatement" but does not otherwise specify how this three – year look-back period should be measured. Commenters recommended that the listing standards address this point.[134] One commenter suggested that it be the three fiscal years preceding the date that a Form 8-K is filed disclosing non-reliance on the issuer's financial statements, or, if no Form 8-K is required, preceding the date that either the board of directors or management makes a determination that a restatement is required.[135]

Under proposed Rule 10D-1, the three-year look-back period for the recovery policy required by the listing standards would be the three completed fiscal years immediately preceding the date the issuer is required to prepare an accounting restatement.[136] We believe that basing the look-back period on fiscal years, rather than a preceding 36-month period, is consistent with issuers' general practice of making compensation decisions and awards on a fiscal year basis. Using the proposed recovery period trigger, if a calendar year issuer concludes

[133] See Section II.C.3.a, below, addressing the computation of excess incentive-based compensation for these forms of compensation.

[134] See letters from Frederic W. Cook & Co., Inc., ABA Business Law Section and Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

[135] See letter from Davis Polk & Wardwell LLP.

[136] Proposed Rule 10D-1(b)(ii).

in November 2018 that a restatement of previously issued financial statements is required and files the restated financial statements in January 2019, the recovery policy would apply to compensation received in 2015, 2016 and 2017. The three-year look-back period is not meant to alter the reporting periods for which an accounting restatement is required or for which restated financial statements are to be filed with the Commission.[137] Moreover, an issuer would not be able to delay or relieve itself from the obligation to recover erroneously awarded incentive-based compensation by delaying or failing to file restated financial statements.

In proposing Rule 10D-1, we considered other approaches, such as a recovery policy that requires issuers to recover incentive-based compensation received during any period of three consecutive years preceding the date on which the issuer is required to prepare an accounting restatement so long as the incentive-based compensation was affected by the error. However, we do not believe that this approach is the most appropriate means to implement Section 10D because it would require additional judgments about which three years' compensation should be subject to recovery, making it less objective and harder for exchanges and listed issuers to apply uniformly.

In situations where an issuer has changed its fiscal year end during the three-year look-back period, we are proposing that the issuer must recover any excess incentive-based compensation received during the transition period occurring during, or immediately following, that three-year period in addition to any excess incentive-based compensation received during

[137] For example, assume the three-year look-back period is 2016, 2017 and 2018, and incentive compensation received (as "received" would be defined in proposed Rule 10D-1(c)(6), discussed in Section II.C.2.c, below) in 2016 was earned by achieving a certain level of cumulative operating income for the two-year period from 2015 to 2016. In determining the amount of excess compensation received in 2016, the issuer would be required to prepare restated financial statements for 2015 and 2016 even if the issuer does not file one or both of those restated financial statements.

the three-year look-back period (i.e., a total of four periods).[138] A transition period refers to the period between the closing date of the issuer's previous fiscal year end and the opening date of its new fiscal year.[139] For example, consider a situation in which, in late 2015, an issuer changes its fiscal closing date from June 30 to December 31, and subsequently reports on the transition period from July 1, 2015 to December 31, 2015. If the issuer's board of directors concludes in May 2017 that it will restate previously issued financial statements due to a material error, the look-back period would consist of the year ended June 30, 2014, the year ended June 30, 2015, the period from July 1, 2015 to December 31, 2015, and the year ended December 31, 2016. However, consistent with Rule 3-06(a) of Regulation S-X, a transition period of nine to 12 months would be considered a full year in applying the three-year look-back period requirement.

Request for Comment

36. Is the proposed approach to determine the three-year look-back period for recovery an appropriate means to implement Section 10D? Does it properly reflect the way in which issuers make their compensation decisions (on a fiscal year by fiscal year basis)? Why or why not?

37. Should a different approach be used to determine the three-year look-back period for recovery? If so, how should the look-back period be determined, and why? For example, should an issuer be permitted to apply its recovery policy to any three-year period in which incentive-based compensation received by executive officers was affected by the accounting error?

[138] Proposed Rule 10D-1(b)(1)(ii).

[139] 17 CFR 240.13a-10 and 17 CFR 240.15d-10

38. Is the proposed approach regarding transition periods related to a change in fiscal year appropriate? If not, what alternative approach should we consider? Consistent with Rule 3-06(a) of Regulation S-X, should a transition period of nine to 12 months be considered a full year in satisfying the three-year look-back period requirement?

c. When Incentive-Based Compensation Is "Received"

Section 10D does not specify when an executive officer should be deemed to have received incentive-based compensation for the recovery policy required under the applicable listing standards. One commenter asked the Commission to clarify whether an option or SAR is received when it is granted or when it is exercised or whether restricted stock, RSUs, other stock-based compensation and long-term cash incentives are received when granted, earned, vested or paid out.[140] Another commenter suggested that compensation be deemed received on the earlier of the date the compensation is paid to or earned by the executive officer, construing "earned" to mean when an executive officer obtains a non-forfeitable interest in a compensatory award.[141]

As proposed, incentive-based compensation would be deemed received for purposes of triggering the recovery policy under Section 10D in the fiscal period[142] during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant occurs after the end of that period.[143] Under this standard, the date of receipt would depend upon the terms of the award. If the grant of an award is based, either wholly or in part, on satisfaction of a financial reporting measure, the award would be deemed

[140] See letter from Brian Foley & Company, Inc.

[141] See letter from Meridian Compensation Partners, LLC.

[142] Including a transition period for a change in fiscal year, if applicable.

[143] Proposed Rule 10D-1(c)(6).

received in the fiscal period when that measure was satisfied. If an equity award vests upon satisfaction of a financial reporting measure, the award would be deemed received in the fiscal period when it vests. Similarly, a cash award earned upon satisfaction of a financial reporting measure would be deemed received in the fiscal period when that measure is satisfied.

A particular award may be subject to multiple conditions. We are not proposing that an executive officer must have satisfied all conditions to an award for the incentive-based compensation to be deemed received for purposes of triggering the recovery policy. For example, an issuer could grant an executive officer an RSU award in which the number of RSUs earned is determined at the end of the three-year incentive-based performance period (2015-2017), but the award is subject to service-based vesting for two more years (2018-2019). Although the executive officer does not have a non-forfeitable interest in the RSUs before expiration of the subsequent two-year service-based vesting period, the number of shares in which the RSUs ultimately will be paid will be established at the end of the three-year performance period. In light of Section 10D's purpose to require listed issuers to recover compensation that "the executive would not have received if the accounting was done properly,"[144] we believe that in this circumstance the executive officer "receives" the compensation for purposes of triggering the recovery policy when the relevant financial reporting measure performance goal is attained, even if the executive officer has established only a contingent right to payment at that time. If the issuer's board of directors concludes in 2018 that the issuer will restate previously issued financial statements for 2015 through 2017 (the

[144] See Senate Report at 135.

three-year performance period),[145] the recovery policy should apply to reduce the number of RSUs ultimately payable in stock, even though the executive has not yet satisfied the two-year service-based vesting condition to payment. In this example, if the executive officer were deemed not to receive the RSUs before obtaining a non-forfeitable interest in them, such a restatement of the financial statements that would reduce the number of RSUs ultimately payable in stock would not be subject to recovery because the incentive-based compensation would not have been received during the three-year look-back period. We do not believe such an outcome would appropriately implement the policy underlying Section 10D, because it would mean that the mere passage of time pursuant to a service-based vesting condition or a subsequent performance condition unrelated to a financial reporting measure[146] would preclude the issuer from recovering incentive-based compensation.

Ministerial acts or other conditions necessary to effect issuance or payment, such as calculating the amount earned or obtaining the board of directors' approval of payment, would not affect the determination of the date received. For example, for an equity award deemed received upon grant, receipt would occur in the fiscal year that the relevant financial reporting measure performance goal was satisfied, rather than a subsequent date on which the award was issued.[147] Similarly, a non-equity incentive plan award would be deemed received in the fiscal

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[145] In this example, the three-year performance period coincides with the three-year look-back period covered by the recovery policy. See Section II.C.2.b. above regarding the three-year look-back period.

[146] For example, if the subsequent condition in the example above was not service-based vesting but instead called for the issuer to open 100 stores during 2018 and 2019, or required the executive to comply with a non-compete or non-solicitation covenant during those years.

[147] The fiscal year in which an incentive-based equity award is deemed received upon grant in some cases may be a fiscal year preceding the fiscal year in which the ASC Topic 718 grant date occurs and for which it is reported in the Summary Compensation Table and Grants of Plan-Based Awards Table because our requirements for reporting equity awards in the Summary Compensation Table do not utilize a "performance year" standard. See Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334] at Section II.A.2.c.

year that the executive earns the award based on satisfaction of the relevant financial reporting measure performance goal, rather than a subsequent date on which the award was paid.[148]

Under proposed Rule 10D-1, incentive-based compensation would be subject to the issuer's recovery policy to the extent that it is received while the issuer has a class of securities listed on an exchange or an association.[149] An award of incentive-based compensation granted to an executive officer before the issuer lists a class of securities would be subject to the recovery policy, so long as the incentive-based compensation was received by the executive officer while the issuer had a class of listed securities. Incentive-based compensation received by an executive officer before the issuer's securities become listed would not be subject to the recovery policy under our proposed rule. As proposed, an exchange would not be permitted to list an issuer that it has delisted or that has been delisted from another exchange for failing to comply with its recovery policy until the issuer comes into compliance with that policy.[150]

Request for Comment

39. Should incentive-based compensation be deemed "received" for purposes of triggering the recovery policy under Section 10D in the fiscal year during which attainment of the financial reporting measure specified in the incentive-based compensation award, by its terms, causes the incentive-based compensation to be granted, to be earned or to vest, as

[148] This would be the same fiscal year for which the non-equity incentive plan award earnings are reported in the Summary Compensation Table, based on Instruction 1 to Item 402(c)(2)(vii), which provides: "If the relevant performance measure is satisfied during the fiscal year (including for a single year in a plan with a multi-year performance measure), the earnings are reportable for that fiscal year, even if not payable until a later date, and are not reportable again in the fiscal year when amounts are paid to the named executive officer."

[149] Proposed Rule 10D-1(b)(1)(i)(A).

[150] Proposed Rule 10D-1(b)(1)(vi).

proposed? If not, when should incentive-based compensation be deemed "received" for purposes of triggering the recovery policy?

40. Should an executive officer be required to obtain a non-forfeitable entitlement to the incentive-based compensation to "receive" the compensation? Would such a requirement effectuate the purpose of Section 10D? Should the rule specifically address the treatment of awards subject to multiple vesting conditions, only some of which may be linked to financial reporting measures? If so, what would be the appropriate treatment of such rewards?

41. If following receipt, as proposed to be defined, an executive officer contributes incentive-based compensation to a nonqualified deferred compensation plan, how should deferral affect recovery?[151]

42. Should incentive-based compensation be subject to the issuer's recovery policy only to the extent that it is received while the issuer has a class of securities listed, as proposed? If not, please explain in what circumstances a different standard should apply and why. For example, if a company lists in 2017, and restates the three prior fiscal years in 2018, should its policy require recovery of incentive-based compensation received in 2015 or 2016?

3. Recovery Process

a. Determination of Excess Compensation

Section 10D(2)(b) requires exchanges and associations to adopt listing standards that require issuers to adopt and comply with recovery policies that apply to the amount of incentive-

[151] See Section II.C.3.a, below, addressing the computation of excess incentive-based compensation for this form of compensation.

based compensation received "in excess of what would have been paid to the executive officer under the accounting restatement."

Commenters recommended that the Commission clarify how excess compensation subject to recovery should be determined.[152] One commenter suggested that the Commission establish a clear set of guidelines as to how issuers should calculate the recoverable amount under a variety of common arrangements, or alternatively, a clear set of principles to be used to make such calculations.[153] In some cases, commenters recommended specific ways to measure excess compensation for particular forms of incentive-based compensation. For example, for cash awards based upon the achievement of erroneous financial metrics, one commenter recommended that the excess incentive-based compensation should be the difference between the cash award that was granted and the cash award that should have been granted using the restated financial metric.[154]

Several commenters sought clarity regarding performance-based equity awards, with some recommending various methods to calculate the recoverable amount for different forms of these awards, taking into account such factors as whether an award is granted or vested based on attaining a financial statement metric, whether or not an option has been exercised, and whether the shares have been sold.[155]

Regarding bonuses paid from "pool plans," two commenters questioned whether determination of the recoverable amount might depend on whether the board or compensation

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[152] See, e.g., letters from Center on Executive Compensation, Compensia, Inc., Meridian Compensation Partners, LLC, Pay Governance LLC and Towers Watson.

[153] See letter from Compensia, Inc.

[154] See letter from Center on Executive Compensation.

[155] See, e.g., letters from Compensia, Inc., and Meridian Compensation Partners, LLC.

committee had exercised any discretion, either in determining whether to allocate the entire pool to bonus awards or in determining individual bonus amounts.[156] For example, commenters noted that if a restatement reduces the size of the bonus pool, but not below the aggregate amount that the board exercised discretion to pay out as bonuses, there would not appear to be any excess compensation to recover. Alternatively, if a restatement reduces the size of the bonus pool below the aggregate amount paid out, the commenters sought clarification whether each bonus paid would need to be ratably reduced, or if discretion could be exercised in allocating recovery of the excess amount among individual bonuses as long as the aggregate excess amount is recovered. Another commenter questioned, in general, whether the amount of compensation earned should be measured by reference to the target achieved, or the compensation actually provided after the compensation committee exercised discretion to either increase or decrease the amount.[157] A different commenter suggested that where incentive-based compensation is not determined based solely on formulaic measures, but also on qualitative measures, the same percentage recoverable from the formulaic portion based on the restatement also should be recovered from the portion based on qualitative measures.[158] Other commenters noted that executive officers would already have paid personal income taxes on incentive-based compensation they had received.[159]

We propose to define the recoverable amount as "the amount of incentive-based compensation received by the executive officer or former executive officer that exceeds the

[156] See letters from Center on Executive Compensation and Protective Life Corporation.

[157] See letter from Davis Polk & Wardwell LLP.

[158] See AFL-CIO Joint Letter.

[159] See letters from Clark Consulting, Davis Polk & Wardwell LLP and Frederic W. Cook & Co, Inc.

amount of incentive-based compensation that otherwise would have been received had it been determined based on the accounting restatement."[160] Applying this definition, after an accounting restatement, the issuer would first recalculate the applicable financial reporting measure and the amount of incentive-based compensation based thereon. The issuer would then determine whether, based on that financial reporting measure as calculated relying on the original financial statements and taking into account any discretion that the compensation committee had applied to reduce the amount originally received, the executive officer received a greater amount of incentive-based compensation than would have been received applying the recalculated financial reporting measure.[161] Where incentive-based compensation is based only in part on the achievement of a financial reporting measure performance goal, the issuer first would determine the portion of the original incentive-based compensation based on or derived from the financial reporting measure that was restated. The issuer would then need to recalculate the affected portion based on the financial reporting measure as restated, and recover the difference between the greater amount based on the original financial statements and the lesser amount that would have been received based on the restatement.[162]

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[160] Proposed Rule 10D-1(b)(1)(iii).

[161] For example, assume a situation in which, based on the financial reporting measure as originally reported, the amount of the award was $3,000. However, the issuer exercised negative discretion to pay out only $2,000. Following the restatement, the amount of the award based on the corrected financial reporting measure is $1,800. Taking into account the issuer's exercise of negative discretion, the recoverable amount would be $200 (i.e., $2,000 - $1,800).

[162] For example, assume a situation in which, based on the financial reporting measure as originally reported, the amount of the award was $3,000. The issuer exercised positive discretion to increase the amount by $1,000, paying out a total of $4,000. Following the restatement, the amount of the award based on the corrected financial reporting measure is $1,800. Taking into account the issuer's exercise of positive discretion, the recoverable amount would be $1,200, provided that based on the revised measurement, the exercise of positive discretion to increase the amount by $1,000 was still permitted under the terms of the plan.

For incentive-based compensation that is based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement, the recoverable amount may be determined based on a reasonable estimate of the effect of the accounting restatement on the applicable measure.[163] To reasonably estimate the effect on the stock price, there are a number of possible methods with different levels of complexity of the estimations and related costs.[164] For these measures, the issuer would be required to maintain documentation of the determination of that reasonable estimate and provide such documentation to the relevant exchange or association.[165]

The recoverable amount would be calculated on a pre-tax basis [166] to ensure that the company recovers the full amount of incentive-based compensation that was erroneously awarded, consistent with the policy underlying Section 10D. Recovery on a pre-tax basis also would permit the company to avoid the burden and administrative costs associated with calculating recoverable amounts based on the particular tax circumstances of individual executive officers, which may vary significantly based on factors independent of the incentive-based compensation.

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[163] Proposed Rule 10D-1(b)(1)(iii)(A).

[164] See Section III.B.2, below, discussing different methodologies for determining a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return.

[165] Proposed Rule 10D-1(b)(1)(iii)(B).

[166] Proposed Rule 10D-1(b)(1)(iii) provides that the erroneously awarded compensation shall be computed without regard to any taxes paid by the executive officer. The pre-tax amount refers to the full amount of incentive-based compensation received by the executive officer, rather than the amount remaining after he or she satisfies his or her personal income tax obligation on it.

While we intend for the definition to apply in a principles-based manner, we recognize that applying the principles may not always be simple. Cash awards that are received upon satisfaction of a financial reporting measure should be relatively straightforward. The recoverable amount would be the difference between the amount of the cash award (whether payable as a lump sum or over time) that was received and the amount that should have been received applying the restated financial reporting measure.[167]

For cash awards paid from bonus pools, the size of the aggregate bonus pool from which individual bonuses are paid would be reduced based on applying the restated financial reporting measure. If the reduced bonus pool is less than the aggregate amount of individual bonuses received from it, the excess amount of an individual bonus would be the pro rata portion of the deficiency. If the aggregate reduced bonus pool would have been sufficient to cover the individual bonuses received from it, then no recovery would be required.

Equity awards involve different considerations. For equity awards, if the shares, options or SARs are still held at the time of recovery, the recoverable amount would be the number received in excess of the number that should have been received applying the restated financial reporting measure. If the options or SARs have been exercised, but the underlying shares have not been sold, the recoverable amount would be the number of shares underlying the excess options or SARs applying the restated financial measure. If the shares have been sold, the recoverable amount would be the sale proceeds received by the executive officer with respect to

[167] Similarly, for nonqualified deferred compensation, the executive officer's account balance or distributions would be reduced by the excess incentive-based compensation contributed to the nonqualified deferred compensation plan and the interest or other earnings accrued thereon under the nonqualified deferred compensation plan. In addition, for retirement benefits under pension plans, the excess incentive-based compensation would be deducted from the benefit formula, and any related distributions would be recoverable.

the excess number of shares.[168] In any case in which the shares have been obtained upon exercise and payment of an exercise price, the recoverable amount would be reduced to reflect the applicable exercise price paid.[169]

We recognize that there may be circumstances in which both proposed Rule 10D-1 and SOX Section 304 could provide for recovery of the same incentive-based compensation. The proposed rule is not intended to alter or otherwise affect the interpretation of Section 304 or the determination by the Commission or the courts of when reimbursement is required under Section 304. If, however, an executive officer reimburses an issuer pursuant to Section 304, such amounts should be credited to the extent that an issuer's Rule 10D-1 recovery policy requires repayment of the same compensation by that executive officer. Further, recovery under Rule 10D-1 would not preclude recovery under Section 304 to the extent any applicable amounts have not been reimbursed to the issuer.

Request for comment

43. Do the proposed rule and rule amendments articulate an appropriate standard for calculating the amount of excess incentive-based compensation that listed issuers must recover? Why or why not?

44. For incentive-based compensation based on stock price or total shareholder return, would permitting the recoverable amount to be determined based on a reasonable estimate of the effect of the accounting restatement, as proposed, facilitate administration of the rule by

[168] Where excess shares have been gifted, such as gifts to charities, the recoverable amount would be the gifted shares' fair market value at the date of the gift.

[169] Shares sold can be traced consistent with Treas. Reg. 1.1012-1(c) and Rule 144(d) [17 CFR230.144(d)].

issuers and exchanges? Why or why not? Should we provide additional guidance regarding how such estimates should be calculated? If so, what particular factors should that guidance address?

45. As proposed, should the issuer be required to maintain documentation of the determination of that reasonable estimate and provide such documentation to the relevant exchange? Why or why not? Is the documentation required sufficient for compliance monitoring? If not, what else should be required? Should the rule specify a period of time that an issuer would need to maintain such documentation or what types of documentation should be maintained? If so, what period of time or documentation is appropriate? Should we require that such determination be disclosed, either to the exchange or in Commission filings? What would be the effects of such disclosure?

46. Should the rule and rule amendments alternatively, or in addition, include specific instructions for how to compute the excess amount of specific forms of incentive-based compensation? If so, which ones and why?

47. Is further guidance needed on the application of the proposed standard? If yes, what additional guidance is necessary? Is further guidance required regarding any particular form of compensation? For example:

    a. Should we provide guidance on how to determine the recoverable amount of supplemental retirement plan benefits that are calculated based on erroneously awarded incentive-based compensation? If so, what should that guidance be?

    b. For equity awards granted based on satisfaction of a financial reporting measure, the guidance above directs listed issuers to recover the excess number of shares or, if no longer held, the proceeds from the sale of the excess shares so that executive officers cannot benefit from future appreciation in shares that were not earned. Instead of recovering the excess number of shares, should listed issuers have the choice to recover the cash value of the excess shares? If so, should the shares be valued at the vesting date, the date the recoverable amount is determined, or some other date?

c. Where the number of excess shares is less than the entire award and some of the shares received were sold and some are still held, should recovery be made first against the remaining shares that are held? Alternatively, should recovery apply first to shares that were sold, so as not to erode company stock holding policies? Should this decision be left to the listed issuer's discretion?

d. Where excess shares have been gifted, such as gifts to charities, should the recoverable amount be the shares' fair market value at the date of the gift? If not, at what other date should the excess shares be valued?

e. Is the guidance above appropriate for determining the recoverable amount where the listed issuer has exercised discretion to reduce or increase the original amount of incentive-based compensation received?

48. Where the issuer chose to increase the original amount of incentive-based compensation, should an amount proportionate to the effect of the restatement on the financial statement measure also be recovered from the discretionary enhancement?

49. One commenter recommended that the Commission require recovery of a proportionate amount of incentive compensation awarded under qualitative standards.[170] Should we require recovery of amounts awarded under qualitative standards that may involve

[170] See AFL-CIO Joint Letter.

judgement by the board? If so, how would the excess compensation be calculated in those instances?

50. Is further guidance needed regarding circumstances in which both proposed Rule 10D-1 and SOX Section 304 would apply?

b. Board Discretion Regarding Whether to Seek Recovery

Section 10D requires exchanges and associations to adopt listing standards that require issuers to adopt and comply with recovery policies. Specifically, the statute provides that "the issuer will recover" incentive-based compensation, and does not address whether there are circumstances in which an issuer's board of directors may exercise discretion not to recover.

Commenters suggested that the Commission's implementing rules should address the issue of board discretion whether to pursue recovery and, if such discretion is permitted, address its scope. Many of these commenters asserted that the Commission should allow for board discretion to determine whether to pursue recovery.[171] Commenters raised concerns about situations where the potential costs of recovery may exceed the excess incentive-based compensation to be recovered[172] and recommended that boards be permitted to evaluate the benefits of recovery against the costs involved.[173] Commenters noted the following factors that

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[171] See letters from Davis Polk & Wardwell LLP, Center on Executive Compensation, Meridian Compensation Partners, LLC, American Benefits Council, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Compensia, Inc., Clark Consulting, LLC, Society of Corporate Secretaries and Governance Professionals, Frederic W. Cook & Co., Inc., Stuart R. Lombardi and Protective Life Corporation.

[172] See letters from Clark Consulting, LLC and ABA Business Law Section.

[173] See letters from Davis Polk & Wardwell LLP, Meridian Compensation Partners, LLC, American Benefits Council, Compensia, Inc., Clark Consulting, LLC, Society of Corporate Secretaries and Governance Professionals, Stuart R. Lombardi and Protective Life Corporation.

may affect this decision: the likelihood of recovery;[174] de minimis recovery;[175] the need to pursue litigation to recover;[176] and the possibility that recovery might violate existing statutory or contractual provisions.[177] One commenter asserted that in the absence of discretion, companies will be incentivized to implement compensation arrangements that are not subject to Section 10D recovery provisions.[178] Other commenters recommended the Commission establish a standard similar to the Troubled Asset Relief Program ("TARP") standard where an issuer is not required to enforce its recovery policy if it would be unreasonable to do so.[179]

In considering this issue, we note that the Emergency Economic Stabilization Act of 2008 ("EESA") contained an executive compensation recovery provision[180] applicable to any financial institution that sells troubled assets to the Secretary of the United States Department of the Treasury under TARP. In its interim final rule to provide guidance on the EESA's executive compensation and corporate governance provisions applicable to entities receiving financial assistance under TARP, the Department of the Treasury provided that "[t]he TARP recipient must exercise its clawback rights except to the extent it demonstrates that it is unreasonable to do

[174] See letter from Society of Corporate Secretaries and Governance Professionals.

[175] See letters from Center on Executive Compensation, Meridian Compensation Partners, LLC, American Benefits Council, Frederic W. Cook & Co., Inc., and Protective Life Corporation.

[176] See letters from Society of Corporate Secretaries and Governance Professionals and Center on Executive Compensation.

[177] See letters from Society of Corporate Secretaries and Governance Professionals and Center on Executive Compensation.

[178] See letter from Stuart R. Lombardi. To guard against the abuse of discretion, this commenter recommended that following a restatement an issuer either should publicly announce its decision whether to pursue or decline recovery, or should delegate all clawback decision making authority to an independent party.

[179] See letters from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC and Compensia, Inc.

[180] Section 111(b)(3)(B) of EESA, Pub. L. No. 110-343, 12 U.S.C. 5221, as amended by Title VII of Division B of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5 [123 STAT. 115] (Feb. 17, 2009).

so, such as, for example, if the expense of enforcing the rights would exceed the amount recovered."[181]

We are mindful that allowing discretion whether to recover excess incentive-based compensation could undermine the purpose of Section 10D by permitting an issuer's board of directors to determine that an executive officer may retain incentive-based compensation to which he or she is not entitled. At the same time, we acknowledge that there are circumstances in which pursuing recovery of excess incentive-based compensation may not be in the interest of shareholders and that a standard similar to the TARP standard would permit boards of directors to evaluate whether to pursue recovery of excess incentive-based compensation in particular circumstances.

To address these circumstances, proposed Rule 10D-1 would provide that an issuer must recover erroneously awarded compensation in compliance with its recovery policy except to the extent that pursuit of recovery would be impracticable because it would impose undue costs on the issuer or its shareholders or would violate home country law and certain conditions are met. We believe the unqualified "no-fault" recovery mandate of Section 10D intends that the issuer should pursue recovery in most instances. For example, we do not believe the extent to which an individual executive officer may be responsible for the financial statement errors requiring the restatement could be considered in seeking the recovery. Further, we do not view inconsistency between the proposed rule and rule amendments and existing compensation contracts, in itself, as

[181] TARP Standards for Compensation and Corporate Governance, 31 CFR 30.8.

a basis for finding recovery to be impracticable, because issuers can amend those contracts to accommodate recovery.[182]

In our view, the only criteria that should be considered are whether the direct costs of enforcing recovery would exceed the recoverable amounts or whether recovery would violate home country law. Before concluding that it would be impracticable to recover any amount of excess incentive-based compensation based on enforcement costs,[183] the issuer would first need to make a reasonable attempt to recover that incentive-based compensation.[184] The issuer would be required to document its attempts to recover, and provide that documentation to the exchange.[185] As described in Section II.D, below, the issuer also would be required to disclose why it determined not to pursue recovery. We believe that in this circumstance requiring an attempt to recover is both consistent with the no-fault character of Section 10D, and necessary for the issuer to justify concluding that recovery of the amount at issue would be impracticable. Similarly, before concluding that it would be impracticable to recover because doing so would violate home country law, the issuer first would need to obtain an opinion of home country counsel, not unacceptable to the applicable national securities exchange or association, that recovery would result in such a violation.[186] In addition, to minimize any incentive countries may have to change their laws in response to this provision, the relevant home country law must

[182] We note that some have suggested that issuers may be able to amend their by-laws to implement their recovery policies. See, e.g., Robert E. Scully Jr, Executive Compensation, the Business Judgment Rule, and the Dodd-Frank Act: Back to the Future for Private Litigation?, The Federal Lawyer, January 2011, pp 39-41.

[183] Only direct costs involving financial expenditures, such as reasonable legal expenses, would be considered for this purpose. Indirect costs relating to concerns such as reputation or the effect on hiring new executive officers would not be taken into account.

[184] Proposed Rule 10D-1(b)(1)(iv).

[185] Id.

[186] Id. The listed issuer would need to provide such opinion to the exchange or association.

have been adopted in such home country prior to the date of publication in the Federal Register of proposed Rule 10D-1.

In either case, to prevent potential conflicts of interest, any determination that recovery would be impracticable would need to be made by the issuer's committee of independent directors that is responsible for executive compensation decisions.[187] In the absence of a compensation committee, the determination would need to be made by a majority of the independent directors serving on the board. Such a determination, as with all determinations under proposed Rule 10D-1, would be subject to review by the listing exchange.[188]

We believe that the proposed issuer discretion is necessary or appropriate in the public interest and consistent with the protection of investors because it would save issuers the expense of pursing recovery in circumstances where the costs of recovery could exceed or be disproportionate to the recoverable amounts, and for foreign private issuers, would avoid such issuers having to choose between potential de-listing or violating home country laws, either of which could be detrimental to shareholders. Further, as discussed below,[189] we propose to require a listed issuer to disclose the reasons why it decided not to pursue recovery in particular instances. We believe that requiring this disclosure will mitigate potential abuse of this discretion.

Request for Comment

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[187] Exchange Act Rule 10C-1 mandated that the exchanges adopt listing standards to require that directors responsible for oversight of executive compensation (whether or not serving as part of a formal compensation committee) be independent. Examples of such listing standards are Section 303A.05 of the NYSE Listed Company Manual and NASDAQ Rule 5605(d), both of which require listed companies, with limited exceptions, to have a compensation committee composed entirely of independent directors. Listed companies were given until the earlier of their first annual meeting of shareholders after January 15, 2014 or October 31, 2014 to comply with the revised NYSE and Nasdaq independence requirements for compensation committee members.

[188] Proposed Rule 10D-1(b)(1)(iv).

[189] See Section II.D.1, below.

51. Is the proposed issuer discretion not to pursue recovery of incentive-based compensation consistent with the purpose of Section 10D? Is the scope of this discretion appropriate? Why or why not?

52. Should the standard for exercising discretion not to recover be limited to the extent to which that recovery is impracticable? Should direct costs of recovery be a basis for exercising discretion not to recover? If so, what specific costs of recovery should be considered? For example, should only direct expenditures to third-parties be considered, as proposed? Should we further define what constitutes "direct costs"? Should an issuer be permitted to consider indirect costs, such as opportunity costs or reputational costs? Should the issuer disclose the cost estimates in its Exchange Act annual reports? If the cost estimates are not disclosed in the issuer's annual reports, should those costs be independently verified?

53. Should the issuer first be required to make a reasonable attempt to recover that compensation, as proposed? If so, should we specify what steps to recover excess incentive-based compensation should be required or what constitutes a "reasonable attempt" to recover such compensation? Should this requirement depend on what financial reporting metric triggers recovery? Should the issuer be required to document its attempts to recover, and provide that documentation to the exchange?

54. Should a listed issuer be permitted to forego recovering incentive-based compensation if doing so would violate home country law? In this circumstance, should the issuer first be required to obtain a legal opinion from home country counsel, as proposed? If not, why not? Are there any other conditions that should be met beyond a legal opinion from home country counsel before an issuer should be permitted to forego recovering

incentive-based compensation in these circumstances? Should the proposed accommodation apply only to the extent that recovery would conflict with home country laws in effect before the date of publication of proposed Rule 10D-1 in the Federal Register, as proposed? If not, please explain why not. In addition, as proposed, the listed issuer would need to provide such opinion to the exchange upon request. Should a copy of this opinion be filed with the Commission as an exhibit? Why or why not?

55. Should the determination that recovery would be impracticable need to be made by the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, by a majority of the independent directors serving on the board? If not, why not, and who should be authorized to make the determination?
56. Are there other circumstances in which a listed issuer should be permitted to not pursue recovery from its former executive officers? If so, please explain the circumstances and what, if any, conditions should apply.
57. Could application of the Section 10D recovery policy to current or former employees cause an issuer to violate any existing statutory or contractual provisions? If so, please specify the applicable provisions, how they might make affect recovery, and how an issuer could address them to implement recovery.
58. Would issuers be able to implement their recovery policies with respect to existing compensation agreements and arrangements through amendments to their by-laws?

c. Board Discretion Regarding Manner of Recovery

Section 10D does not address whether an issuer's board of directors may exercise discretion in the manner in which it recovers excess compensation to comply with the listing standards. Commenters suggested that the Commission's rule and rule amendments should address whether boards may exercise discretion in effecting recovery in two primary areas – the amount to be recovered when discretion was exercised in the original grant, and the means of recovery.

i. Amount to Be Recovered

Commenters requested that boards be able to exercise discretion with regard to the amount to be recovered when discretion was used in determining the original award amount.[190] For example, some issuers use "pool plans," in which the size of the available bonus pool is determined based wholly or in part on satisfying a financial reporting measure performance goal, but specific amounts granted from the pool to individual executives are based on discretion. One commenter recommended that the issuer's board of directors have the discretion to decide how much to recover from each executive officer, as long as the issuer recovers the aggregate erroneously awarded amount.[191] A different commenter stated that the issuer's board should be given the same level of discretion to determine the amount to be recovered from individual executive officers as was used in making the initial compensation decision.[192] This commenter also suggested that the Commission consider situations in which the issuer's board would be permitted to settle for less than the full amount when seeking recovery under its recovery policy.[193]

[190] See letters from Davis Polk & Wardwell LLP, Center on Executive Compensation and Society of Corporate Secretaries and Governance Professionals. See Section II.C.3.a, above, regarding the amount to be recovered when discretion was used to either increase or decrease the original award amount.

[191] See letter from Protective Life Corporation.

[192] See letter from Center on Executive Compensation.

[193] See letter from Center on Executive Compensation.

As proposed, Rule 10D-1 would not limit the amount of compensation the board could seek to recover on any other legal basis. However, under the proposed rule, issuers' boards of directors would not be permitted to pursue differential recovery among executive officers, including in "pool plans," where the board may have exercised discretion as to individual grants in allocating the bonus pool. In this instance, we believe that recovery should be pro rata based on the size of the original award rather than discretionary. We believe that permitting discretion in these instances would be inconsistent with Section 10D's no-fault standard and its goal of preventing executive officers from retaining compensation to which they are not entitled under the restated financial reporting measure. Additionally, permitting discretion in these instances could result in issuers selectively applying recovery policies to former executive officers, which we believe also would be inconsistent with Section 10D's purpose.

Moreover, consistent with Section 10D's emphasis on preventing executive officers from retaining compensation that they received and to which they were not entitled under the issuer's restated results, and as described above, we are not proposing that issuers be permitted to settle for less than the full recovery amount unless impracticable from a cost standpoint. In that circumstance, the same conditions would apply as for a determination to forgo recovery.[194]

ii. Means of Recovery

In addition, several commenters recommended that boards of directors be able to exercise discretion on how to accomplish recovery under the recovery policy required by the proposed

[194] See Section II.C.3.b, above.

listing standards.[195] One commenter suggested that boards may decide to recover the excess compensation over time or from future pay,[196] while another commenter recommended that issuers recover erroneously paid compensation first from current compensation owing, and then from executive officers' after-tax funds.[197] One commenter recommended that recovery of an incentive-based compensation award that has been earned but not paid should be accomplished through forfeiture of the award, while recovery in all other cases should be accomplished solely by the executive officer's repayment.[198] Several commenters suggested cancellation of unvested equity and non-equity awards or offsetting against amounts otherwise payable by the issuer to the executive officer, such as deferred compensation, as possible recovery methods.[199]

We recognize that the appropriate means of recovery may vary by issuer and by type of compensation arrangement. Consequently, we believe issuers should be able to exercise discretion in how to accomplish recovery. Nevertheless, in exercising this discretion, we believe that issuers should act in a manner that effectuates the purpose of the statute – to prevent executive officers from retaining compensation that they received and to which they were not entitled under the issuer's restated results. Regardless of the means of recovery utilized, we believe that issuers should recover excess incentive-based compensation reasonably promptly, as undue delay would constitute non-compliance with an issuer's policy as required.

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[195] See letters from Davis Polk & Wardwell LLP, Center on Executive Compensation, Pay Governance LLC, Society of Corporate Secretaries and Governance Professionals, Stuart R. Lombardi and Protective Life Corporation.

[196] See letter from Davis Polk & Wardwell LLP.

[197] See letter from Frederic W. Cook & Co., Inc.

[198] See letter from Meridian Compensation Partners, LLC.

[199] See letters from Center on Executive Compensation, Society of Corporate Secretaries and Governance Professionals and Protective Life Corporation.

Request for Comment

59. How and under what circumstances, if any, should the board of directors be able to exercise discretion regarding the amount to be recovered? What steps should the board of directors be required to take, if any, before exercising any permitted discretion about the amount to be recovered from individual executive officers?
60. Are there any material tax considerations relevant to whether an issuer should be able to exercise discretion as to the amount of recovery? If so, please explain.
61. Would the exercise of discretion by an issuer's board of directors on the amount to be recovered where discretion was used in determining the original award amount (e.g., in a pool plan) be consistent with the purpose of Section 10D? If so, how?
    a. If an issuer uses a pool plan in which achievement of a financial reporting measure determines the aggregate amount of the bonus pool and the bonus pool is insufficient after giving effect to the restatement, how should the issuer determine the amount to be recovered? Should this decision be left to the board of directors or compensation committee? Should recovery be on a pro rata basis?
62. Should an issuer's board of directors be able to exercise discretion regarding the means of recovery, as proposed? If so, how and under what circumstances should the board be able to exercise discretion regarding the means of recovery? Are there any steps the board should be required to take before it exercises any permitted discretion regarding the means of recovery?
63. Should any of the principles discussed in this section be codified?

64. Should deferred payment arrangements be permitted when an executive officer otherwise is unable to repay excess incentive-based compensation? If so, should the time period over which repayment may be deferred be limited?

65. If recovery does not occur reasonably promptly, this would constitute non-compliance with an issuer's policy. Should there be an explicit window of time within which an issuer must have recovered excess incentive-based compensation from an executive beyond which the failure to recover would not be considered "reasonably prompt"? Why or why not? If so, what should that time period be?

66. Should an issuer be permitted to recover excess incentive-based compensation by netting incentive-based compensation overpayments with incentive-based compensation underpayments that result from restating financial statements for multiple periods during the three-year recovery period? For example, suppose an issuer's restatement for a material error in revenue recognition results in a shift in revenue from the most recent year to an earlier year in the three-year period, such that an incentive payment in the earlier year would have been greater under the restatement. Should the issuer be permitted to recover the excess incentive-based compensation in the later year by crediting the earlier "underpayment"? Why or why not? Should the conclusion be different from the situation where the executive officer received incentive-based compensation due to the achievement of a cumulative performance goal for the three-year period based on the financial reporting measure? Why or why not?

67. One commenter suggested that we specifically authorize or approve of the use of a nonqualified deferred compensation plan (e.g., a "holdback plan" or "bonus bank") to aid

in the recovery of erroneously awarded incentive-based compensation.[200] Would these or other mechanisms aid in the recovery of such compensation? Why or why not?

4. Compliance with Recovery Policy

Under the proposed rule and rule amendments, an issuer would be subject to delisting if it does not adopt and comply with its compensation recovery policy.[201] The proposed rule and rule amendments do not specify the time by which the issuer must complete the recovery of excess incentive-based compensation. Rather, under proposed Rule 10D-1, an exchange would determine whether the steps an issuer is taking constitute compliance with its recovery policy. In making this assessment, an exchange would need to determine, among other things, whether the issuer was making a good faith effort to promptly pursue recovery.

<u>Request for Comment</u>

68. Should Rule 10D-1 specify the time by which the issuer must complete the recovery of excess incentive-based compensation required by the listing standards?
69. Should Rule 10D-1 provide an objective standard to determine whether an issuer is complying with its recovery policy? For example, if the issuer has not recovered a certain percentage of excess incentive-based compensation within a certain time period after a restatement that triggers application of the policy, should it be deemed non-compliant? If so, what percentages or time periods should be used, and why?

[200] See letter from Clark Consulting.

[201] Under the proposed rule and rule amendments, it would also be subject to delisting if it does not disclose its compensation recovery policy in accordance with Commission rules.

70. Alternatively, should Rule 10D-1 provide a standard that includes different subjective criteria, or both subjective and objective criteria, to determine whether an issuer is complying with its recovery policy? If so, what standard should be used and why?

71. Are there procedures that should be considered to assess compliance with an issuer's policies and procedures concerning recovery of excess incentive-based compensation? If so, what are they? Should an issuer be required to disclose those policies and procedures? Should there be an independent third-party assessment of an issuer's compliance with those policies and procedures?

72. Could proposed Rule 10D-1 be revised to better ensure compliance with the obligation to recover? If so, how?

D. Disclosure of Issuer Policy on Incentive-Based Compensation

Section 10D(b)(1) requires exchanges and associations to adopt listing standards that call "for disclosure of the policy of the issuer on incentive-based compensation that is based on financial information required to be reported under the securities laws." Sections 10D(a) and (b) require that the Commission adopt rules requiring the exchanges to prohibit the listing of any security of an issuer that does not develop and implement a policy providing for such disclosure.

Commenters noted that Section 10D(b)(1) could be read either to require disclosure about the issuer's policy on incentive-based compensation generally, or, instead, to require disclosure only about the issuer's recovery policy with regard to such compensation. One commenter[202] requested that the Commission address how the disclosure required by Section 10D(b)(1) would

[202] See letter from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

relate to the recovery policy disclosure already provided in an issuer's CD&A.[203] Another commenter recommended implementing Section 10D(b)(1)'s disclosure requirement by mandating that CD&A include the type of disclosure currently addressed but not mandated under Item 402(b)(2)(viii) of Regulation S-K, to the extent that such policies relate to financial information required to be reported under the securities laws.[204]

A different commenter recommended that the Commission not interpret Section 10D(b)(1) as creating a new disclosure requirement for incentive-based compensation or, if the Commission does adopt a separate disclosure requirement, that it allow the requirement to be satisfied by identifying any types of incentive-based compensation that are based on financial information that is required to be reported under the securities laws.[205] This commenter further recommended that the Commission allow an issuer to present any required disclosure on its general corporate website in view of the information about incentive-based compensation that is currently required in proxy materials under Item 402 of Regulation S-K.

Other commenters sought disclosure of issuers' clawback decisions. One commenter recommended public disclosure of an issuer's decision whether or not to pursue recovery as a means to prevent abuse of any permitted discretion.[206] A different commenter stated that in addition to disclosing the existence of a clawback policy, listed issuers should be required to disclose whether or not recovery has been initiated and completed, along with details of the sums

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[203] Item 402(b)(2)(viii) provides as an example of information that may be material information to be disclosed under CD&A "[r]egistrant policies and decisions regarding the adjustment or recovery of awards or payments if the relevant registrant performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment."

[204] See letter from ABA Business Law Section.

[205] See letter from Compensia, Inc.

[206] See letter of Stuart R. Lombardi.

recovered and identity of executives from whom compensation was recovered, as a prophylactic against firms that restate but do not meet their obligation to recover funds.[207]

In part, because Section 10D(b)(1) comes under the Section 10D(b) heading "Recovery of Funds," we construe its disclosure requirement to mean disclosure of the listed issuer's policy related to recovery of erroneously awarded compensation. This approach would permit an assessment of a listed issuer's compliance with the mandatory recovery policy, while avoiding a potential duplication of the existing disclosure requirements applicable to incentive-based compensation. The proposed disclosure requirements are intended to inform shareholders and the listing exchange as to both the substance of a listed issuer's recovery policy and how the listed issuer implements that policy in practice.

While the specific language of Sections 10D(a) and (b) may be ambiguous, we believe that it is intended to require listed issuers to adopt, comply with, and provide disclosure about their compensation recovery policies. Accordingly, proposed Rule 10D-1 would call for the listing standards to include among the new requirements that listed issuers disclose their recovery policies.[208] Implementing the disclosure requirement as an element of the listing standards would permit exchanges to commence de-listing proceedings for issuers that fail to make the required disclosure, as well as those that fail to adopt recovery policies or fail to comply with their terms.

Further, to provide consistent disclosure across exchanges, proposed Rule 10D-1would provide that the required disclosure about the issuer's recovery policy must be filed in accordance with the disclosure requirements of the federal securities laws. These requirements

[207] See AFL-CIO Joint Letter, suggesting that this disclosure be in the Form 8-K.

[208] Proposed Rule 10D-1(b)(1).

would be implemented by the proposed amendments to Regulation S-K and relevant forms described below. Structuring the provision in this manner would assure that, in addition to making the disclosure a condition to listing, it would be subject to Commission oversight to the same extent as other disclosure required in Commission filings.

Finally, to facilitate verification of compliance by the exchanges, the listing standards of each exchange would require that listed issuers record their compensation recovery policies in writing, and these recovery policies would be filed with the Commission, as described immediately below.

1. Listed U.S. Issuers

The first of the proposed disclosure requirements would amend Item 601(b) of Regulation S-K to require that a listed issuer file its recovery policy as an exhibit to its annual report on Form 10-K.[209] For this purpose, an issuer would be "a listed issuer" if it had a class of securities listed on an exchange registered pursuant to Section 6 of the Exchange Act or an association registered pursuant to Section 15A of the Exchange Act at any time during its last completed fiscal year. Because the disclosure is keyed to the statutorily mandated listing requirement, we would apply this disclosure requirement to all listed issuers and do not propose to apply it to issuers who do not have a listed class of securities.

Although not specifically required by the Act, to further implement Section 10D(b)(1), we are also using our discretionary authority to propose to amend Item 402 of Regulation S-K to

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[209] Proposed Item 601(b)(96) of Regulation S-K. The Form 20-F Instructions as to Exhibits would be amended correspondingly to add new Instruction 17. Similarly, Form 40-F would be amended to add new paragraph (17(a)) to General Instruction B. Form N-CSR would be amended to renumber Item 12 (Exhibits) as Item 13 and add new paragraph (a)(3) to that item for those registered management investment companies that would be subject to the requirements of proposed Rule 10D-1.

require listed issuers to disclose how they have applied their recovery policies. Proposed Item 402(w) of Regulation S-K would apply if at any time during its last completed fiscal year either a restatement that required recovery of excess incentive-based compensation pursuant to the listed issuer's compensation recovery policy was completed or there was an outstanding balance of excess incentive-based compensation from the application of that policy to a prior restatement. In this circumstance, the listed issuer would be required to provide the following information in its Item 402 disclosure:

- For each restatement, the date on which the listed issuer was required to prepare an accounting restatement, the aggregate dollar amount of excess incentive-based compensation attributable to such accounting restatement and the aggregate dollar amount of excess incentive-based compensation that remains outstanding at the end of its last completed fiscal year;[210]
- The estimates used to determine the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric;
- The name of each person subject to recovery of excess incentive-based compensation attributable to an accounting restatement, if any, from whom the listed issuer decided during the last completed fiscal year not to pursue recovery, the amount forgone for each such person, and a brief description of the reason the listed issuer decided in each case not to pursue recovery; and

[210] Proposed Instruction 4 to Item 402(w) would provide that if the aggregate dollar amount of excess incentive-based compensation has not yet been determined, the listed issuer would disclose this fact and explain the reasons.

- The name of, and amount due from, each person from whom, at the end of its last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the person owed.

As proposed, the disclosure would show a listed issuer's activity to recover excess incentive-based compensation during its last completed fiscal year. We believe this disclosure would inform shareholders' voting and investment decisions and help exchanges ensure compliance with their listing standards. All listed issuers would be subject to Item 402(w) disclosure.[211] The proposed disclosure would be included along with the listed issuer's other Item 402 disclosure in annual reports on Form 10-K and any proxy and consent solicitation materials that require executive compensation disclosure pursuant to Item 402 of Regulation S-K.[212] As proposed, a listed issuer that complies with its Item 402(w) disclosure requirements would not need to disclose any incentive-based compensation recovery pursuant to Item 404(a).[213] With respect to registered management investment companies subject to proposed Rule 10D-1, information mirroring the proposed Item 402(w) disclosure would be included in annual reports on Form N-CSR and in proxy statements and information statements relating to the election of directors.[214]

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[211] See proposed Instruction 1 to Item 402(w), defining the term "listed registrant; and proposed Instruction 2 to Item 402(w) defining the term "compensation recovery policy."

[212] Proposed Instruction 5 to Item 402(w).

[213] Proposed Instruction 5.a.iii to Item 404(a) of Regulation S-K. Item 404(a) requires a description of any transaction, since the beginning of the issuer's last fiscal year, or any currently proposed transaction, in which the issuer was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest. For registered management investment companies, see proposed Instruction 1 to Item 22(b)(20) of Schedule 14A (information provided pursuant to Item 22(b)(20) is deemed to satisfy the requirements of paragraphs (b)(8) and (b)(11) of Item 22 with respect to the recovery of erroneously awarded compensation pursuant to Rule 10D-1(b)(1)).

[214] Proposed Item 12 of Form N-CSR; proposed Item 22(b)(20) of Schedule 14A. We are also proposing to amend General Instruction D to Form N-CSR to permit registered management investment companies subject to proposed

Since our proposal would apply to <u>any</u> current or former executive officer to recovery, rather than only the "named executive officers" whose compensation is subject to discussion in CD&A, we propose this disclosure requirement as a separate item rather than as an amendment to CD&A. If the listed issuer is required to provide CD&A under Item 402 of Regulation S-K, however, the listed issuer could choose to include the disclosure required by proposed Item 402(w) in its CD&A discussion of its recovery policies and decisions pursuant to Item 402(b)(2)(viii) of Regulation S-K. Such a practice could benefit investors by disclosing all compensation recovery information in a single location in the filing.

We also considered implementing Section 10D(b)(1)'s disclosure requirement by mandating that CD&A include the type of disclosure currently addressed but not mandated under Item 402(b)(2)(viii) of Regulation S-K, to the extent that such policies relate to financial information required to be reported under the securities laws. This approach, however, would always locate the disclosure in CD&A, a section that requires discussion of the compensation awarded to, earned by, or paid to the smaller group of "named executive officers." Further, smaller reporting companies, emerging growth companies and foreign private issuers are not required to provide CD&A in their filings and proposed Item 402(w) disclosure would be required in some filings that do not require CD&A disclosure.[215] In addition, the disclosure

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Rule 10D-1 to answer the information required by proposed Item 12 by incorporating by reference from the company's definitive proxy statement or definitive information statement.

[215] Smaller reporting companies and emerging growth companies are not required to provide CD&A in accordance with the scaled disclosure requirements contained in Item 402 of Regulation S-K. <u>See</u> Item 402(l) of Regulation S-K and Section 102(c) of the JOBS Act. Foreign private issuers and filers under the multijurisdictional disclosure system ("MJDS") who file annual reports on Form 20-F or Form 40-F, respectively, are not subject to Item 402 of Regulation S-K and are not required to provide CD&A. <u>See</u> Form 20-F and Form 40-F. Similarly, foreign private issuers electing to use U.S. issuer registration and reporting forms are not required to provide CD&A because they will be deemed to comply with Item 402 by providing the information required by Items 6.B and 6.E of Form 20-F, with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded. <u>See</u> Item 402(a)(1) of Regulation S-K.

called for by CD&A is not limited to recovery triggered by the restatement of a financial reporting measure, but instead encompasses other adjustments that would reduce the size of an award or payment, including with respect to an award based on a strategic or operational measure.[216]

We are also proposing amendments to the Summary Compensation Table disclosure requirements. A new instruction to the Summary Compensation Table would require that any amounts recovered pursuant to a listed issuer's erroneously awarded compensation recovery policy reduce the amount reported in the applicable column for the fiscal year in which the amount recovered initially was reported, and be identified by footnote.[217] For example, if a listed issuer reported that in 2016 its Principal Executive Officer earned $1 million in non-equity incentive plan award compensation, and in 2017 a restatement of 2016 financial statements resulted in recovery of $300,000 of that incentive-based compensation, the 2017 Summary Compensation Table would revise the 2016 reported amount to $700,000, with footnote disclosure of the $300,000 recovered. The Summary Compensation Table "total" column would also be revised the same way. The new instruction would apply in any filing requiring Summary Compensation Table disclosure covering the affected fiscal year, including in Securities Act registration statements.

In addition, Form N-CSR and Schedule 14A do not require registered investment companies to provide CD&A disclosure. Currently, registered investment companies are not subject to Item 402 disclosure. We are proposing that registered management investment companies subject to proposed Rule 10D-1 would provide information mirroring the proposed Item 402(w) disclosure in annual reports on Form N-CSR pursuant to proposed Item 12 of that form, and in proxy statements and information statements pursuant to proposed Item 22(b)(20) of Schedule 14A.

[216] Item 402(b)(2)(viii) of Regulation S-K: "Registrant policies and decisions regarding the adjustment or recovery of awards or payments if the relevant registrant performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment."

[217] Proposed Instruction 5 to Item 402(c), and proposed Instruction 5 to Item 402(n).

We are proposing that the disclosure required by proposed Item 402(w) be provided in interactive data format using XBRL using block-text tagging.[218] The interactive data would have to be provided as an exhibit to the definitive proxy or information statement filed with the Commission and as an exhibit to the annual report on Form 10-K.[219] Issuers would be required to prepare their interactive data using the list of tags the Commission specifies and submit them with any supporting files the EDGAR Filer Manual prescribes.[220] This requirement generally would apply to all listed issuers.[221]. We believe requiring the data to be tagged would lower the cost to investors of collecting this information, and would permit data to be analyzed more quickly by shareholders, exchanges and other end-users than if the data was provided in a non-machine readable format.

2. Listed Foreign Issuers

Foreign private issuers, including Canadian issuers using the MJDS, would be required to provide the same information called for by Item 402(w) in, and to file their erroneously awarded compensation policies as an exhibit to, the annual reports they file with the Commission pursuant to Section 13(a) of the Exchange Act.[222] We propose to require foreign private issuers, including MJDS filers, to disclose the information in annual reports they file on Form 20-F,

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[218] Data becomes interactive when it is labeled or "tagged" using a computer markup language such as XBRL that software can process for analysis.

[219] Proposed Item 25 of Schedule 14A and proposed Item 601(b)(97) of Regulation S-K.

[220] The EDGAR Filer Manual is available at: http://www.sec.gov/info/edgar/edmanuals.htm.

[221] <u>See</u> n. 229, below.

[222] A foreign private issuer required to file annual reports with the Commission pursuant to Section 13(a) or Section 15(d) of the Exchange Act may file on Form 20-F or, if it elects to use the registration and reporting forms that U.S. issuers use, on Form 10-K. MJDS filers are those eligible Canadian reporting issuers that file registration statements and reports with the Commission in accordance with the requirements of the MJDS. MJDS filers file annual reports with the Commission pursuant to Section 13(a) or Section 15(d) of the Exchange Act on Form 40-F.

Form 10-K[223] and Form 40-F, as applicable. Because securities registered by these listed issuers are exempt from Section 14(a) of the Exchange Act,[224] they would not be required to disclose the information in any proxy or consent solicitation materials with respect to their securities.

Form 20-F is used as either the registration statement or annual report for foreign private issuers under the Exchange Act.[225] The proposals would amend Item 402(a)(1) to add proposed Item 6.F of Form 20-F to the list of mandatorily required executive compensation disclosures for foreign private issuers.[226] As proposed, Item 6.F would mirror the disclosure requirements of Item 402(w). In addition, a listed foreign private issuer that provides the disclosure required by Item 6.F of Form 20-F would not need to provide Item 7.B[227] disclosure of any individual excess incentive-based compensation recovery transaction otherwise subject to Item 7.B.[228] We are proposing a similar amendment to Form 40-F to add Paragraph (17) of General Instruction B to mirror the disclosure requirements of Item 402(w). As discussed above, listed issuers would

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[223] If a foreign private issuer elects to use the registration and reporting forms that U.S. issuers use and files its annual report on Form 10-K, it is deemed to comply with Item 402 of Regulation S-K, an express form requirement of Form 10-K, by complying with Item 402(a)(1) of Regulation S-K. Therefore, we are also proposing to amend Item 402(a)(1) of Regulation S-K to include proposed Item 6.F of Form 20-F, which calls for the same disclosure as proposed Item 402(w).

[224] See Exchange Act Rule 3a12-3 (stating that securities registered by a foreign private issuer, as defined in Rule 3b-4, shall be exempt from sections 14(a), 14(b), 14(c), 14(f) and 16 of the Exchange Act).

[225] Form 20-F also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. Effective in 2000, the Commission incorporated in Form 20-F the International Equity Disclosure Standards, which were published by the International Organization of Securities Commissions (IOSCO). Release No. 33-7745 (Sept. 28, 1999) [64 FR 53900]. The disclosure requirements for related party transactions are set forth in Item 7.B of Form 20-F.

[226] The amendment would require a foreign private issuer that elects to provide domestic Item 402 disclosure to provide Item 402(w) disclosure in its annual report.

[227] Item 7.B requires a description of related party transactions for foreign private issuers.

[228] Proposed Instruction 4 to Item 7.B of Form 20-F.

generally be required to tag this disclosure in an interactive data format.[229]

Request for Comment

73. Is the proposed approach of having the listing standard require an issuer to disclose its compensation recovery policy an appropriate means to implement Sections 10D(a) and 10D(b)(1)?

74. Would it be preferable to implement the disclosure requirement only through issuer disclosure requirements? Alternatively, would it be preferable to make the disclosure requirement solely a listing standard requirement? If so, please explain why.

75. Should a listed issuer be required, as proposed, to file as an exhibit to its Exchange Act annual report its policy regarding the recovery of incentive-based compensation that is based on or derived from financial information required to be reported under the securities laws? Are there better ways to disclose the policy? Should the policy be included in the text of the Exchange Act annual report?

76. Would proposed Item 402(w) and the proposed amendment to Item 404 elicit the appropriate level of detail about how issuers have applied their recovery policies? Should listed issuers be required to disclose the names of executive officers from whom recovery has been forgone, the amounts forgone and the reason the listed issuer decided not to pursue recovery? Should listed issuers be required to disclose the names of

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[229] In general, foreign private issuers are required to submit Interactive Data Files, as defined in Rule 11 of Regulation S-T, to the Commission with their financial statements; however, those foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board are not required to submit Interactive Data Files until the Commission specifies on its website a taxonomy for use by such foreign private issuers in preparing their Interactive Data Files. See Interactive Data to Improve Financial Reporting, Release No. 33-9002 (Jan. 30, 2009) at n. 94 http://www.sec.gov/rules/final/2009/33-9002.pdf. See also Letter to the Center for Audit Quality (Apr. 8, 2011) at http://www.sec.gov/divisions/corpfin/cf-noaction/2011/caq040811.htm. We anticipate that foreign private issuers that do not yet submit a data file with their financial statements would have a similar accommodation for submitting proposed Item 6.F disclosure in a tagged format.

executive officers from whom, as of the end of the last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the person owed? If not, are there different disclosures that should be required?

77. Should an issuer also be required to disclose the basis of the determination of the amount of excess incentive-based compensation and any critical estimates used in determining the amounts? Should a listed issuer also be required to disclose the process or procedures by which it will seek to recover excess incentive-based compensation for amounts in which it is seeking recovery? Why or why not? If not, what should be disclosed and why?

78. As proposed, Item 402(w) disclosure would be required if at any time during the last completed fiscal year either a restatement was completed that required recovery pursuant to the listed issuer's compensation recovery policy, or there was an outstanding balance of excess incentive-based compensation based on application of that policy to a prior restatement. Should the disclosure proposed in Item 402(w) be required in both these circumstances? If not, please explain why. Will it be clear if a restatement was completed during a fiscal year, such that disclosure would be required? If not, what guidance should we provide? Alternatively, should listed issuers be required to disclose every restatement in Item 402(w) – even if recovery of excess incentive-based compensation is not required?

79. Should Item 402(w) disclosure be required even after an issuer has been delisted if it has not recovered all compensation under the policy?

80. Would the proposed Item 402(w) disclosure properly track any amount of incentive-based compensation subject to recovery through the duration of the recovery obligation until that amount either is recovered or the listed issuer concludes that recovery would be impracticable? If not, how should we revise the disclosure requirement to better track such amounts?

81. Is there any additional information that would be important to investors that should be disclosed?

82. Should the disclosure proposed by Item 402(w) of Regulation S-K be required only in annual reports and proxy and consent solicitations, as proposed? If not, please explain why. Should the disclosure of a listed issuer's application of its recovery policy be implemented by amending the executive compensation disclosure requirements of Item 402, as proposed? Alternatively, should it be implemented by amending the Item 407 corporate governance disclosure requirements, or by adopting a new Item of Regulation S-K? If so, please explain why.

83. Should a listed issuer only be required to provide the disclosure proposed by Item 402(w) in a report to its listing exchange or association, rather than in its annual reports and proxy and consent solicitations? If detailed notification is provided to its exchange or association, what type of disclosure, if any, should be made in a listed issuer's Commission filings? Alternatively, should a listed issuer be required to provide the proposed Item 402(w) disclosure and, in addition, be required to make a separate notification to its exchange or association?

84. How would the proposed Item 402(w) disclosure be used by institutional and retail investors, investment advisers, and proxy advisory firms in making voting decisions and recommendations on matters such as director elections and executive compensation?

85. Should we require that the disclosure required by proposed Item 402(w) be tagged in XBRL format, as proposed? Should we require a different format, such as, for example, eXtensible Markup Language (XML)? Would tagging these disclosures enhance the ability of shareholders and exchanges to assess issuers' compliance with their recovery policies? Alternatively, instead of requiring that either of these disclosures be tagged, should tagging this disclosure be optional?

86. Is the burden to implement the proposed tagging requirements comparatively greater for smaller reporting companies and emerging growth companies than for other issuers, such that we should exempt them or provide them a phase-in period for this requirement? If so, please explain the differential burden and how long a phase-in period it would justify.

87. We anticipate that foreign private issuers would not be required to submit an electronic data file with proposed Item 6.F disclosure until they submit financial statement information in an electronic data file. Is there a reason to require this information to be tagged before financial statement information is available in an electronic data file? What would the relative costs and benefits be of filing this information for the first time together or filing them separately?

88. Is the proposed instruction to Item 404(a), which would exclude a transaction involving recovery of excess incentive-based compensation that is disclosed pursuant to Item 402(w) from disclosure as a related party transaction, appropriate? Why or why not?

89. In the Summary Compensation Table, should any amount recovered pursuant to a listed issuer's recovery policy reduce the amount reported in the applicable column for the fiscal year in which the amount recovered initially was reported, as proposed? For example, with respect to equity awards, should the then-probable grant date fair value reported be reduced by the portion of that grant date fair value attributable to the number of shares or options recovered? Should this disclosure be required in any filing containing Summary Compensation Table disclosure? Should we require similar reductions in amounts reported in compensation tables required for registered management investment companies? Why or why not? Are there any special considerations relating to registered management investment companies that make disclosing this information more or less useful than similar disclosure by operating companies? If so, please describe.

90. Our rules permit emerging growth companies and smaller reporting companies to provide scaled disclosure of certain requirements. Should the proposed disclosure rules for incentive-based compensation recovery policies be scaled for these companies? If so, please explain why and in what manner.

91. Is the disclosure proposed to be included in annual reports on Form N-CSR and proxy statements and information statements that mirrors the proposed disclosure in Item 402(w) appropriate for registered management investment companies subject to the rule? Should it be modified and, if so, how? Is it appropriate to include disclosure in both Form N-CSR reports and proxy statements and information statements? Should we, as proposed, amend General Instruction D to permit registered management investment companies to answer proposed Item 12 of Form N-CSR by incorporating by reference

information from definitive proxy statements and definitive information statements? Why or why not? Should the proposed disclosure appear elsewhere in addition to, or in lieu of, reports on Form N-CSR and proxy and information statements, and, if so, where (*e.g.*, the Statement of Additional Information)? Should we require that registered management investment companies tag these disclosures in XBRL format, as proposed? Why or why not? Are there any special considerations relating to registered management investment companies that make tagging this information more or less useful than similar tagging by operating companies? If so, please describe.

92. Should listed foreign private issuers, including MJDS filers, be exempt from the requirement to provide disclosure about compensation recovery policies? If so, please explain why.

E. Indemnification and Insurance

State indemnification statutes, indemnification provisions in an issuer's charter, bylaws, or general corporate policy and coverage under directors' and officers' liability insurance provisions may protect executive officers from personal liability for costs incurred in a successful defense against a claim or lawsuit resulting from the executive officer's service to the issuer.[230] Commenters requested clarification about whether issuers may indemnify executive officers whose compensation is recovered due to no fault of their own.[231] If the Commission does not prohibit such arrangements, these commenters asserted that issuers should be required to disclose the existence of these agreements in their proxy statements and other filings.

[230] In the context of Securities Act registration statements, a registrant is required to "state the general effect of any statute, charter provisions, by-laws, contract or other arrangements under which any controlling persons, director or officer of the registrant is insured or indemnified in any manner against liability which he may incur in his capacity as such." Item 702 of Regulation S-K.

[231] See letters from Towers Watson and Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

We believe that indemnification arrangements may not be used to avoid or nullify the recovery required by Section 10(D). Section 10D's listing standard requirement that "the issuer will recover" is inconsistent with indemnification because a listed issuer does not effectively "recover" the excess compensation from the executive officer if it has an agreement, arrangement or understanding that it will mitigate some or all of the consequences of the recovery.[232]

Congress designed the recovery policy required by Section 10D to apply on a no-fault basis, requiring listed issuers to develop and implement a policy to recover "any compensation in excess of what would have been paid to the executive officer had correct accounting procedures been followed."[233] Indemnification arrangements that permit executive officers to retain compensation that they were not entitled to receive based on restated financial statements fundamentally undermine the purpose of Section 10D.[234]

We further believe that Section 29(a) of the Exchange Act would render any indemnification agreement unenforceable to the extent that the agreement purported to relieve the issuer of its obligation under Section 10(D), the proposed rule and rule amendments, and a

[232] See Cohen v. Viray, 622 F.3d 188, 195 (2d Cir. 2010) (holding that an indemnification agreement cannot be used to release chief executive officer and chief financial officer from liability to repay compensation under Section 304 of SOX, in part because "indemnification cannot be permitted where it would effectively nullify a statute"); see, also Senate Report at 136 ("[I]t is unfair to shareholders for corporations to allow executives to retain compensation that they were awarded erroneously."). To the extent that an issuer indemnifies an executive officer, arranges for or provides insurance protecting against the risk that incentive-based compensation will be recovered pursuant to the issuer's recovery policy, whether directly by purchasing this coverage or indirectly by increasing the executive compensation to facilitate the executive's purchase of this coverage, the executive officer retains the excess compensation to which he or she was not entitled.

[233] See Senate Report at 136.

[234] Cf. First Golden Bancorporation v. Weiszmann, 942 F.2d 726, 729 (10th Cir. 1991) (finding any attempt by a corporate insider to seek indemnity against liability for short-swing profits under Section 16(b) of the Exchange Act void as against public policy where Congress had a clear intent to provide a "catch-all, prophylactic remedy, not requiring proof of actual misconduct.").

resulting listing standard to recover erroneously-paid incentive compensation. Section 29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void."[235] As courts have noted, "by its terms, Section 29(a) 'prohibits waiver of the substantive obligations imposed by the Exchange Act.' .... The underlying concern of this section is 'whether the [challenged] agreement weakens [the] ability to recover under the Exchange Act.'"[236] Thus, we believe that Section 29(a) would not permit an indemnification agreement to undermine an issuer's right and obligation to recover excess incentive-based compensation.[237]

For these reasons, Rule 10D-1, as proposed, would prohibit a listed issuer from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.[238] Further, while an executive officer may be able to purchase a third-party insurance policy to fund potential recovery obligations, the indemnification prohibition would prohibit an issuer from paying or reimbursing the executive for premiums for such an insurance policy. For the reasons stated above, we believe that indemnification and insurance premium payment or reimbursement arrangements would frustrate Section 10D's ultimate

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[235] 15 U.S.C. § 77cc. National securities exchanges and national securities associations are self-regulatory organizations. 15 U.S.C. 78c(a)(26).

[236] AES Corp. v. The Dow Chemical Company, 325 F.3d 174, 179 (3d Cir. 2003) (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 228, 230 (1987)).

[237] See Cohen v. Viray, 622 F.3d at 195 (citing Section 29(a) in rejecting indemnification against SOX § 304 liability); Allied Artists Pictures Corp. v. Giroux, 312 F. Supp. 450 (S.D.N.Y. 1970) (Section 29(a) rendered general release given by corporation to former chairman "unenforceable as a matter of law" in action by corporation to recover short-swing profits action under Section 16(b) of the Exchange Act).

[238] Proposed Rule 10D-1(b)(1)(v).

purpose of preventing an executive officer from retaining compensation "that the executive would not have received if the accounting was done properly and was not entitled to."[239]

Request for Comment

93. Should we require the exchanges to adopt listing standards that would prohibit issuers from indemnifying executive officers and/or funding the purchase of insurance to protect against the risk that an executive officer will be subject to the issuer's recovery policy, as proposed?

94. Should such listing standards also prohibit issuers from indemnifying executive officers' litigation expenses in recovery actions?

95. As noted above, the anti-indemnification provisions of Rule 10D-1 would prohibit agreements, arrangements or understandings that directly or indirectly mitigate some or all of the consequences of recovery. Will the exchanges and issuers be able to distinguish between payments that are made to mitigate the effect of a recovery and those that are paid as compensation in the ordinary course of business?

96. Should we define "indemnification" for purposes of the recovery under Section 10D? If so, how should it be defined? Should it require that there be an agreement on the part of the indemnitor in advance of the event for which the indemnitee is being indemnified?

F. Transition and Timing

We received a number of comments regarding timing and transition issues. Commenters generally advocated for prospective application of the recovery policy required by the listing standard. Commenters who addressed the application of Section 10D to former executive officers expressed concern about retroactive application to persons who were executive officers

[239] See Senate Report at 135.

before Section 10D was enacted.[240] Some commenters recommended specific dates after which incentive-based compensation should be subject to recovery, such as the enactment date of the Act,[241] the effective date of the final implementing rules,[242] the effective date of the listing standards approved by the Commission,[243] or the date the issuer implements the listing standard.[244]

Commenters also expressed concerns regarding how the recovery policy would affect existing compensation contracts and agreements.[245] Commenters asserted that issuers may be unable to apply recovery policies retroactively to arrangements in which compensation already has been granted or earned, or to compensation provided pursuant to pre-existing employment agreements.[246] One commenter recommended that the Commission establish a grandfathering rule that would exempt incentive-based compensation awards granted before the effective date of the Commission's final rules implementing Section 10D.[247] Another commenter asked whether the recovery policy would apply to compensation paid from the date the policy is effective, regardless of contract terms, and when issuers would be required to make their recovery policies

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[240] See letters from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC; Davis Polk & Wardwell; and Towers Watson.

[241] See letter from Compensia, Inc.

[242] See letter from Davis Polk & Wardwell LLP.

[243] See letter from Center on Executive Compensation.

[244] See letter from ABA Business Law Section.

[245] See letters from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, American Benefits Council and Towers Watson.

[246] See letters from ABA Business Law Section; American Benefits Council; and Davis Polk & Wardwell.

[247] See letter from American Benefits Council.

first enforceable.[248]

Additionally, some commenters suggested that the Commission provide for delayed compliance after the effective date of proposed Rule 10D-1 or approval of the listing standards, during which time issuers could develop and implement a recovery policy and make necessary plan amendments. These commenters recommended a 12-month period following Commission approval of the listing standards,[249] or a one-year period after the issuance of final rules,[250] for issuers to develop and implement their recovery policies and make any necessary plan amendments.

We propose that each exchange file its proposed listing rules no later than 90 days following publication of the final adopted version of Rule 10D-1 in the Federal Register, and that its rules be effective no later than one year following that publication date,[251] and that each listed issuer shall adopt the recovery policy required by this section no later than 60 days following the date on which the exchanges' rules become effective.[252] We also propose that each listed issuer be required to recover all erroneously awarded incentive-based compensation received by executive officers and former executive officers as a result of attainment of a financial reporting measure based on or derived from financial information for any fiscal period ending on or after the effective date of Rule 10D-1 and that is granted, earned or vested on or after the effective

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[248] See letter from Towers Watson.

[249] See letter from Center on Executive Compensation.

[250] See letter from American Benefits Council.

[251] Proposed Rule 10D-1(a)(2)(i).

[252] Proposed Rule 10D-1(a)(2)(ii).

date of Rule 10D-1 pursuant to the issuer's recovery policy.[253] Finally, we propose that a listed issuer be required to file the required disclosures in the applicable Commission filings required on or after the date on which the exchanges rules become effective.[254]

In light of the statutory purpose of Section 10D, we think it is appropriate to require exchanges to adopt listing standards that require issuers to comply with recovery policies that apply to incentive-based compensation that is based on or derived from financial information for periods that end on or after the effective date of Rule 10D-1. Issuer compliance would be required whether such incentive-based compensation is received pursuant to a pre-existing contract or arrangement, or one that is entered into after the effective date of the exchange's listing standard.

Request for Comment

97. Is the proposed schedule for exchanges to file their proposed listing rules and have them effective following the effective date of proposed Rule 10D-1 workable and appropriate? Similarly, is the proposal to require each listed issuer to adopt the required recovery policy within 60 days following the effective date of the exchanges' listing rules workable and appropriate? If not, what other schedule should apply?
98. Should the Commission provide that the recovery policy will apply to require recovery of all erroneously awarded incentive-based compensation received by a current or former executive officer on or after the effective date of Rule 10D-1 that results from attaining a financial reporting measure based on or derived from financial information for periods that end on or after the effective date of Rule 10D-1, as proposed? Alternatively, should

[253] Id.

[254] Id.

the recovery policy apply to incentive-based compensation received by an executive officer on or after the effective date of the exchange's listing standard that results from attaining a financial reporting measure based on or derived from financial information for periods that end on or after the effective date of Rule 10D-1? If neither of these alternatives, what date(s) would be more appropriate and why? Should the Commission consider the date of compensation agreements and the ability of issuers to modify those agreements as part of the transition? If so, how?

99. Is there anything the Commission should do to address the potential effect proposed Rule 10D-1 will have on existing compensation plans and employment agreements that do not contemplate recovery under a policy required by the rule and rule amendments implementing Section 10D? To what extent will issuers need to amend their existing compensation plans and employment agreements to provide for the application of the recovery policy? Should the recovery policy only apply to new compensation plans and employment agreements entered into after the effective date of the exchange's listing standard? Why or why not?

100. As proposed, an exchange may not list an issuer that it has delisted or that has been delisted from another exchange for failing to comply with its recovery policy until it comes into compliance with that policy.[255] In this circumstance, should the exchange rules prohibit the issuer from obtaining a new listing at the same or a different exchange? Why or why not? If so, for how long?

101. Are there sufficient enforcement mechanisms to ensure compliance with the listing standard? Why or why not?

[255] Proposed Rule 10D-1(b)(1)(vi), described in Section II.C.2.c, above.

General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might affect the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals, where appropriate.

III. ECONOMIC ANALYSIS

As discussed above, Section 954 of the Dodd-Frank Act amends the Exchange Act to include new Section 10D, which requires the Commission to direct the exchanges and associations to prohibit the listing of issuers that do not develop and implement policies to recover certain incentive-based compensation. The policies must provide that, in the event that the issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws, the issuer will recover any compensation in excess of what would have been paid under the accounting restatement from any of its current or former executive officers who received incentive-based compensation during the three-year period preceding the date of the required restatement. Section 10D also calls for the listing standards to require each issuer to develop and implement a policy providing for disclosure of the issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws. We are proposing a new rule and rule amendments to satisfy the statutory mandates of Section 10D.

We have performed an analysis of the main economic effects that may flow from the rule and rule amendments being proposed today. We consider the economic impact — including the costs and benefits and the impact on efficiency, competition, and capital formation — of the proposed rule requirements on issuers and other affected parties, relative to the baseline discussed below.[256] We also consider the potential costs and benefits of reasonable alternative means of implementing Section 10D. Where practicable, we have attempted to quantify the effects of the proposed rule and rule amendments; however, in certain cases, we are unable to do so because we lack the data necessary to provide a reasonable estimate.

We request comment on all aspects of the economic effects, including the costs and benefits of the proposals and possible alternatives. We also request comment on any effect the proposed requirements may have on efficiency, competition and capital formation. We appreciate comments that include both qualitative information and data quantifying the costs and the benefits identified in the analysis or alternative implementations of the proposed rule and rule amendments.

A. Baseline

The proposed rule and rule amendments require national securities exchanges and national securities associations to establish listing standards that would require each issuer to implement and disclose a policy providing for the recovery of erroneously paid incentive-based compensation. Consistent with Section 10D, the proposed rule and rule amendments require that the recovery of incentive-based compensation be triggered in the event the issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws. In order to reduce the likelihood of a material accounting

[256] Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act 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. See 15 U.S.C. 78c(f); 15 U.S.C. 80a-2(c). Further, Section 23(a)(2) of the Exchange Act requires us, when proposing rules under the Exchange Act, to consider the impact that any new rule would have on competition and to not 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. See 15 U.S.C. 78w(a)(2).

error, executive officers may have an enhanced incentive to ensure that greater care is exerted in preparing accurate financial reports, or a reduced incentive to engage in inappropriate accounting practices for the purpose of increasing incentive-based compensation awarded to them.[257] While these incentives could result in high-quality financial reporting that would benefit investors, they may also alter operating decisions of executive officers or divert resources away from activities that may involve more complex accounting judgments.

The proposed requirement that an issuer implement a recovery policy would introduce uncertainty about the amount of incentive-based compensation the executive officer will be able to retain. As a result, executive officers may demand that incentive-based compensation comprise a smaller portion of their pay packages, or that they receive a greater total amount of compensation, to account for the possibility that the awarded incentive-based compensation may be reduced due to future recovery. With these possible changes to the pay packages of executive officers, overall executive compensation may become less sensitive to the performance of the issuer, and the interests of the executive officers could diverge from those of the shareholders. Further, to the extent that executive officers respond negatively to the expected effects of the compensation recovery policies developed and implemented by issuers, the proposed rule and rule amendments may cause affected issuers to be less able to attract and retain executive talent, when competing for that talent against unlisted companies. We note that there may be other factors affecting the ability of an issuer to attract and retain executive talent. Further, the incremental effect of the proposed rule and rule amendments is mitigated to the extent that the labor markets for executives at listed issuers and at unlisted issuers do not overlap.

[257] We note that not all executive officers affected by the proposed rule and rule amendments may have the ability to directly affect the financial reporting of the issuer.

To assess the economic impact of the proposed rule and rule amendments, we are using as our baseline the current state of the market without a requirement for listed issuers to implement and disclose a compensation recovery policy consistent with Section 10D.

The proposed rule and rule amendments would dictate listing standards that require the recovery of excess incentive-based compensation that is based on financial reporting measures, including stock price and total shareholder return ("TSR"). Performance-based compensation can be either short-term or long-term, and each type can potentially be tied to different measures of performance. One study[258] found that, in the short-term incentive plans of chief executive officers (CEOs) at S&P 1500 companies in 2012, the three most common financial reporting measures used as performance metrics were earnings (36 percent), revenue (27 percent), and operating income (26 percent). In contrast, in long-term incentive plans, the three most common financial reporting measures used to compensate CEOs were TSR (48 percent), earnings (31 percent), and revenue (17 percent).[259] While earnings also was frequently used as a performance measure in long-term incentive plans, TSR was the most frequent metric used for such plans. The use of TSR was far less prevalent in short-term incentive plans, where only 10 percent of plans used it.[260] Based on Commission staff analysis of 145 randomly sampled issuers drawn from the full population of firms (both domestic and foreign) that filed an annual proxy

[258] See Equilar *Measuring Short-Term and Long-Term Performance in 2012* (May 28, 2013), available at http://www.equilar.com/publications/26-measuring-short-term-and-long-term-performance-in-2012.html.

[259] See Equilar *Measuring Short-Term and Long-Term Performance in 2012* (May 28, 2013).

[260] Performance-based compensation may be tied to multiple measures of performance. The average number of performance measures to evaluate performance in the short-term and long-term is 1.8 and 1.7, respectively. See Equilar *Measuring Short-Term and Long-Term Performance in 2012* (May 28, 2013).

statement in calendar year 2013, we estimate that approximately 21 percent of issuers used stock price and/or TSR as an element of their performance-based compensation.[261]

Under the proposed rule and rule amendments, the trigger for the recovery of excess incentive-based compensation would be when the issuer is required to prepare an accounting restatement as the result of a material error that affects a financial reporting measure based on which executive officers received incentive-based compensation. Hence, not all accounting restatements would trigger a recovery of compensation that was earned as a result of meeting performance measures. Using incentive-based compensation tied to revenue as an example, in order for that compensation to be required to be recovered, there would have to be a material accounting error that affects revenue. Based on one recent study, only 15 percent of all Item 4.02-reported accounting restatements made between 2005 and 2012 were due to errors involving revenue.[262] If the issuers that had a material accounting error in revenue had been subject to the proposed rule requirements, those issuers that awarded incentive-based compensation tied to the restated revenue or other measures that are affected by the restatement

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[261] We estimated the percentage of issuers that use stock price and/or TSR as performance metrics based on Commission staff analysis of information disclosed in annual proxy statements (DEF 14A). The sample comprises 145 proxy filers, which represents about 3 percent of the total number of DEF14A filers in calendar year 2013. Staff manually examined the CD&A in each of the 145 proxy statements to find that 21 percent of the 145 randomly sampled issuers disclosed the use of stock price and/or TSR as compensation performance metrics in 2013. Another 30 percent of the 145 randomly sampled issuers do not disclose whether they use compensation performance metrics; however, if these companies use stock price and/or TSR as a compensation performance metric, it is likely not a material element of their compensation because Item 402 of Regulation S-K calls for disclosure in the CD&A if a performance target is a material element of compensation policies and practices.

[262] See Scholz, S. 2013. "Financial Restatement: Trends in the United States: 2003–2012." Center for Audit Quality, available at: http://thecaq.org/reports-and-publications/financial-restatement-trends-in-the-united-states-2003-2012/financial-restatement-trends-in-the-united-states-2003-2012. In referring to findings of the study, we use the phrase *Item 4.02-reported accounting restatement* when the issuer filed an Item 4.02 to Form 8-K in connection with such restatement. The study characterizes these as "4.02 restatements" and observes that the filing of Item 4.02 to Form 8-K is required when an accounting error renders previously-filed financial statement unreliable. The study also comments that these are generally more serious than other restatements, which it refers to as "non-4.02 restatements."

of revenue would be required to recover the incentive-based compensation paid to executive officers.[263]

Further, the incidence of events where incentive-based compensation would be required to be recovered is affected by the number of restatements based on material errors that occur. A recent study reports that between 2005 and 2012 there was an average of 531 Item 4.02-reported accounting restatements per year, but the incidence of accounting restatements steadily declined over this period.[264] In calendar year 2012, there were 255 Item 4.02-reported accounting restatements, which represent approximately three percent of the population of issuers that potentially could have had an Item 4.02-reported accounting restatement.[265] This suggests that an event that would require an issuer to recover compensation (i.e., payment of incentive-based compensation tied to a financial reporting measure *and* occurrence of a material accounting error) would be relatively infrequent.[266]

The proposed rule and rule amendments would require exchanges to apply the compensation recovery requirement to all listed issuers, including emerging growth companies (EGCs), smaller reporting companies (SRCs), foreign private issuers (FPIs), and controlled

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[263] Incentive-based compensation tied to financial reporting measures that are affected by more reported items on the financial statements is more likely to be recovered. For example, incentive-based compensation tied to earnings or operating income is more likely to be recovered because material accounting errors that involve either revenue or expenses could impact these measures and thereby trigger a required recovery. Between 2005 and 2012, 52 percent of significant restatements involved operating expenses. See Scholz, S. 2013. "Financial Restatement: Trends in the United States: 2003–2012." Center for Audit Quality.

[264] See Scholz, S. 2013. "Financial Restatement: Trends in the United States: 2003–2012." Center for Audit Quality.

[265] In calendar year 2012, approximately 8,000 registrants filed annual reports on Form 10-K and would be required to file Item 4.02 to Form 8-K. We note that the proposed rule and rule amendments would affect a subset of registrants subject to reporting on Form 8-K (i.e., the listed issuers).

[266] These estimates are based on historical rates and types of restatements, which may not be indicative of future rates and types of restatements.

companies. We estimate that proposed Rule 10D-1 would be applicable to 4,845 registrants.[267] We estimate that, of those 4,845 registrants, there are 706 SRCs, 376 EGCs, 511 FPIs (filing annual reports on Form 20-F), and 128 MJDS issuers (filing annual reports on Form 40-F). There are a limited number of registered management investment companies that also would be affected by the proposed rule and rule amendments. We estimate that there are approximately seven registered management investment companies that are listed issuers and are internally managed, that may have executive officers who receive incentive-based compensation.

As outlined in the table below, we estimate that approximately 23 percent of all filers currently disclose some form of an executive compensation recovery policy.[268] We further estimate that approximately four percent of SRCs, two percent of EGCs, three percent of FPIs, and one percent of MJDS issuers disclose some form of a recovery policy.

	Number of filers that disclose a recovery policy	*Number of filers affected (total)*	*Percent of filers that disclose a recovery policy*
All affected filers (total)	1,116	4,845	23.0%
SRCs	29	706	4.1%
EGCs	9	376	2.4%
FPIs	17	511	3.3%

[267] We estimate the number of issuers subject to the proposed rule based upon Commission staff analysis of issuers that filed annual reports on Form 10-K, Form 20-F, or Form 40-F pursuant to Section 12(b) of the Exchange Act in the period from 7/1/2013 to 6/30/2014, regardless of the fiscal year of the filing. The staff used text analysis of an issuer's Form 10-K to determine if the issuer is an SRC. The staff performed a similar analysis of an issuer's Form 10-K and registration statement to determine if the issuer is an EGC. Examining filings in this manner involves a certain degree of error, and it is possible for issuers to be misclassified. Hence all numbers in this analysis should be taken as estimates.

[268] We estimate the number of issuers that have disclosed some form of recovery policy based on Commission staff analysis of information disclosed in Form 10-K, Form 20-F, Form 40-F, and an issuer's annual proxy statement (DEF 14A). Staff used text analysis and keyword searches similar to those of Babenko, Bennett, Bizjak, and Coles in their working paper *Clawback Provisions* (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2023292. Examining filings in this manner involves a certain degree of error, and it is possible for issuers to be misclassified. Hence all numbers in this analysis should be taken as estimates.

MJDS	1	128	0.8%
All other filers	1,060	3,124	33.9%

We note that larger issuers are more likely to have already implemented and disclosed a recovery policy. Using the staff estimates discussed above, as of June 30, 2014, approximately 64 percent (305 issuers) of the issuers that comprise the S&P 500 and approximately 50 percent (713 issuers) of the issuers that comprise the S&P 1500 report having a recovery policy of some form.[269]

In addition to the issuers referenced above, some issuers may have experience with recovering executive compensation given existing provisions of law concerning the recovery of such compensation under certain circumstances. Section 304 of SOX contains a recovery provision that is triggered when a restatement is the result of issuer misconduct. This provision applies only to CEOs and chief financial officers ("CFOs") and the amount of required recovery is limited to compensation received in the 12-month period following the first public issuance or filing with the Commission of the improper financial statements.[270] In addition, the Interim Final Rules under Section 111 of EESA, as amended by ARRA, required institutions receiving assistance under TARP to mandate that Senior Executive Officers and the next twenty most highly compensated employees repay compensation if awards based on statements of earnings, revenues, gains, or other criteria were later found to be materially inaccurate.[271] As discussed

[269] A report by Equilar finds that the prevalence of recovery policies in Fortune 100 companies has increased from less than 18 percent in 2006 to 84 percent in 2011 and more than 89 percent in 2013. See Equilar *Clawback Policy Report* (2013), available at http://info.equilar.com/rs/equilar/images/equilar-2013-clawbacks-policy-report.pdf. This increasing trend in the implementation of recovery policies is supported by Babenko, Bennett, Bizjak, and Coles in their working paper *Clawback Provisions* (2012).

[270] See 15 U.S.C. §7243.

[271] Under EESA a "Senior Executive Officer" is defined as an individual who is one of the top five highly paid executives whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934. See

above, relative to either SOX or EESA, the compensation recovery requirement of the proposed rule and rule amendments has a different scope because it would affect any current or former executive officer of all listed issuers and would be triggered when the issuer is required to prepare an accounting restatement due to material noncompliance of the issuer with any financial reporting requirement under securities laws, regardless of issuer or executive misconduct or the role of the executive in preparing the financial statements. Finally, we note that currently issuers other than SRCs, EGCs, and FPIs are required to disclose in the CD&A, if material, their policies and decisions regarding adjustment or recovery of named executive officers' compensation if the relevant performance measures are restated or adjusted in a manner that would reduce the size of an award or payment.[272]

Many of the issuers that disclose having recovery policies do not require misconduct on the part of the executive to trigger recovery.[273] In a review by Commission staff[274] of a random sample of 104 issuers with disclosed recovery policies, 51 issuers (49 percent) did not require misconduct on the part of the executive, 34 issuers (33 percent) required misconduct on the part

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Department of Treasury, TARP Standards for Compensation and Corporate Governance; Interim Final Rule (June 15, 2009), available at http://www.gpo.gov/fdsys/pkg/FR-2009-06-15/pdf/E9-13868.pdf.

[272] See Item 402(b)(2)(viii).

[273] In a sample of 2,326 companies in the Corporate Library database, DeHaan et al (2013) find that 39 percent had compensation recovery policies that did not require executive misconduct in order to be triggered. DeHaan, Hodge, and Shevlin *Does Voluntary Adoption of a Clawback Provision Improve Financial Reporting Quality?* Contemporary Accounting Research 30 (2013) 1027-1062.

[274] In the staff review, 104 issuers out of the 1,116 issuers that disclosed a recovery policy in the period 7/1/2013 to 6/30/2014 were randomly selected for an in depth examination of their recovery policies. Each recovery policy disclosure was read, or if the recovery policy was incorporated by reference, the original disclosure was read. Staff examined each policy for (1) which employees were covered, (2) what type of compensation was at risk for recovery, (3) how much of that compensation was at risk for recovery, (4) what type of event or events triggered a recovery action, (5) if misconduct was required for a recovery action, and (6) the timing of the window for which compensation was at risk for recovery. The characterization of these policies, as set forth below, is based on limited information available from public filings and may involve some interpretation of otherwise ambiguous terms and conditions. Hence, all numbers presented should be taken as estimates.

of the executive, and 19 issuers (18 percent) did not specify. By contrast, the proposed rule and amendments would require all listed issuers to have a recovery policy that applies to any material accounting error, without regard to misconduct.

There appears to be considerable variation in the coverage of employees subject to recovery under currently disclosed recovery policies.[275] Under the proposed rule and rule amendments, a listed issuer's compensation recovery policy would require recovery of excess incentive-based compensation received by an individual who served as an executive officer of the issuer at any time during the performance period for that incentive-based compensation. As a result, in some cases recovery would be required from individuals who may be former executive officers either at the time they receive the incentive-based compensation or at the date when the listed issuer is required to prepare an accounting restatement. In a review by Commission staff of the random sample of 104 issuers with disclosed recovery policies noted above, the recovery policies of 82 issuers (79 percent) applied to any current executive officer; and only three of those 82 issuers had recovery policies that applied to former executive officers.[276] Therefore, the majority of issuers examined disclose having recovery policies that require compensation recovery from a narrower range of individuals than a recovery policy that would comply with the proposed rule requirements.

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[275]As of 2013 approximately 61 percent of S&P Fortune 100 companies had recovery policies that applied to key executives and employees including named executive officers; approximately 13 percent applied to all employees; approximately seven percent applied to just the CEO and/or CFO; and the remainder did not have a recovery policy or did not specify coverage. See Equilar *Clawback Policy Report* (2013).

[276] Of the remaining 22 issuers in the sample, the recovery policies of two applied to CEOs, two applied to both the CEO and CFO, one applied to the COO, and 17 did not specify to whom the recovery policy applied. From the current disclosure in public filings, the staff generally could not determine whether the definition of "executive officers" that issuers use for purposes of their compensation recovery policies is consistent with the definition of "executive officer" in the proposed rule and rule amendments. A subset of issuers specified that only named executive officers were covered, while others specified senior executives, executive officers, or employees vice-president and above. For purposes of this baseline discussion, we include these employees in the category "executive officer."

The type and scope of compensation subject to recovery in currently disclosed recovery policies also appears to vary across issuers. In the staff's review of a random sample of 104 issuers that disclosed recovery policies, the recovery policies of 64 issuers (62 percent) applied to any form of performance-based compensation, and thus would satisfy the requirements of the proposed rule in this regard. Further, out of the 104 issuers with disclosed recovery policies, 29 issuers (28 percent) specified that only the excess performance-based compensation was subject to recoupment, while 47 issuers (45 percent) specified that all of the performance-based compensation was potentially recoverable.[277] Considered together, 76 of the 104 issuers (73 percent) examined may already have a recovery policy that covers excess incentive-based compensation as would be required by the proposed rule and rule amendments.

Moreover, 94 issuers (90 percent) specified either a look-back period of three years or did not specify a look-back period, which we interpret as having a potentially indefinite look-back period. Accordingly, a majority of the current policies the staff reviewed have a look-back period that is the same length or longer than the look-back period required in a recovery policy that would comply with the proposed rule requirements. We note, however, that due to the limited disclosure available in public filings, the staff was unable to determine if the start and end dates of the look-back window would cover the proposed required look-back period in the proposed rule. The results of this random sample indicate that, for issuers with disclosed recovery policies, the majority may already include look-back provisions consistent with the requirements under the proposed rule and rule amendments.

In summary, the staff's review of the disclosed recovery policies of 104 issuers found:

[277] As discussed above, the characterization of these policies is based on limited information available from public filings and may involve some interpretation of otherwise ambiguous terms and conditions. Hence, all numbers presented should be taken as estimates.

Proposed Requirements	*Existing Policies*
The recovery policy is "no fault" in nature.	51 of the 104 policies examined do not require misconduct on the part of the executive.
Former executive officers are covered.	101 of the 104 policies examined do not disclose that former executive officers are covered.
Excess incentive-based compensation based on attainment of a financial reporting measure is recoverable.	64 of the 104 policies examined apply to any form of performance-based compensation. 76 of the 104 policies examined may already allow for excess incentive-based compensation to be recovered.
Policy has a three year look-back period.	94 of the 104 policies examined may already have a look-back period of three years or longer.

B. Analysis of Potential Economic Effects

The discussion below analyzes the economic effects of the proposed rule and rule amendments, including the anticipated costs and benefits as well as the likely impact on efficiency, competition, and capital formation. For purposes of this analysis, we address the potential economic effects resulting from the statutory mandate and from our exercise of discretion together, recognizing that it is often difficult to separate the costs and benefits arising from these two sources. Below we discuss the potential effects of the proposed rule and rule amendments on financial reporting quality, on executive compensation packages, on listed issuers, and on U.S. exchanges. We also discuss the potential effects arising from the proposed rule's prohibition on indemnification and payment or reimbursement of premiums for insurance against recovery.

1. Potential Effects on Financial Reporting

In seeking to maximize the value of their financial investments, shareholders rely on the financial reporting quality of issuers to make informed investment decisions about the issuer's securities. High-quality financial reporting should provide shareholders with an accurate estimate of the issuer's performance and should be informative about its firm value.[278] An accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws may cause shareholders to question the accuracy of those estimates and may lead shareholders and other prospective investors to substantially revise their beliefs about the issuer's financial performance and prospects with potentially significant effects on firm value.

While incentive-based compensation is typically intended to provide incentives to executives to maximize the value of the enterprise, thus aligning their incentives with shareholders, it may also provide executives with incentives that conflict with shareholders' reliance on high-quality financial reporting. In particular, when setting the compensation for executives, the board of directors of an issuer may seek to align the interests of executives with those of the shareholders by tying executive compensation to financial reporting measures that the board believes will have a positive effect on firm value. To the extent that executives are in a position to affect the preparation of financial statements, this approach can, however, create the incentive for executives to influence the preparation of financial statements and related filings in ways that appear to achieve those measures. For example, certain financial performance measures require estimates and judgments, and if those estimates and judgements are influenced by the performance incentives that are part of the executive compensation packages, then the reported performance of the issuer may not reflect actual enhancement to firm value.

[278] For purposes of this economic analysis, high-quality financial reporting means when financial disclosure is informative about the actual performance of the issuer.

In some instances, executives might have incentives to pursue impermissible accounting methods under GAAP that result in a material misstatement of financial performance.[279] This potential for *deliberate* misreporting raises a principal-agent problem that is detrimental for shareholders.[280] Although civil and criminal penalties already create disincentives to deliberate misreporting, the recovery requirements under the proposed rule and rule amendments would reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, and thus may add another disincentive to engage in deliberate misreporting. The magnitude of this effect would likely depend on the particular circumstances of an issuer.

The proposed rule and rule amendments may also provide executives with an increased incentive to take steps to reduce the likelihood of *inadvertent* misreporting. Most directly, the executive may have the ability to reduce the uncertainty in her compensation by devoting more resources to the production of high-quality financial reporting, thereby reducing the likelihood of a material accounting error. For example, an executive could devote more labor or internal capital to strengthening internal controls over financial reporting. One study[281] found that, after

[279] We also note that some estimates and judgments permissible under GAAP may allow executives to realize higher compensation, without resulting in a material misstatement of financial performance and thus without triggering recovery consistent with Section 10D.

[280] Among other decisions, executives must decide the extent of internal resources and personal attention to devote to achieving high-quality financial reporting and assuring that the financial disclosure is informative about the performance of the issuer. Given that the expected costs and benefits associated with any level of investment decision in financial reporting quality would ultimately be reflected in the issuer's firm value, in absence of a principal-agent problem, executives would likely decide to allocate the value maximizing amount of resources to producing high-quality financial statements and, as a result, the level of information value of the financial reporting would likely be optimal. A principal-agent problem, however, reduces the executive's incentive to allocate the appropriate amount of resources to produce high-quality financial statements, which reduces the information value of financial reporting.

[281] See Chan, Chen, Chen, and Yu *The effects of firm-initiated clawback provisions on earnings quality and auditor behavior* Journal of Accounting and Economics 54 (2012) 180-196.

the implementation of a recovery policy, an auditor is less likely to report a material weakness in an issuer's internal controls over financial reporting, which is consistent with issuers devoting more resources to internal controls over financial reporting.

Executives may also take other steps to reduce the likelihood of an inadvertent misreporting. An executive could change the business practices of the issuer, thereby affecting the opportunity for a material accounting error to arise. For example, an executive could simplify delivery terms of a project or a transaction in order to use accounting standards that are more straightforward to apply and perhaps require fewer accounting judgments, which may reduce the likelihood of material accounting errors.[282] Taking steps such as these does not necessarily affect the selection of the project or transaction the issuer chooses to undertake (although it could, as discussed below), but could result in greater investor confidence in the quality of financial reporting and information value of the financial statements, and thus have a positive impact on capital formation.[283]

As a result of the proposed rule and rule amendments, we believe that the increased incentives to generate high-quality financial reporting may improve the overall quality of financial reporting. An increase in the quality of financial reporting could result in increased

[282] For example, the executive could make accounting judgments on loan loss reserves or expected returns on sales with complicated returns criteria that are less likely to result in an accounting restatement.

[283] An academic study shows that, when market competition is weak, the information environment affects the expected returns of equity securities. In particular, when financial disclosure quality is low, as measured by scaled accruals quality, companies with low market competition, as measured by the number of shareholders of record, have a higher expected return. All else being equal, higher expected returns make raising capital more costly for the company. See Armstrong, Core, Taylor, and Verrecchia *When Does Information Asymmetry Affect the Cost of Capital* Journal of Accounting Research Vol. 49 No. 1 March 2011. The academic literature has developed a measure of the quality of financial reporting denoted accruals quality. This measure quantifies how well accruals are explained either by the cash flow from operations (past, current, and future periods) or accounting fundamentals. For details on the construction and interpretation of the measure see Dechow and Dichev *The Quality of Accruals and Earnings: The Role of Accrual Estimation Errors* The Accounting Review, Vol. 77, Supplement 2002 pp. 35-39; and Francis, LaFond, Olsson, and Schipper *The market pricing of accruals quality* Journal of Accounting and Economics 29 (2005) 295-327.

informational efficiency, enhanced investor confidence that may result in greater market participation, and a reduced cost of raising capital, thereby facilitating capital formation. While we lack the data to quantify the potential benefits to shareholders from a reduced likelihood of a material accounting error, evidence suggests that penalties imposed by the market for accounting restatements are likely to be substantial.[284] For example, one recent study[285] found that over the period 2005 to 2012 the market value of equity of the average issuer declined by 2.3 percent upon announcement of a significant financial restatement.[286]

More broadly, the availability of more informative or accurate information regarding the financial performance of issuers would also have the effect of increasing the efficient allocation of capital among corporate issuers. Because investors would be better informed about the potential investment opportunities at any given point in time, they would be more likely to allocate their capital according to its highest and best use. This would benefit all issuers, even those whose financial reporting would not be affected by the proposed rule requirements on exchanges' listing standards. In particular, issuers whose financial reporting is unaffected may have better access to capital by virtue of investors being able to make more informed comparisons between them and issuers whose financial reporting would become more accurate

[284] These penalties would likely include both revaluation and reputational effects, where the two types of effects are often difficult to separate.

[285] See Scholz, S. 2013. "Financial Restatement: Trends in the United States: 2003–2012." Center for Audit Quality.

[286] In the 2005-2012 period, the average issuer paid approximately 0.48 percent of its market value of equity to all named executive officers in the form of non-salary compensation during that time period. Non-salary compensation data is from Standard and Poor's Executive Compensation database which tracks compensation for the companies currently or previously in the S&P 1500 index. Moreover, this comparison is inexact, because the proposed rule would require the recovery of only *excess* incentive-based compensation, and not all non-salary compensation, thereby reducing the percentage of market value paid to executives. The proposed rule and rule amendments would however, also require a recovery policy that applies to more than just the named executive officers, thereby increasing the percentage of market value paid to executives.

as a result of the proposed rule requirements.[287] In contrast, without the proposed rule and rule amendments, investors may improperly assess the value of the issuers whose financial reporting is based on erroneous information, which could result in an inefficient allocation of capital, inhibiting capital formation and competition.

We are aware, however, that these potential benefits of the proposed rule and rule amendments are not without associated costs. Under the proposed rule and rule amendments, the increased allocation of resources to the production of high-quality financial reporting may divert resources from other activities that may be value enhancing. Moreover, while the increased incentive to produce high-quality financial reporting and thus reduce the likelihood of material accounting errors should increase the informational efficiency of investment opportunities, it may also encourage executives to forgo value-enhancing projects if doing so would decrease the likelihood of a financial restatement.[288] For example, when choosing among investment opportunities for the issuer, executives may have less incentive to pursue those projects that would require more complicated accounting judgments, so as to reduce the likelihood of an unintentional but material accounting error.[289] That is, the proposed rule and rule amendments may create an incentive for an executive to forgo projects for which it is more difficult to

[287] See Bushee and Leuz *Economic consequences of SEC disclosure regulation: evidence from the OTC bulletin board* Journal of Accounting and Economics 39 (2005) 233-264.

[288] Projects that increase the volatility of cash flows from operations, the volatility of sales revenue, or percentage of soft assets have been associated with an increased likelihood of an SEC enforcement action (specifically, the likelihood of an issuer being the subject of a SEC Accounting and Auditing Enforcement Release). See Dechow and Dichev *The Quality of Accruals and Earnings: The Role of Accrual Estimation Errors* The Accounting Review, Vol. 77, Supplement 2002 pp. 35-39; Dechow, Ge, Larson, and Sloan *Predicting Material Accounting Misstatements* Contemporary Accounting Research Vol. 28 No. 1 (Spring 2011).

[289] For example, the issuer could select projects that do not add to the complexity of the required reporting systems, or select projects that have a shorter performance period and therefore may involve less difficult accounting judgments about the expected future costs.

generate high-quality financial reporting.[290] This could have an adverse impact on the value of the issuer to the extent that the foregone projects would have resulted in greater value than those that were ultimately chosen.

One study suggests that a compensation recovery policy could result in an increased likelihood of an executive making suboptimal operating decisions in order to affect specific financial reporting measures as a result of the decreased incentive to use accounting judgments to affect those financial reporting measures.[291] For example, if an executive is under pressure to meet an earnings target, rather than manage earnings through accounting judgments, an executive may elect to reduce or defer to a future period research and development or advertising expenses. This could improve reported earnings in the short-term, but could result in a suboptimal level of investment that adversely affects performance in the long run. The study also documents that the propensity of executives to undertake such actions may be particularly high in issuers that are characterized as having strong growth opportunities.[292] The incentive to use operating decisions to affect financial reporting measures could be partially mitigated to the extent that the board's compensation committee would expect this behavior after the

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[290] Babenko et al find that after the implementation of a compensation recovery policy, issuers spend less on research and development, file for fewer patents, and hold more cash. This is consistent with executives changing their project selection policy as the result of implementing a compensation recovery policy. See Babenko, Bennett, Bizjak, and Coles *Clawback Provisions* Working Paper (2015). We note, however, that the determination of whether or not to select a particular project is likely related to many characteristics of the project. These characteristics could include the value the project creates, the cash flows the project returns in the near term, and the strategic objectives of the issuer.

[291] Chan, Chen, Chen, and Yu document that after the implementation of a compensation recovery policy issuers reduce accruals manipulation but increase real transaction management. They further document that the increase in real transaction management results in improved short-term performance, as measured by changes in return on assets, but diminished long-term performance. In the context of their study, real transaction management is when executive officers structure operating decisions to affect reported financial performance. See Chan, Chen, Chen, and Yu *The effects of firm-initiated clawback provisions on earnings quality and auditor behavior* Journal of Accounting and Economics 54 (2012) 180-196.

[292] Id.

implementation of a recovery policy and construct metrics that take into account the possibility of such actions. They might also design internal controls to detect such actions, such as rigorous budget variance analyses.

Under the proposed rule and rule amendments, if it appears that previously filed financial statements may contain a material accounting error, there may also be an incentive for issuers or individual executives (to the extent they are in a position to do so) to cause the company to delay investigating the error or to characterize as immaterial an accounting error that would otherwise be properly characterized as material. The incentive to delay is present because only excess incentive-based compensation received in the three fiscal years prior to the determination of a material accounting error is subject to recovery under the proposed rule and rule amendments.[293] The incentive to characterize an accounting error as immaterial that would otherwise properly be characterized as material is present because compensation recovery is only required after the conclusion a material accounting error exists.[294] To the extent that these incentives discourage the timely and accurate reporting of material accounting errors, it could result in loss of confidence in financial information disclosures by investors and hinder capital formation.

These incentives to delay the conclusion that a restatement is necessary or to mischaracterize material accounting errors are mitigated, however, by several factors. For example, the proposed definition of the date on which an issuer is required to prepare an

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[293] For example, suppose that in November 2015 an issuer with a fiscal year ending in December suspects that there is a material accounting error in its financial statements. Further, suppose that the executives of the issuer had received a large incentive-based compensation award in 2012. If the issuer investigates immediately and concludes in November 2015 that there was a material accounting error, then incentive-based compensation received in 2012 is at risk for recovery. The issuer might choose to delay its investigation until 2016 in order to avoid this result.

[294] See Files, Swanson, and Tse *Stealth Disclosure of Accounting Restatements* The Accounting Review 84 (2009), 1495–1520; Myers, Scholz, and Sharp *Restating Under the Radar? Determinants of Restatement Disclosure Choices and the Related Market Reactions* Working Paper (2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309786&download=yes.

accounting restatement, which is the date on which the issuer concludes, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error would provide an objective basis for assessing when the required three year look-back period begins. Moreover, the potential for the issuer and individual executives to incur additional legal liability, including potential criminal prosecution, for the deliberate or negligent delay in investigating and reporting a material accounting error or mischaracterization of an accounting error, combined with the likelihood that such conduct would be detected,[295] may offset the incentives arising from the required three year look-back period prior to the determination of a material accounting error.

2. Potential Effects on Executive Compensation

When setting the compensation for executives, the board of directors of an issuer frequently incorporates into the total compensation package a payout that is tied to one or more measures of the issuer's performance. The purpose of tying compensation to performance is to provide an incentive for executives to maximize the value of the enterprise, thus aligning their incentives with other shareholders. The proportion of the pay package that relies on performance incentives generally depends on factors such as the level of risk inherent in the issuer's business activities, the issuer's growth prospects, and the scarcity and specificity of executive talent needed by the issuer. It also may reflect personal preferences influenced by characteristics of the executive such as age, wealth, and aversion to risk. In particular, the executive's risk aversion may make pay packages with strong performance incentives undesirable because of the less

[295] Outside auditors' oversight may play as an additional mitigating factor.

predictable payments. These factors contribute not only to the magnitude of the expected compensation, but also to how an executive views and responds to the compensation.[296]

We anticipate that the requirements of the proposed rule and rule amendments could meaningfully affect the size and composition of the compensation packages awarded to executives of listed issuers. As noted above, risk averse executives prefer predictable compensation, and the mandatory implementation of a recovery policy that meets the requirements of the proposed rule and rule amendments would introduce an additional source of uncertainty in the compensation of the executive. Moreover, because the mandated recovery policy would be required to be "no-fault" in nature, the occurrence of a material accounting error would require executives to return excess incentive-based compensation even if they had no role in the material accounting error. A recovery policy would, therefore, introduce uncertainty in the amount of incentive-based compensation that executives will ultimately retain, with those executives less directly involved with financial reporting incurring relatively more uncertainty.

For executives who already have established compensation packages, the proposed rule and rule amendments may create an incentive to negotiate changes to their composition.[297] In particular, because of the increased uncertainty, risk averse executives may lower the value that they attach to the incentive-based component of their pay and may as a result demand an offset to bear the increased uncertainty. The offset could come in the form of a smaller portion of pay

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[296] Executives typically have personal preferences regarding the form of compensation received. To the extent that executives have different levels of risk aversion, they can arrive at different personal valuations of the same performance-based compensation package. Hence, more risk-averse executives may require additional compensation when paid in the form of less certain performance-based compensation.

[297] See letters from Stuart R. Lombardi and Towers Watson.

being comprised of incentive-based compensation,[298] which could weaken incentive alignment, i.e., pay-for-performance sensitivity,[299] or through an increase in expected total compensation, which would come at a greater cost to the issuer.[300] Research suggests that as a result of bearing this new source of uncertainty the total compensation of executives would increase.[301] The extent of any such increase would depend on the structure and conditions of the labor market for executives as well as other economic factors, including the negotiating environment and particular preferences of executives.

Notably, under a recovery policy that implements the proposed rule requirements, incentive-based compensation tied to stock price metrics such as TSR is included within the scope of compensation that may be subject to recovery. The stock price of an issuer incorporates investor expectations of cash flows and future earnings of that issuer and can be materially impacted by inaccurate reporting of financial information. In particular, inaccurate financial information could lead investors to incorrectly estimate future cash flows and potential earnings of the issuer with concurrent effects on the valuation of its stock. If the receipt of incentive-based compensation by executives is tied to stock price, then executives could receive

[298] We note that, if the offset comes as a reduced weight placed on incentive-based compensation, the recoverable funds if a material accounting error occurs would be reduced.

[299] Pay-for-performance sensitivity is a measure of incentive alignment used in academic research. The measure captures the correlation of an executive officer's compensation with changes in shareholder wealth. See, e.g., Jensen and Murphy, Journal of Political Economy, Vol. 98, No. 2 (Apr., 1990), pp. 225-264.

[300] Increased expected total compensation could come in the form of an increase in base salary, incentive-based compensation, or other compensation. While increasing the incentive-based component of an executive's compensation package increases the variability of the executive's compensation beyond the additional variability due to the recovery policy, the issuer may find this to be the least costly way to compensate the executive. For example, an issuer may choose to increase the incentive-based compensation component, instead of increasing base salary, because the executive's current base salary is near the limit for tax deductibility under 162(m) of the Internal Revenue Code and an increase in base salary may therefore not be tax deductible.

[301] See DeHaan, Hodge, and Shevlin *Does Voluntary Adoption of a Clawback Provision Improve Financial Reporting Quality?* Contemporary Accounting Research 30 (2013) 1027-1062; Babenko, Bennett, Bizjak, and Coles *Clawback Provisions* Working Paper (2012).

erroneously awarded compensation and a subsequent accounting restatement due to material noncompliance with a financial reporting requirement could trigger recovery of such compensation tied to stock price.

While the economic effects associated with the inclusion of stock price and TSR within the scope of financial reporting measures would be the same as for the proposed rule and rule amendments in general, we discuss below the more specific effects stemming from this inclusion. Specifically, in the case of stock price and TSR, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement, the cost of recovering incentive-based compensation may be higher. The significance of these costs would depend on the size and financial condition of the issuer, as well as the board's approach to determining the amount, if any, of excess incentive-based compensation to be recovered following a material accounting error. Since the proposed rule would require that this amount be based on a reasonable estimate of the effect of the accounting restatement on the financial reporting measure, a reasonable estimate of the "but for" price of the stock (i.e., the stock price that would have been if financial statements originally had been presented as later restated) must be first determined.[302]

To reasonably estimate the "but for" price of the stock, there are a number of possible methods with different levels of complexity of the estimations and related costs.[303] One such method, which is often used in accounting fraud cases to determine the effects of corrective disclosure on the market price of an issuer's stock, is an "event study." An event study captures

[302] See Section II.C.3.a for a discussion of the determination of the recoverable amount.

[303] The complexity of a particular methodology involves a trade-off between the potential for more precise estimates of the "but for" price and the assumptions and expert judgments required to implement such methodology.

the market's view of the valuation impact of an event or disclosure. In the case of a restatement, the event study estimates the drop in the stock price attributed to the announcement[304] that restated financial information is required, separate from any change in the stock price due to market factors. An event study therefore measures the net-of-market drop in the stock price,[305] which is a key input to establish the "but for" price at which the security is presumed to have traded in the absence of the inaccurate financial statements. In the context of an event study, to determine the net-of-market drop in the stock price, certain decisions have to be made, such as determining the appropriate proxy for the market return and statistical adjustment method (i.e., a model to account for the potential difference in risk between the company and market); the model estimation period; the date and time that investors learned about the restatement; and the length of time it took for investors to incorporate the information from the restatement into the issuer's stock price. If designed appropriately, the implementation of a robust event study method would include an evaluation of the various design choices that are anchored on objective and commonly accepted practices by the industry and relevant literature.[306] The effects of these

[304] Event studies can have multiple event dates. For example an event study can measure the stock price impact attributed to the announcement that amended filings are required, as well as the stock price impact attributed to when the actual amended filings are made available for the investors to examine.

[305] Over the 2005–2012 period, the average stock price reaction to restatements disclosed under Item 4.02 of Form 8-K was negative 2.3 percent. See Scholz, S. 2013. "Financial Restatement: Trends in the United States: 2003–2012." Center for Audit Quality. This study documents a substantial drop in the number and severity of restatements in the years following the enactment of SOX. The study includes 4,246 restatements reported by U.S. and foreign filers registered with the Commission from 2005 to 2012 on Form 8-K under Item 4.02. The number of restatement announcements peaked in 2006 (940), soon after implementation of SOX Section 404 internal control reporting. In subsequent years, the number of Item 4.02 restatements declined significantly, with 255 reported in 2012, a reduction of approximately 73 percent from the 2006 peak year. Restatement periods are shorter in later years, declining from an average 29 months in 2006 to 18 months in 2012.

[306] The complexity of an event study depends on the circumstances of the event and the particular approach taken. For example, one event study could use a broad market index in estimating a market model, while another event study could use a more tailored index that may take into account industry specific price movements but would require judgments on the composition of the issuers in the more tailored index. For further discussion on the complexities of event studies see Mitchell, M. and J. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission," *The Business Lawyer,* vol 49, Feb 1994, p. 565;

design choices may vary from case to case. Some of the potential choices may have no effect on the results while other choices may significantly drive the results and could generate considerable latitude in calculating a reasonable estimate of the excess amount of incentive-based compensation that was erroneously awarded.

Under any reasonable methodology, calculating the "but for" price can be complicated when stock prices are simultaneously affected by information other than the announcement of a restatement on the event date. Confounding information potentially affecting an issuer's stock price on the event date could include other plans released by the issuer related to potential corporate actions (e.g., mergers, acquisitions, or capital raising), announcements of non-restatement related performance indicators, and news related to macro-economic events (e.g., news about the industry the issuer operates in, changes to the state of the economy, and information about expected inflation). Because an issuer has influence over the timing of the release of issuer-specific information, the issuer has the ability to complicate the estimation of a reasonable "but for" price. For example, if an accounting restatement is expected to have a negative effect on an issuer's stock price, the executive has an incentive and often the ability to contemporaneously release positive information in an attempt to mitigate any reduction in the issuer's stock price. The strategic release of confounding information may make it more difficult for investors to evaluate the effect of the restatement on the performance of the issuer.

The proposed rule and rule amendments do not require an event study to calculate a reasonable estimate of the excess incentive-based compensation tied to stock price to be recovered after a material accounting error. Instead, the proposed rule and rule amendments

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Kothari, S.P, and J. Warner, "Econometrics of Event Studies," *Handbook of Corporate Finance: Empirical Corporate Finance* (Elsevier/North-Holland), 2004; and Campbell, John Y., A. Lo, and A. C. MacKinlay, *The Econometrics of Event Studies*, NJ: Princeton University Press, 1997.

would permit an issuer to use any reasonable estimate of the effect of the restatement on stock price and TSR. In addition, the proposed rule and rule amendments allow the board of directors to forego recovery if the aggregate direct costs of seeking recovery from a current or former executive officer would exceed the amount of excess incentive-based compensation to be recovered. We note that an issuer would need to incur the direct costs associated with implementing a methodology to reasonably estimate the "but for" price *prior to* determining whether any amount of incentive-compensation is required to be recovered under the proposed rule and rule amendments. In choosing a methodology to derive a reasonable estimate of the effect of the accounting restatement on stock price and/or TSR, issuers would likely weigh the costs of implementing any methodology against the complexity of the "but for" price estimate and the potential need to justify that estimate, under their unique facts and circumstances.

Some issuers may decide to use a methodology that is testable, supported by published literature, or follows procedures that derive from objective standards because such a methodology may reduce the likelihood that the reasonableness of the amount of excess incentive-based compensation required to be recovered would be challenged by interested parties, including the executives subject to recovery and the exchanges that are required to ensure that the proposed rule and rule amendments are enforced as a listing standard. The implementation of such methodology may be complex because it would likely include extensive checks of the assumptions and design choices made to generate the estimate of the "but for" price. If these issuers have a reasonable basis to believe that some amount of incentive-based compensation is required to be recovered, they may decide to retain an expert for the implementation of such methodology and determination of the "but for" price.

If an issuer chooses to retain an expert, the monetary costs that would be incurred to estimate the "but for" price and subsequent calculation of the amount of excess incentive-based compensation required to be recovered could be substantial. In these circumstances, we expect that the determination of the "but for" price would require a significant number of hours of work by highly skilled experts. In addition, once a "but for" price is estimated, the determination of the amount of excess incentive-based compensation could involve complex calculations and assumptions that may require additional hours of work by the expert.[307] To establish a proxy for billing rates of experts who have specialized knowledge in financial economics, we examined expert witness fees by areas of expertise. For example, based on survey responses from 21 financial experts, SEAK, Inc. 2014 Survey of Expert Witness Fees reports that the hourly fee for case review/preparation ranges from $175 to $800 with an average fee of $337 per hour.[308]

Other issuers may decide to use a methodology that results in less complex implementations to estimate the "but for" price[309] because, for example, by using simpler implementations, issuers may already be in a position to determine with reasonable confidence that, after taking into account a reasonable range of variation in the "but for" price, no amount of incentive-based compensation tied to stock price and/or TSR was erroneously awarded to executive officers in the first place and consequently no recovery is required. If an issuer chooses to implement a less complex methodology, the determination of the "but for" price and

[307] For example, if an executive receives at-the-money options as a form of incentive-based compensation, where the number of options is based on the current stock price, the issuer may determine that a reasonable estimate of the amount to be recovered involves recalculating both the number of options awarded as well as the value of those options that would have been issued at a different strike price.

[308] See SEAK, Inc. 2014 Survey of Expert Witness Fees, available at: http://store.seak.com/2014-survey-of-expert-witness-fees/.

[309] For example, issuers may use historical estimates of beta that are publicly available on several sources to substitute for a more complex estimation of the market model. The beta estimate of a stock captures the correlation of that stock's return with the return of the overall market over a certain period of time.

subsequent calculation of the amount of excess incentive-based compensation required to be recovered would entail a significantly lower number of hours of work that can be likely performed internally without retaining an expert.

Under any methodology, the variation in assumptions used to determine a reasonable estimate of the "but for" price (e.g., determining a proxy for market returns; the date and time that investors learned about the restatement; and the length of time it took for investors to incorporate the information from the restatement into the issuer's stock price) and of the amount of excess incentive-based compensation may increase the level of perceived uncertainty that risk averse executives attach to the incentive-based component of their pay. This uncertainty may in turn make it more costly and difficult for issuers to retain executive officers' talent, when competing for that talent against unlisted companies. We note that there may be other factors affecting the ability of an issuer to attract and retain executive talent. Further, the incremental effect of the proposed rule and rule amendments is mitigated to the extent that the labor markets for executives at listed issuers and at unlisted issuers do not overlap.

The significant complications of establishing a reasonable estimate of the "but for" price, in conjunction with the likely monetary costs incurred to calculate it, make it difficult to assess the relative costs and benefits accruing to an issuer from enforcing a recovery policy that covers compensation based on stock price and/or TSR. These uncertainties also could undermine issuers' incentives to enforce their recovery policies and make it more difficult for exchanges to monitor compliance.[310] This effect may be partially or entirely mitigated by the requirement for issuers to provide documentation to the relevant exchange of any reasonable estimates used or

[310] Due to the discretion that an issuer may have in choosing both the method and the assumptions underlying the method to estimate a "but for" price, it may be difficult for an exchange to determine if the "but for" price resulted in a reasonable estimate of the excess incentive-based compensation required to be recovered. This may make it more difficult for exchanges to monitor compliance.

attempts to recover compensation, which will assist exchanges in monitoring compliance and incentivize issuers to carefully document the considerations that went into the determination to enforce (or not enforce) their recovery policy. On balance, we think other aspects of the proposed rule and rule amendments, such as the ability to use reasonable estimates and the board's discretion not to pursue recovery when the direct enforcement costs would exceed the amount to be recovered, may serve to mitigate these costs; however, below we request comment on this aspect of the proposed rule and rule amendments to help us better understand its economic effects.

Notably, incentive-based compensation as defined in the proposed rule and rule amendments would not include base salary; compensation tied to operational metrics that are not financial reporting measures; or compensation awarded solely at the issuer's discretion. These forms of compensation would not be subject to recovery under a policy that meets the proposed rule requirements. These exclusions may create the incentive to shift compensation from forms that are subject to recovery to forms that are not subject to such recovery. This would apply to both re-negotiated compensation packages as well as newly instituted ones. The incentive to shift compensation away from forms that are subject to a recovery policy may affect the level of incentive alignment between executive interests and shareholder interests in terms of the enhancement of firm value, which depends on how well performance metrics used as triggers in compensation contracts capture the relationship between an executive's effort to enhance firm value and the actual enhancement of firm value.

The incentive to substitute away from incentive-based compensation tied to financial reporting measures may result in base salary or performance-based compensation tied to operational metrics being a larger portion of the executive officer's compensation package. This could reduce pay-for-performance sensitivity and may reduce the correlation between the executive officer's effort to enhance value and executive compensation if these alternative metrics are poor substitutes for financial reporting measures. In addition, as a result of the proposed rule and rule amendments, an issuer's board of directors may use increased discretion in setting compensation awards, since compensation that is solely awarded at the discretion of the board, such as bonuses, would not be subject to recovery under the proposed rule and rule amendments. Issuers may adjust compensation policies to be more dependent on the discretion of the board, which may make it more difficult for investors to understand the incentives of executives and may result in lower pay-for-performance sensitivity.[311]

The implementation of a mandatory recovery policy may also make it less costly overall to use incentive-based compensation. Without a recovery policy, as noted above, a compensation package with significant incentive-based compensation components based on financial reporting measures may provide incentives for an executive to engage in conduct that could result in inaccurate financial reporting. If a recovery policy encourages business practices and accounting judgments that are less likely to result in a material accounting error, the benefits to the issuer of having higher quality financial reporting could more than offset the additional compensation executives require to bear the increased uncertainty about the compensation they expect to ultimately retain.[312]

[311] If the issuer transitions to compensation that is not payable on account of the attainment of one or more performance goals, such as compensation payable solely at the discretion of the board of directors, the issuer may lose the ability to deduct a portion of executive compensation under Section 162(m) of the Internal Revenue Code. This may mitigate the incentive for companies to transition compensation away from performance-based metrics.

[312] A voluntarily implemented recovery policy may not reduce the expected cost of issuing incentive-based compensation because of insufficient incentive for board members to enforce the recovery after a material restatement. The proposed rule, which conditions initial and continued listing of securities on compliance with the recovery policy, substantially increases the incentives of board members to enforce the policy.

The proposed rule and rule amendments may have effects on the competition among issuers for executive officers. By increasing uncertainty and reducing the perceived value of the expected incentive-based compensation of an executive, companies where the proposed rule and rule amendments apply (i.e., listed issuers) may have more difficulty attracting talented executives and, as such, may be at a comparative disadvantage to companies that are not covered (i.e., unlisted issuers and private companies). It is unclear to what extent the labor market for executives at listed issuers and the labor market for executives at unlisted issuers and private companies overlap. The more these labor markets are segmented, the lower the comparative disadvantage potentially imposed by the proposed rule requirements.

3. Additional Potential Effects on Listed Issuers

We anticipate several effects of the proposed rule and rule amendments on listed issuers. Although we believe some issuers have already implemented recovery policies broadly consistent with the proposed rule requirements, the most immediate outcome of the proposed rule and rule amendments would be the establishment of listing standards that would result in issuers implementing recovery policies consistent with Section 10D. Under such recovery policies, an immediate benefit for a listed issuer would be the recovery of incentive-based compensation that was erroneously paid to executive officers, which would then be available for the issuer to invest in productive assets that may generate value for shareholders. Although recovery of erroneously paid compensation would provide an immediate benefit for issuers and shareholders, we note that, in many cases, these funds are not likely to be significant in the context of the issuer's business operations, and thus this effect may not be as consequential as the other, more indirect effects that we discussed above on financial reporting quality and executive compensation packages.[313]

We also anticipate direct benefits to flow from the disclosure of the recovery policy that are separate from any pecuniary recovery following an accounting restatement. Currently, an issuer could have a compensation recovery policy but choose not to disclose the existence or the terms of that policy. Under the proposed rule and rule amendments, the issuer's recovery policy would be required to be filed as an exhibit to the issuer's annual report on Form 10-K, 20-F or 40-F or, for registered management investment companies, on Form N-CSR. The proposed rule and rule amendments also require the disclosure be provided in interactive data format using XBRL. This may facilitate the extraction and analysis of the information contained in the disclosure across a large number of issuers or, eventually, over several years. This requirement would impose additional costs and burdens on issuers, but despite these costs, some shareholders and prospective investors may benefit from the data tagging requirement to the extent that it is helpful in extracting the tagged information across large number of filings.

With this information investors would have a better understanding of the incentives of the issuer's executive officers, owing to more complete disclosure of the issuer's compensation policies, including its recovery policy. Moreover, while all listed issuers would be required to adopt and comply with a recovery policy satisfying the requirements of the proposed rule and rule amendments, issuers would have the choice to implement recovery policies that are more extensive than these requirements. For example, issuers may choose to establish more stringent

[313] Based on an analysis of executive compensation using Standard & Poor's Compustat and Executive Compensation databases, in fiscal year 2013 non-salary compensation for all named executive officers combined was 0.4 percent of net income. This represents an upper bound for the amount of incentive-based compensation for named executive officers. This number does not include current and former executive officers that would be covered by the proposed rule but are not named executive officers.

recovery policies (e.g., a longer look-pack period, more forms of compensation subject to recovery, or more individuals covered) to provide a positive signal to the market regarding their approach to executive compensation. If variation in the scope of issuers' recovery policies emerges across issuers, disclosure of those policies may improve allocative efficiency by allowing investors to make more informed investment decisions based on a better understanding of the incentives of the executives. The requirement to publish recovery policies may make such variation more likely to emerge.[314]

Further, if at any time during the last completed fiscal year a listed issuer's recovery policy required that issuer to recover excess incentive-based compensation, the proposed rule and rule amendments would require the issuer to disclose details of the recovery efforts under proposed Item 402(w) of Regulation S-K. These disclosures would allow existing and prospective shareholders to observe whether issuers are enforcing their recovery policies consistent with Section 10D. This would also help exchanges monitor compliance. Similarly, the requirement to disclose instances in which the board does not pursue recovery and its reasons for doing so (i.e., because the expense of enforcing recovery rights would exceed the recoverable amount or because the recovery would violate a home country's laws), would permit shareholders to be aware of the board's actions in this regard and thus potentially hold board members accountable for their decisions.

There are a number of direct costs for issuers resulting from the proposed rule and rule amendments. As part of the implementation of a recovery policy that meets the proposed rule

[314] In the absence of a mandatory requirement for issuers to implement and disclose a recovery policy, investors may be uncertain about whether the implementation of a voluntary recovery policy by an issuer is a credible signal of the issuer's approach to executive compensation. By increasing the likelihood of a recovery policy being enforced, the proposed rules and rule amendments may make the signal more credible and allow issuers to differentiate themselves based on variation in the scope of a recovery policy.

requirements, issuers would likely incur legal and consulting fees to develop policies that comply with the proposed requirements and to modify the compensation packages of executive officers to conform to those policies. Moreover, even those issuers that already have recovery policies would likely incur some costs to revise those policies to comply with the proposed rule requirements. We note, however, that those issuers that currently have recovery policies similar to the proposed rule requirements likely would not incur significant additional costs. While we do not have the data to quantify the implementation costs, we expect that these costs will vary with the complexity of the compensation practices of the issuer as well as the number of executive officers the recovery policy will apply to. In addition to these implementation costs, issuers also would incur direct costs to provide the required disclosures about their compensation recovery policies, including costs to tag the required disclosure in XBRL format, as described above. For purposes of our Paperwork Reduction Act (PRA) Analysis, we estimate that the proposed disclosure requirement would impose a minimal internal burden of approximately one hour. If an issuer is required to recover erroneously awarded compensation, the issuer would incur a direct cost to prepare and disclose the information required by proposed Item 402(w) (and for registered management investment companies, new Item 12 to Form N-CSR and Item 22 (b)(20) of Schedule 14A) and the corresponding narrative. For purposes of our PRA, we estimate that proposed disclosure requirement would impose a burden of approximately 21 hours.[315]

There would also be costs attendant upon any recovery actions taken under the new mandated recovery policy. The proposed rule and rule amendments would require a recovery

[315] See Section IV.C, below, for a more extensive discussion of these disclosure burdens, including the monetization and aggregation across issuers of these direct costs.

policy to recover excess compensation that was paid based on the achievement of a financial reporting measure that was later restated. The issuer would likely face costs to calculate the amount to be recovered. This could be done internally or the issuer could choose to retain an accountant or other expert to calculate this amount. The costs of calculating the amount to be recovered likely will vary depending on the nature of the restatement, the type of compensation involved and the periods affected. Given this variation, it is difficult to derive a precise estimate of these costs; however, we believe that if outside professionals are retained to assist with the calculations, they will likely charge between $200 and $400 per hour for their services.[316] Whatever the precise costs, we note they are likely to be significantly less than the costs associated with performing the restatement itself.

Depending on the circumstances, there may be other costs associated with enforcing the mandatory recovery policy. For example, the issuer may incur costs to trace specific shares to determine if the executive sold shares that were awarded based on an erroneous financial reporting measure. If the current or former executive officer is unwilling to return excess incentive-based compensation, the issuer may incur legal expenses to pursue recovery through litigation or arbitration. If the aggregate direct costs incurred to seek recovery from an executive or former executive officer would exceed the erroneously paid incentive-based compensation, the proposed rule and rule amendments would allow discretion on the part of the board of directors in determining whether to pursue recovery. This discretion may mitigate the direct costs of enforcement to issuers. Finally, if an issuer does not take action when required under its

[316] Staff estimate is based on wage information compiled by the U.S. Bureau of Labor Statistics, Occupational Employment Statistics for the Financial Analyst occupation. As of May 2014, the median hourly wage for a financial analyst was $37.80 and the 90th percentile hourly wage was $74.36. The hourly wage is multiplied by a factor of 5.35 to account for bonuses, employee benefits, and overhead.

recovery policy, then the issuer may also incur costs associated with the listing exchange's proceedings to delist its securities.

These effects of the proposed rule and rule amendments may vary across different types of listed issuers. In particular, the effects of implementing a recovery policy could be greater (or lower) on SRCs, relative to non-SRCs, to the extent that SRCs use a higher (or lower) proportion of incentive-based compensation than other issuers. Analysis by Commission staff finds evidence that SRCs, on average, use a lower proportion of performance-based compensation than non-SRCs, suggesting a lower potential impact of the proposed rule and rule amendments on SRCs.[317] However, there is also evidence that companies that are typically required to restate financial disclosures are generally smaller than those that are not required to restate financial disclosures, suggesting that there could be a greater incidence of recoveries at SRCs.[318] One academic study suggests that the likelihood of reporting a material weakness in internal controls over financial reporting decreases as the size of the issuer increases.[319] This may imply that, relative to non-SRCs, the proposed rule and rule amendments may cause executives at SRCs to devote proportionately more resources to the production of high-quality financial reporting.

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[317] Commission staff analyzed the composition of total compensation paid to all named executive officers whose compensation was reported in the Summary Compensation Table for 50 randomly selected SRCs and 50 randomly selected non-SRCs in fiscal year 2013. Staff found that, on average, SRCs pay 60 percent of total compensation in base salary versus 36 percent for non-SRCs; SRCs pay 13 percent of total compensation in stock awards versus 27 percent for non-SRCs; and SRCs pay 5 percent of total compensation in non-equity incentive plan compensation versus 16 percent for non-SRCs. Since the Summary Compensation Table does not provide sufficient information to determine if stock awards or non-equity incentive plan compensation would constitute "incentive-based compensation" as defined in the proposed rule, these differences should be taken as maximum estimated differences of incentive-based compensation for named executives. Staff did not find significant differences between SRCs and non-SRCs in the percent of compensation paid as a bonus, in option awards, in nonqualified deferred compensation, or in other compensation. We also note that the proposed rule covers a broader set of employees than the named executives required to report within the Summary Compensation Table.

[318] See Scholz, S. 2013. "Financial Restatement: Trends in the United States: 2003–2012." Center for Audit Quality.

[319] See Doyle, Ge, and McVay *Determinants of weaknesses in internal control over financial reporting* Journal of Accounting and Economics 44 (2007) 193-223.

Finally, to the extent that implementation of the proposed rule and rule amendments entails fixed costs, SRCs, because of their smaller size, would incur a greater proportional compliance burden than larger issuers.

The proposed rule and rule amendments also may affect EGCs differently than non-EGCs. Relative to non-EGCs, EGCs can be characterized as having higher expected growth in the future and potentially higher risk investment opportunities.[320] As such, relative to non-EGCs, the market valuations of EGCs may be driven more by future prospects than by the value of current assets. As discussed previously, a recovery policy could reduce the incentive of an executive officer to invest in certain value-enhancing projects that may increase the likelihood of a material accounting error. The reduced incentive of executive officers could have a greater adverse effect for EGCs, relative to non-EGCs, to the extent that executives at EGCs are more likely to forgo value-enhancing growth opportunities as a result of the proposed rule and rule amendments, which as discussed above, may have a larger impact on the market value of equity of EGCs, relative to non-EGCs. However, EGCs also tend to be smaller than non-EGCs,[321] which may imply that EGCs have a higher likelihood of an accounting restatement and a higher likelihood of reporting a material weakness in internal controls over financial reporting. Similar

[320] In an analysis of 270 EGCs with fiscal year 2013 data available in the Standard & Poor's Compustat and the CRSP monthly stock returns databases, Commission staff found that on average EGCs have higher research and development expenses as a percent of total assets. Further, on average EGCs have a lower book-to-market ratio, which is indicative of shareholders expecting higher than average growth in the future. For this analysis staff set book-to-market to the 0.025 and 0.975 percentile for values outside of that range; staff set research and development to the 0.975 percentile for values about that level; and staff restricted the analysis to companies that issued common equity and were listed on NYSE, NYSE MKT, or NASDAQ.

[321] Using the same dataset referenced in note 322 above, staff found that the average market capitalization of EGCs is approximately $1.08 billion while the average market capitalization of non-EGCs is approximately $6.09 billion. Staff also found that the smallest EGCs tend to be similar in market capitalization to the smallest non-EGCs, with the 10th percentile of the distributions of the market capitalization of EGCs and non-EGCs being approximately $48 million and $45 million, respectively. Conversely, staff found that the largest EGCs tend to have substantially lower market capitalizations than the largest non-EGCs, with the 90th percentile of the distributions of the market capitalization of EGCs and non-EGCs being approximately $2.49 billion and $11.59 billion.

to SRCs, this may imply that, relative to non-EGCs, the proposed rule and rule amendments may cause executives at EGCs to devote proportionately more resources to the production of high-quality financial reporting.

4. Potential Effects on U.S. Exchanges

Proposed Rule 10D-1 would affect U.S. exchanges by requiring them to adopt listing standards that prohibit the initial or continued listing of an issuer that does not comply with the proposed rule and rule amendments. The requirement places a direct burden on exchanges to amend applicable listing standards. This burden could involve deploying legal and regulatory personnel to develop listing standards that comply with the proposed rule requirements. Moreover, the exchanges are likely to incur some costs associated with tracking the compliance of each issuer. We anticipate these costs to be minimal as exchanges likely already have robust compliance tracking systems and personnel that are dedicated to ensuring listing standards are met. Finally, if an issuer chooses not to implement a recovery policy or does not take action when required under its recovery policy, the exchanges would incur costs to enforce the listing standards required by the proposed rule and rule amendments. This would also result in a loss of the revenue associated with the delisted issuer.

In the event that issuers alter their decisions regarding where to list due to the proposed rule and rule amendments, revenue of U.S. exchanges may be affected. For example, there could be revenue effects for U.S. exchanges if issuers choose to list their securities on a foreign exchange without such a compensation recovery policy requirement. More generally, if the mandated listing requirements are perceived to be particularly burdensome for listed issuers, this could adversely impact the competitive position of U.S. exchanges vis-à-vis those foreign exchanges that do not enforce similar listing standards. However, given the costs associated with transferring a listing and the broad applicability of the proposed rule to securities listed on U.S. exchanges, we do not believe it is likely that the proposed rule requirements would compel a typical issuer in the short-term to find a new trading venue not subject to these requirements. The proposed rule and rule amendments may result in a loss of potential revenue to exchanges to the extent that issuers, who would have decided to list on an exchange in the absence of the proposed rule requirements, choose to forgo listing or delay listing until the issuers' circumstances change.[322] The magnitude of this effect on exchanges is not quantifiable given the absence of data. It could be significant because the loss in potential revenue from the total number of issuers that have chosen to forgo or delay listing aggregates over time, thus having lasting impact on the exchanges' revenue.

While we believe the typical issuer is unlikely to transfer listing in the short-term as a result of the proposed rule and rule amendments, the potential response of foreign issuers is less clear. On one hand, by virtue of listing on a U.S. exchange, a foreign issuer has demonstrated willingness to list outside of the issuer's home country. The issuer presumably chose to list on a U.S. exchange because the particular U.S. exchange is an advantageous trading venue for the issuer's securities. Although the direct costs are not expected to be substantial, the proposed rule and rule amendments would increase the compliance burden on listed issuers and could thereby potentially reduce the advantage of listing on a U.S. market. As a result, foreign issuers could choose to delist from U.S. exchanges. Further, foreign issuers that are not currently listed on U.S. exchanges, but are considering listing on a non-home country exchange, may choose to list

[322] We note that capital formation could be hindered if an issuer chooses to forgo or delay listing because of the proposed rule and rule amendments and the alternative methods of raising capital result in less liquid securities being issued or less thorough disclosures being required. We also note that other factors may affect the decision for an issuer to list and any effect from the proposed rule and rule amendments would be incremental to these other factors.

on a foreign exchange because of the increased burden of our proposed rule and rule amendments. At the same time, we understand that many foreign issuers list on a U.S. exchange to signal their high quality, which is achieved by subjecting themselves to more rigorous corporate governance rules and regulations. As a result, many foreign issuers may gain the ability to raise capital at a reduced cost compared to their home market by listing on U.S. exchanges. Hence, some foreign issuers seeking access to U.S. capital markets may view the requirements as beneficial. Therefore, the revenue effect on U.S. exchanges resulting from the behavior of foreign issuers is unclear, because while some foreign issuers may choose to delist as a result of the proposed rule and rule amendments, others may choose to list because of them.

Finally, the proposed rule and rule amendments apply to all issuers who list securities on a national securities exchange. As such there are unlikely to be competitive effects between national securities exchanges due to all national securities exchanges being affected by the proposed rule requirements.

5. Indemnification and Insurance

The benefits discussed above would result from an executive's changes in behavior as a result of incentive-based compensation being at risk for recovery should a material accounting error occur. These benefits would be substantially undermined if the issuer were able to indemnify the executive for the loss of compensation. Moreover, shareholders would bear the cost of providing such indemnification. Therefore, the proposed rule and rule amendments expressly prohibit listed issuers from indemnifying executives against the loss of erroneously awarded compensation or paying or reimbursing executives for insurance premiums to cover losses incurred under the recovery policy.

Although reimbursement of insurance premiums by issuers would be prohibited, the insurance market may develop a policy that would allow an executive, as an individual, to purchase insurance against the loss of incentive-based compensation when the material accounting error is not attributable to the executive. In that event, an executive would be able to hedge the risk that results from a recovery policy. If an executive purchased this type of insurance policy, the benefits of the issuer's recovery policy could be reduced to the extent that insurance reduces the executive's incentive to ensure accurate financial reporting. However, to the extent an insurance policy does not cover losses resulting from the recovery of compensation attributed to a material accounting error that resulted from inappropriate actions by the insured executive, then incentives would remain for the executive to ensure accurate financial reporting.

The development of this type of private insurance policy for executives would also have implications for issuers. Overall, it could make it less costly for an issuer to compensate an executive after implementing a recovery policy. Without insurance, an issuer that implemented a recovery policy would likely have to adjust compensation to account for the loss in expected incentive-based compensation in addition to the increased uncertainty in incentive-based compensation. If an active insurance market develops such that the executive could hedge against the uncertainty caused by the recovery policy, then market-determined compensation packages would likely increase to cover the cost of such policy. While the proposed rule and rule amendments explicitly prohibit issuers from reimbursing an executive for the cost of such insurance policy, a market-determined compensation package would likely account for the hedging cost and incorporate it into the base salary of the executive's compensation. This increase would likely be less than the increase in the market-determined compensation packages if an insurance policy was unavailable because a risk averse executive would no longer need to bear recovery policy induced uncertainty.

C. Alternatives

Below we discuss possible alternatives to the proposed rule and rule amendments we considered and their likely economic effects.

1. Exemptions for Certain Categories of Issuers

We considered exempting (or permitting the exchanges to exempt) SRCs and EGCs from proposed Rule 10D-1. As discussed above, the proposed rule and rule amendments may impose certain disproportionate costs on SRCs and EGCs. However, SRCs and EGCs may have an increased likelihood of reporting a material accounting error and may be more likely to report a material weakness in internal controls over financial reporting, due to their smaller size relative to non-SRCs and non-EGCs. As such, we believe the benefits of the proposed rule and rule amendments may be particularly salient for these categories of issuers. For these reasons, SRCs or EGCs would not be exempt from the proposed rule and rule amendments.

One commenter suggested that we consider exempting FPIs, arguing that home countries would generally have a greater interest in determining whether issuers should have recourse against executives.[323] As discussed previously in the context of foreign issuers generally, the potential effect of the proposed rule and rule amendments on FPIs is difficult to predict. On the one hand, due to the potential differences in home country law, the proposed rule requirements may be especially burdensome for FPIs relative to non-FPIs.[324] On the other hand, there is

[323] See letter from the American Bar Association.

[324] We note that if recovery of excess incentive-based compensation would violate home country law, the proposed rule and rule amendments permit the board of directors discretion to forgo recovery as impracticable, subject to certain conditions.

evidence that many FPIs may be listing on U.S. exchanges in part in order to credibly signal to investors their willingness and ability to be subjected to stricter governance standards.[325] While FPIs may face a relatively higher burden from the proposed rule and rule amendments, they also may experience a relatively higher benefit.

2. Excluding Incentive-Based Compensation Tied to Stock Price

As discussed above, the proposed rule and rule amendments may result in issuers incurring significant costs to recover incentive-based compensation tied to stock price. If incentive-based compensation tied to stock price were excluded from the proposed rule and rule amendments, issuers would not incur the costs associated with recovery. However, a significant component of the total performance-based compensation would be excluded from the scope of the proposed rule and rule amendments without generating the related potential benefits. In addition, the exclusion of performance-based compensation tied to stock price would provide issuers with an incentive to shift compensation away from forms subject to recovery to forms tied to market-based metrics such as stock price and TSR that would not be subject to recovery.

The economic effect of any incentive to shift away from compensation subject to recovery is difficult to predict due to the nature of incentive-based compensation tied to stock price. On one hand, incentive-based compensation tied to metrics that are market-based, such as stock price or TSR, could be highly correlated with the interests of shareholders and therefore may be beneficial to shareholders. On the other hand, because market-based measures may be influenced by factors that are unrelated to the performance of the executive officer, these metrics

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[325] See Doidge, Karolyi, and Stulz *Why Do Foreign Firms Leave U.S. Equity Markets?* The Journal of Finance, Vol. LXV, No. 4, August 2010.

may not fully capture or represent the effort and actions taken by the executives. In particular, market-based measures incorporate expectations about future earnings, which may not be closely tied to the executive officer's current performance. In contrast, the use of accounting-based measures, such as those derived from revenue, earnings, and operating income, can be tailored to match a specific performance period and provide direct measures of financial outcomes.[326] To this end, accounting-based measures of performance – although not directly tied to issuer value enhancement – may better capture the effect of an executive's actions during the relevant performance period. Therefore, if incentive-based compensation tied to stock price was excluded, the incentive to substitute away from accounting-based measures to market-based measures of performance may result in compensation that is less tied to the consequences of an executive's actions during the performance period.

The optimal compensation package likely contains a mix of incentive-based compensation tied to market-based measures and accounting-based measures. Empirically, the use of market-based performance metrics is more prevalent in long-term incentive plans than in short-term incentive plans.[327] Using market-based measures of performance in short-term incentive plans may be undesirable for the executive in that the stock price may be volatile and may not reflect the executive's efforts to enhance firm value in the performance period. The relatively higher use of market-based measures in long-term incentive plans could reflect that in the long-term the executive's efforts to enhance firm value may be more likely to be incorporated in the market value of the firm. Short-term and long-term performance-based

[326] Six of the eight most frequently used metrics to award compensation in short-term incentive plans were accounting-based measures. Those measures are earnings, revenue, operating income, EBITDA, cash flow, and return on capital. See Equilar *Measuring Short-Term and Long-Term Performance in 2012*.

[327] See Equilar *Measuring Short-Term and Long-Term Performance in 2012*.

compensation may act as complements, with the different performance measures used to award each type reflecting the compensation committee's effort to align the executive's interests with those of the shareholders. The exclusion of incentive-based compensation tied to stock price may affect the relative mix of short-term and long-term performance-based compensation, or the performance measures that each type is linked to, and as such a recovery policy may have large economic effects through a change in the incentives of the executive.

3. Other Alternatives Considered

One commenter suggested that the Commission specifically authorize the use of a nonqualified deferred compensation plan (e.g., a "holdback plan" or "bonus bank") to aid in the recovery of erroneously awarded incentive-based compensation.[328] A bonus bank would likely reduce the enforcement costs of recovering erroneously awarded incentive-based compensation. On the other hand, a bonus bank may further augment any increase in compensation necessary to offset the expected cost to the executive of a recovery policy. This is due to the executive not having access to the funds she has earned and having to delay consumption that would otherwise be possible. Further, as the commenter acknowledged, a bonus bank implicitly makes the executive a creditor to the issuer, resulting in reduced risk-taking incentives for the executive. While for some companies reduced risk-taking incentives may be value increasing, for other companies reduced risk-taking incentives may be value decreasing. Further, by making the executive a creditor to the issuer, a bonus bank reduces the incentive alignment between equity holders and the executive officer.

One commenter suggested that the Commission also require issuers to recover a proportionate amount of the compensation tied to qualitative variables or board judgment after a

[328] See letter from Clark Consulting.

material accounting error.[329] Relative to the proposed rule and rule amendments, this alternative implementation would reduce the incentive to alter the composition of an executive's compensation package to more heavily weight qualitative variables or board judgment, while increasing the incentive to more heavily weight base salary as well as performance-based compensation tied to metrics other than financial reporting measures. To the extent that performance compensation based on qualitative variables and board judgment allows the board to compensate the executive officer for performance that is otherwise difficult to measure, the reduced weight on this form of performance-based compensation could make it more difficult for the board to align the executive officer's interests with those of the shareholders. On the other hand, reduced weight on this form of performance-based compensation could make it easier for shareholders to understand the incentives of the executive officer. Because a greater amount of performance-based compensation would be at risk for recovery, implementing this alternative implementation could also increase the amount of expected compensation the executive officer would require in order to voluntarily bear the increased uncertainty.

D. Request for Comment

We request data to quantify the costs and benefits described throughout this release. We seek estimates of these costs and benefits, as well as any costs and benefits not already identified, that may result from the adoption of the proposed rule and rule amendments. We also request qualitative feedback on the nature of the economic effects, including the benefits and costs, we have identified and any benefits and costs we may have overlooked.

To assist in our consideration of the economic effects of the proposed rule and rule amendments, we request comment on the following:

[329] See letter from AFL-CIO.

1. We request comment on all aspects of the economic effects, including the costs and benefits of the proposed rule and rule amendments, and identification and assessment of any effects not discussed herein. In addition, we seek estimates and views regarding these costs and benefits for particular types of issuers, including SRCs, EGCs, FPIs, registered management investment companies, and issuers that only have listed debt or preferred equity securities, as well as the costs or benefits for any other types of issuers that may result from the adoption of these proposed amendments.
2. What, if any, effects on financial reporting or executive compensation practices might arise from the requirement for listed issuers to recover erroneously awarded incentive-based compensation as proposed?
3. Would proposed Rule 10D-1 lead to higher quality financial reporting? If so, explain how this would occur, and how the rule might be revised to mitigate any adverse unintended consequences?
4. Would proposed Rule 10D-1 incentivize listed issuers to conclude that a material error is not material in order to avoid recovery of incentive-based compensation? Would the proposed rule and rule amendments incentivize listed issuers to delay investigating or reporting a material error?
5. What is the likely effect of the requirement on executive compensation practices of listed companies, and how would this effect likely vary according to the issuer's size or line of business?
6. What is the likely burden that listed issuers would incur to modify the compensation packages of executive officers?

7. What would be the burden if issuers were required to recover only the amount of excess incentive-based compensation tied to accounting-based performance metrics? Would the burden be different in the case of recovery of excess incentive-based compensation tied to market-based performance metrics? What are the benefits of each approach?
8. What implementation issues, if any, would issuers encounter in conducting an event study or otherwise establishing the "but-for" price?
9. What is the cost of establishing a "but for" price and determining the amount of excess incentive-based compensation to be recovered? What factors affect the determination of reasonable estimates of the "but for" price and of this amount? Would issuers seek expert help in making such determinations? If so, what would be the costs to issuers of retaining such experts?
10. Would it be more difficult for exchanges to monitor compliance with the proposed rule and rule amendments for compensation tied to market-based performance metrics? Is the documentation required to support the analyses of the issuer sufficient for compliance monitoring? If not, what other documentation should be required?
11. Would there be any significant transition costs imposed on listed issuers as a result of the proposals, if adopted? Please be detailed and provide quantitative data or support, as practicable.
12. How is this rulemaking likely to affect the market for executive officers?
13. What is the likely effect of this rulemaking on the decision to be a listed issuer in the United States, and how does this effect vary according to the size or line of business of the issuer?

14. Are there additional alternatives to the proposals we should consider that would satisfy the requirements of new Section 10D of the Exchange Act? If so, please describe.

IV. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the proposed rule and rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[330] The Commission is submitting the proposed rule and rule amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[331] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. The titles for the collections of information are:[332]

"Regulation S-K" (OMB Control No. 3235-0070);

"Regulation 14A and Schedule 14A" (OMB Control No. 3235-0059);

"Regulation 14C and Schedule 14C" (OMB Control No. 3235-0065);

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

"Form 20-F" (OMB Control No. 3235-0288);

"Form 40-F" (OMB Control No. 3235-0381);

"Rule 20a-1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations" (OMB Control No. 3235-0158); and

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[330] 44 U.S.C. 3501 et seq.

[331] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[332] The paperwork burden from Regulation S-K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S-K.

"Form N-CSR" under the Securities Exchange Act of 1934 and under the Investment Company Act of 1940, Certified Shareholder Report of Registered Management Investment Companies" (OMB Control No. 3235-0570).

Regulation S-K was adopted under the Securities Act and the Exchange Act. Regulations 14A and 14C and the related schedules, Form 10-K, Form 20-F and Form 40-F were adopted under the Exchange Act. Rule 20a-1 was adopted under the Investment Company Act, and Form N-CSR was adopted under the Exchange Act and Investment Company Act. The regulations, schedules and forms set forth the disclosure requirements for proxy and information statements and annual reports filed by issuers to help shareholders make informed voting and investment decisions. Our proposed rule and rule amendments to existing regulations, schedules and forms are intended to implement new Section 10D of the Exchange Act.

The hours and costs associated with preparing and filing the forms and preparing, filing and sending the schedules constitute reporting and cost burdens imposed by each collection of information. Compliance with the amendments is mandatory. Responses to the information collections will not be kept confidential and there is no mandatory retention period for the information disclosed.

B. Summary of Proposed Rule and Rule Amendments

We are proposing new Rule 10D-1 under the Exchange Act and amendments to Items 601, 402 and 404 of Regulation S-K, Schedule 14A, Form 20-F, Form 40-F, and Form N-CSR to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which added Section 10D to the Securities Exchange Act of 1934. Section 10D requires the Commission to adopt rules directing the exchanges and associations to prohibit the listing of any security of an issuer that is not in compliance with Section 10D's requirements concerning disclosure of the issuer's policy on incentive-based compensation and recovery of erroneously awarded compensation. In accordance with the statute, proposed Rule 10D-1 directs the exchanges to establish listing standards that, among other things, require each issuer to adopt and comply with a policy providing for recovery, under certain circumstances, of incentive-based compensation received by current or former executive officers and to file all disclosure with respect to that policy in accordance with Commission rules.

To implement Section 10D(b)(1), we are proposing to add new disclosure provisions to Items 601 and 402 of Regulation S-K, Schedule 14A, Form 20-F, Form 40-F, and Form N-CSR. The new disclosure provisions would require each listed issuer to file the issuer's policy, if applicable, regarding recovery of incentive-based compensation from its executive officers as an exhibit to its Exchange Act annual report or, in the case of a listed registered management investment company, its Form N-CSR annual report. A new instruction to the Summary Compensation Table would require that any amounts recovered pursuant to the listed issuer's policy reduce the amount reported in the applicable column and total column for the fiscal year in which the amount recovered initially was reported.

In addition, if during the last completed fiscal year, either a restatement was completed that required recovery of excess incentive-based compensation pursuant to a listed issuer's recovery policy, or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, proposed Item 402(w) would require the listed issuer to disclose:[333]

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[333] See proposed Item 402(w) of Regulation S-K, proposed Item 6.F of Form 20-F, and proposed Paragraph (17) of Paragraph B of Form 40-F. We also are proposing to amend the instructions to Items 404(a) of Regulation S-K so that a listed issuer that complies with Item 402(w) disclosure requirements would not need to disclose any incentive-based compensation recovery pursuant to those requirements. We are also proposing to amend Form N-CSR and

- For each restatement,
  - The date on which the listed issuer was required to prepare an accounting restatement;
  - The aggregate dollar amount of excess incentive-based compensation attributable to the restatement;
  - The estimates used to determine the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and
  - The aggregate dollar amount of excess incentive-based compensation that remained outstanding as of the end of the last completed fiscal year;
- The name of each person, if any, from whom during the last completed fiscal year the listed issuer decided not to pursue recovery, the amount forgone from each such person, and a brief description of the listed issuer's reasons for not pursuing recovery; and
- The name of, and amount due from, each person from whom, at the end of its last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the person owed.

We propose that the same disclosure requirements apply to listed U.S. issuers and listed foreign private issuers, including MJDS filers. These disclosure requirements would increase the amount of information that listed U.S. issuers and listed foreign private issuers must compile and disclose in their schedules and forms. For listed U.S. issuers, other than registered management investment companies, the proposed amendments to Items 402 and 601 of Regulation S-K would

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Item 22 of Schedule 14A to require registered management investment companies that would be subject to Rule 10D-1 to provide information that would mirror the disclosure requirements of proposed Item 402(w).

require additional disclosure in Exchange Act annual reports and proxy or information statements filed on Schedule 14A or Schedule 14C relating to an annual meeting of shareholders, or a special meeting in lieu of an annual meeting, at which directors are to be elected and would increase the burden hour and cost estimates for each of those forms. For a listed management investment company registered under the Investment Company Act of 1940, the proposed amendments to Form N-CSR and Schedule 14A would require additional disclosure and would increase the burden hour and cost estimates associated with Form N-CSR and Rule 20a-1, if the registered investment company pays incentive-based compensation. For a listed foreign private issuer filing an annual report on Form 20-F, Form 40-F or, if a foreign private issuer elects to use U.S. registration and reporting forms, on Form 10-K, the proposed amendments to those forms and the proposed amendment to Item 402(a)(1), respectively, would require additional disclosure in annual reports and would increase the burden hour and costs estimates for each of these forms. The disclosure required by proposed Item 402(w), proposed paragraph 22(b)(20) to Schedule 14A, proposed new Item 12 to Form N-CSR, and proposed Item 6.F of Form 20-F would be required to be block-text tagged in XBRL.

C. Paperwork Reduction Act Burden Estimates

As proposed, the information a listed U.S. issuer is required to compile and disclose regarding its policy on incentive-based compensation pursuant to Item 402(w) would supplement information that U.S. issuers that are not registered management investment companies, smaller reporting companies or emerging growth companies are already required to provide elsewhere in their executive compensation disclosure, if material. Specifically, these issuers are required to provide information relating to the compensation of the named executive officers, including policies and decisions regarding the adjustment or recovery of awards or payments if the relevant performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment.[334] With respect to registered management investment companies subject to proposed Rule 10D-1, information mirroring the proposed Item 402(w) disclosure would be included in annual reports on Form N-CSR and in proxy statements and information statements relating to the election of directors.[335] Such information would also supplement existing disclosures.

Similarly, for a listed foreign private issuer filing an annual report on Form 20-F or, if a foreign private issuer elects to use U.S. registration and reporting forms, on Form 10-K, the proposed amendments would supplement existing disclosures. Currently, Item 7.B of Form 20-F requires disclosure of transactions between the issuer and senior management of the nature and extent of any transactions that are material to the company or related party that are unusual in their nature or conditions involving services to which the company was a party. Although this disclosure requirement generally would require disclosure of the recovery of excess incentive-based compensation, it may not elicit the same information required to be provided under the proposed rule and rule amendments.

We arrived at the estimates discussed below by reviewing our burden estimates for similar disclosure and considering our experience with other tagged data initiatives. We believe that the preparation of the information required by proposed Item 402(w) and the corresponding narrative disclosure provisions is comparable to an issuer's preparation of the disclosure required

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[334] See Item 402(b)(2)(viii) of Regulation S-K.

[335] Proposed Item 12 of Form N-CSR; proposed Item 22(b)(20) of Schedule 14A. We are also proposing to amend General Instruction D to Form N-CSR to permit registered management investment companies subject to proposed Rule 10D-1 to answer the information required by proposed Item 12 by incorporating by reference from the company's definitive proxy statement or definitive information statement.

by the amendments to enhance certain aspects of proxy disclosure.[336] The amendments in that release were largely designed to enhance existing disclosure requirements. Similarly, we believe that the proposed Item 402(w) amendments would enhance the disclosure that is already required by Item 402 of Regulation S-K and disclosure that is required by Section 10D(b)(1). We believe that certain of the information required to prepare the new disclosure would be readily available to some U.S. issuers because this information, if material, is required to be gathered, determined or prepared in order to satisfy the other disclosure requirements of Item 402 of Regulation S-K. For other listed issuers, we believe that the information required to prepare the new disclosure requirement will not impose a significant burden because the issuer controls and possesses this information, which is a compilation of facts related to an issuer's implementation of its recovery policy if during the last completed fiscal year the issuer was required to recover excess incentive-based compensation or there was an outstanding balance of excess incentive-based compensation not recovered pursuant to that policy. In the Proxy Disclosure Enhancements release, we estimated that the amendments would impose on average an incremental burden of 25 hours for accelerated filers and 17 hours for non-accelerated filers to prepare their proxy and information statements. We believe the proposed disclosure regarding an issuer's policy on recovery of erroneously awarded compensation requires less new information than the amendments in the Proxy Disclosure Enhancements Release. We believe the primary cost elements for issuers preparing the proposed disclosure would be determining the types of incentive-based compensation awards an issuer grants to executive officers that could be subject to recovery

[336] See Release No. 33-9089, Proxy Disclosure Enhancements, (Dec. 16, 2009) [74 FR 68334] ("Proxy Disclosure Enhancements"). The release adopted amendments to make new or revised disclosures about: compensation policies and practices that present material risks to the company; stock and option awards of executives and directors; director and nominee qualifications and legal proceedings; board leadership structure; the board's role in risk oversight; and potential conflicts of interest of compensation consultants that advise companies and their boards of directors.

under the issuer's recovery policy and, if necessary, gathering the information regarding the application and implementation of this recovery policy if required by a restatement.

As a result, we estimate that the average incremental burden for an issuer to prepare the new narrative disclosure would be 21 hours. This estimate includes the time and cost of preparing disclosure that has been appropriately reviewed by management, in-house counsel, outside counsel and members of the board of directors, as well as block-text tagging the data in XBRL format. Because this estimate is an average, the burden could be more or less for any particular company, and may vary depending on a variety of factors, such as the degree to which companies use the services of outside professionals or internal staff and resources to tag the data in XBRL. Issuers subject to Item 402(w) would provide the required disclosures by either including the information directly in Exchange Act annual reports or incorporating the information be reference from a proxy statement on Schedule 14A or information statement on Schedule 14C. For purposes of our PRA estimates, consistent with past amendments to Item 402,[337] we have assumed that all of the burden relating to the new narrative disclosure requirements would be associated with Form 10-K, even if registrants include the new disclosure required in Form 10-K by incorporating that disclosure by reference from the proxy statement on Schedule 14A.[338]

We believe that the requirement to file a listed issuer's recovery policy as an exhibit to its annual report pursuant to proposed Item 601(b)(96) and the corresponding provisions (and for

[337] We took a similar approach in connection with the rules for Summary Compensation Table disclosure required by the 2006 amendments to Item 402. See Executive Compensation and Related Person Disclosure, Release No. 33-8732A, n. 326 (Aug. 29, 2006) [71 FR 53158].

[338] Similarly, for purposes of the PRA estimates, we are also assuming that all of the burden relating to the new narrative disclosure requirements for registered investment companies would be associated with Form N-CSR, and therefore, we are not allocating a separate burden estimate for Rule 20a-1.

registered investment companies, as an exhibit to its annual report on Form N-CSR pursuant to proposed Item 13(a)(2) of Form N-CSR) will be minimal. A listed issuer will be required simply to file the policy that it otherwise would be required to have pursuant to the listing standards of the exchange on which it lists securities. We estimate this burden to be approximately one hour.

As a result of the estimates discussed above, we estimate for purposes of the PRA that the total incremental burden on all listed issuers with respect to the proposed amendments would be 5,961 hours for internal company time and $203,700 for the services of outside professionals. The total incremental burden for Form 10-K would be 5,246 hours for internal company time and $138,600 for the services of outside professionals.[339] The total incremental burden for Form N-CSR would be 23 hours for internal company time and $2,100 for the services of outside professionals.[340] The total incremental burden for Form 20-F would be 553 hours for internal company time and $50,400 for the services of outside professionals and for Form 40-F would be

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[339] This includes one hour to file the recovery policy as an exhibit to the annual report as well as the burden associated with providing Item 402(w) disclosure, when applicable. We estimate the number of responses for filing the recovery policy based on the number of listed domestic issuers filing annual reports in 2014, or 4,206 issuers. Proposed Item 402(w) would require disclosure when a listed issuer completes a restatement that requires recovery of excess incentive-based compensation pursuant to its compensation recovery policy or when there is an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement. To estimate the burden associated with this disclosure, we looked to the number of listed issuers that filed an Item 4.02 Form 8-K (Non-Reliance on Previously Issued Financial Statements) in 2014, or 66 issuers. To calculate the total annual incremental burden arising from the new narrative disclosure, we multiplied the estimated number of annual responses (66) by 21 burden hours. We note that the number of restatements filed in any given year will vary and that, depending on the nature of their recovery efforts, certain issuers may be required to provide Item 402(w) disclosure for more than one year.

[340] We estimate seven registered management investment companies that are listed issuers and are internally managed that may have executive officers who receive incentive-based compensation. Of these seven, we assume for PRA purposes that one registered management investment company per year will be required to prepare the new narrative disclosure required by proposed new Item 12 of Form N-CSR. As indicated below, for Form N-CSR, we estimate that 75% of the burden of preparation will be carried by the registrant internally and the remaining 25% of the burden will be carried by outside professionals retained by the company at an average cost of $400 per hour. On the basis of the foregoing, we estimate an aggregate internal burden hour of 22 hours ((7 registrants x 1 hour per registrant to file the policy pursuant to proposed new Item 13(a)(2)) + (1 registrant x 21 hours per registrant to prepare the new narrative disclosure required by proposed new Item 12 x 75%) = 23 hours), and estimate an aggregate increase of $2,100 for the services of outside professionals (1 registrant x 21 hours per registrant to retain outside professionals to prepare the new narrative disclosure required by proposed new Item 12 x 25% x $400 per hour) = $2,100).

139 hours for internal company time and $12,600 for the services of outside professionals.[341] For Form 10-K and Form N-CSR we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. For Forms 20-F and 40-F we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. There is no change to the estimated burden of Regulation S-K because the burdens that this regulation imposes are reflected in our revised estimates for the forms. Similarly, there is no change to the estimated burden of Schedule 14A, Schedule 14C and Rule 20a-1 because, as noted above, the burdens associated with the proposed disclosures are allocated to Form 10-K and Form N-CSR, respectively

We derived our new burden hour and cost estimates by estimating the total amount of time it would take a listed issuer to prepare and review the disclosure requirements contained in the final rules. This estimate represents the average burden for all listed issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual listed issuers based on a number of factors, including the size and complexity of their organizations. We believe that some listed issuers will experience costs in excess of this average in the first year of compliance with the amendments and some issuers may experience less than the average costs. A summary of the proposed changes is included in the table below.

[341] Consistent with our estimates for Form 10-K, we estimate the number of responses for filing the recovery policy based on the number of listed foreign private issuers and MJDS issuers filing annual reports in 2014, or 639 issuers. To estimate the burden associated with the disclosure required when a foreign private issuer or MJDS issuer is required to pursue recovery pursuant to its policy, we looked to the number of listed foreign private issuers and MJDS issuers that restated financial statements in 2014, or 8 foreign private issuers filing on Form 20-F and 2 MJDS issuers filing on Form 40-F. To calculate the total annual incremental burden arising from the new narrative disclosure, we multiplied the estimated number of annual responses (8 and 2, respectively) by 21 burden hours and allocated the resulting burden estimate to the relevant form.

Table 1: Calculation of Incremental PRA Burden Estimates[342]

	Current Annual Responses (A)	Proposed Annual Responses (B)	Current Burden Hours (C)	Increase in Burden Hours (D)	Proposed Burden Hours (E) =C+D	Current Professional Costs (F)	Increase in Professional Costs (G)	Proposed Professional Costs =F+G
Form 10-K	8137	8137	12,198,095	5,246	12,203,089	$1,627,400,000	$138,600	$1,627,538,600
Form 20-F	942	942	623,021	553	623,795	$743,277,230	$50.400	$743,277,630
Form 40-F	205	205	22,034	139	22,425	$26,440,500	$12,600	$ 26,453,100
Form N-CSR	6,576	6,576	177,799	23	177,822	$3,189,771	$2,100	$3,191,871
Total	15,860	15,860	13,020,949	5,961	13,026,910	$2,400,257,501	$203,700	$2,400,461,201

D. Solicitation of Comments

We request comments in order to evaluate: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[343]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting

[342] The number of responses reflected in the table equals the three-year average of the number of schedules and forms filed with the Commission and currently reported by the Commission to OMB.

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

comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-12-15. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-12-15, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[344] we solicit data to determine whether the proposed rule and rule amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

[344] 5 U.S.C. 801 et seq.

Commenters should provide empirical data on (1) the potential annual effect on the economy; (2) any increase in costs or prices for consumers or individual industries; and (3) any potential effect on competition, investment or innovation.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Analysis ("IRFA") has been prepared in accordance with the Regulatory Flexibility Act.[345] This IRFA involves proposals to direct the exchanges and associations to prohibit the listing of a security of an issuer that is not in compliance with Section 10D's requirements concerning recovery of erroneously awarded compensation and to implement disclosure requirements related to the recovery of such compensation.

A. Reasons for, and Objectives of, the Proposed Action

We are proposing a new rule and rule amendments to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which adds Section 10D to the Securities Exchange Act of 1934. Section 10D requires the Commission to adopt rules directing the exchanges and associations to prohibit the listing of any security of an issuer that is not in compliance with Section 10D's requirements concerning disclosure of the issuer's policy on incentive-based compensation and recovery of erroneously awarded compensation. In accordance with the statute, the proposed rule would direct the exchanges to establish listing standards that require each issuer to adopt and comply with a policy providing for the recovery of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers, and to file all disclosure with respect to that policy in accordance with Commission rules.

[345] 5 U.S.C. 603.

The primary objective of the proposed rule and rule amendments is to require that all listed issuers have a policy in place to recover compensation based on material noncompliance with any financial reporting requirement. This policy would require executives to return erroneously awarded compensation without the need for shareholders to embark on costly litigation.[346] The disclosure requirements in the proposed rule and rule amendments are intended to promote consistent disclosure among issuers as to both the substance of a listed issuer's recovery policy and how the listed issuer implements that policy in practice.

B. Legal Basis

We are proposing the rule and rule amendments pursuant to Sections 6, 7, 10, and 19(a) of the Securities Act; Sections 10D, 13, 14, 23(a) and 36 of the Exchange Act and Sections 20, 30, and 38 of the Investment Company Act of 1940.

C. Small Entities Subject to the Proposed Action

The proposals would affect, among other entities, exchanges that list securities and listed issuers subject to our proxy rules. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[347] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Exchange Act Rule 0-10(e) provides that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (1) has been exempted from the reporting requirements of Exchange Act Rule 601;[348] and (2) is not affiliated with any person

[346] Senate Report at 135-36.

[347] 5 U.S.C. 601(6).

[348] 17 CFR 242.601.

(other than a natural person) that is not a small business or small organization, as defined under Exchange Act Rule 0-10.[349] No exchanges are small entities because none meet these criteria. Securities Act Rule 157[350] and Exchange Act Rule 0-10(a)[351] define an issuer, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed $5 million. The proposed rule and rule amendments would affect small entities that have a class of securities that are registered under Section 12(b) of the Exchange Act. We estimate that there are approximately 27 listed issuers, other than registered investment companies, that may be considered small entities. An investment company, including a business development company, is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[352] We believe that certain of the rule and rule amendments would affect small entities that are investment companies, including business development companies, with a class of securities registered under Section 12(b) of the Exchange Act. We estimate that there are approximately 13 listed investment companies, including business development companies, that may be considered small entities.

[349] 17 CFR 240.0-10(e).

[350] 17 CFR 230.157.

[351] 17 CFR 240.0-10(a).

[352] 17 CFR 270.0-10(a).

D. Reporting, Recordkeeping, and other Compliance Requirements

Under the proposals, the exchanges will be directed to prohibit the listing of an equity security of an issuer that does not comply with Section 10D's requirements concerning development and implementation of a policy requiring recovery of erroneously awarded incentive-based compensation, and disclosure of that policy. Large and small entities would be subject to the same recovery and disclosure requirements.

Proposed Rule 10D-1 would require exchanges to adopt listing standards that would require a listed issuer (including a small entity) to develop and implement a policy providing that, in the event that the issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement, the issuer will recover from any of its current or former executive officers who received incentive-based compensation during the preceding three-year period based on the erroneous data, any such compensation in excess of what would have been paid under the accounting restatement.

If during the last completed fiscal year, either a restatement was completed that required recovery of excess incentive-based compensation pursuant to the listed small entity's compensation recovery policy, or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, proposed Item 402(w) would require the listed small entity to disclose and provide in block-text tagged XBRL format:

- For each restatement,
    - The date on which the listed issuer was required to prepare an accounting restatement;
    - The aggregate dollar amount of excess incentive-based compensation attributable to the restatement; and

- The aggregate dollar amount of excess incentive-based compensation that remained outstanding as of the end of the last completed fiscal year;

- The name of each person subject to recovery of excess incentive-based compensation attributable to an accounting restatement, if any, from whom during the last completed fiscal year the listed small entity decided not to pursue recovery, the amount forgone from each such person, and a brief description of the listed small entity's reasons for not pursuing recovery; and
- The name of, and amount due from, each person from whom, at the end of its last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the small entity determined the amount the person owed.

In addition, proposed Item 601(b)(96) and the corresponding amendment to Form N-CSR would require a listed small entity to file, as an exhibit to its Exchange Act annual report or, in the case of a listed registered management investment company, its Form N-CSR annual report, its policy regarding the recovery of erroneously awarded incentive-based compensation.

The proposals will impose additional requirements on small entities in order to comply with the new listing standards and to collect, record and report the disclosures. For example, it can reasonably be expected that listed small entities would need to engage the professional services of attorneys to develop their recovery policies and would also need the services of both attorneys and accountants to implement those policies in the event of an accounting restatement. Such services will likely be needed to compute recoverable amounts, especially for incentive-based compensation based on stock price or total shareholder return metrics. Small entities also will incur costs to tag the required disclosures in XBRL format and may need to engage the services of outside professionals to assist with this process.

Our existing disclosure rules require smaller reporting companies to provide compensation information for named executive officers for the last two completed fiscal years in the Summary Compensation Table pursuant to Item 402(n) of Regulation S-K. We also believe that small entities do not typically grant their executive officers complex incentive-based compensation awards or use many different types of incentive-based compensation awards, which would significantly minimize the impact of the proposal, including the proposed reporting requirements, on small entities. To the extent a small entity may not currently be required to disclose the information the proposals require in the event there is a restatement and the restatement requires application of the small entity's recovery policy, this information should be readily available to the small entity as it controls how it implements its recovery policy. Where a small entity may be required to disclose this type of information in such filings pursuant to Item 404(a) of Regulation S-K, the proposed new instruction to Item 404 will provide that Item 404 disclosure is not required if the transaction involves the recovery of excess incentive-based compensation that is disclosed pursuant to Item 402(w).

In addition, we believe that the impact of the proposals on small entities will be lessened because the proposals apply only to listed issuers, and the quantitative listing standards applicable to issuers listing securities on an exchange, such as market capitalization, minimum revenue, and shareholder equity requirements, will serve to limit the number of small entities that would be affected.

E. Duplicative, Overlapping or Conflicting Federal Rules

As noted above, other statutes and rules administered by the Commission address the recovery of executive compensation. Section 304 of SOX provides for recovery of executive compensation when there has been material noncompliance of the issuer, as a result of misconduct, with any financial reporting measure. In addition, existing CD&A disclosure requirements call for disclosure of an issuer's policies and decisions regarding recovery of executive compensation in the event of an accounting restatement, to the extent material. Outside of the federal securities laws, EESA contains an executive compensation recovery provision applicable to financial institutions that sell troubled assets to the Secretary of the Treasury under TARP. As explained above, the proposed rule and rule amendments are generally broader in scope, and more specific in detail, than these existing provisions. For example, the proposed rule and rule amendments—unlike Section 304 of SOX—would require recovery in the event of an accounting restatement regardless of issuer misconduct. Similarly, the clawback provisions in EESA apply only to financial institutions that sold troubled assets to and have not repaid the Treasury, whereas the proposed rules apply to all listed issuers. Thus, although there may be some overlap between the proposed rule and rule amendments and these existing provisions, we do not believe the proposed rule and rule amendments would duplicate or conflict with other federal rules or statutes.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Exempting small entities from all or part of the requirements; and
- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities.

In some respects, we have used performance standards in crafting the proposals. Specifically:

- Proposed Rule 10D-1 uses a standard-based definition of "incentive based compensation" subject to recovery;
- Proposed Rule 10D-1 provides boards of directors with limited discretion to determine whether and how much compensation to pursue and broader discretion to determine the means of recovery; and
- Proposed Rule 10D-1 adopts a standard-based approach to determining the amount of excess incentive-based compensation subject to recovery.

We believe that high quality financial reporting is important for promoting investor confidence in the financial markets. The proposed rule and rule amendments would further this objective by requiring that all listed issuers have policies requiring the recovery of executive compensation that was received based on material noncompliance with financial reporting requirements. The disclosure requirements in the proposed rule and rule amendments would require clear disclosure of a listed issuer's policy on recovery of incentive-based compensation, and provide investors with useful information regarding the application of that policy. We believe that our proposed rule and rule amendments will promote consistent compliance with recovery obligations and related disclosure across all listed issuers without unduly burdening small entities. We note that the proposal provides issuers flexibility to forgo recovery in circumstances where the costs of enforcing recovery would exceed the recoverable amounts. This will help to limit costs for all issuers subject to the rule, including small entities.

Although we preliminarily believe that an exemption for small entities from coverage of the proposals would not be appropriate, we seek comment on whether we should exempt small entities from any of the proposed requirements or scale the proposed disclosure amendments to reflect the characteristics of small entities and the needs of their investors.[353]

At this time, we do not believe that different compliance methods or timetables for small entities would be appropriate. The proposals are intended to further the statutory goal of assuring that executive officers do not retain incentive-based compensation that they received erroneously. The specific disclosure requirements in the proposals will promote consistent disclosure among all issuers, including small entities. Separate compliance requirements or timetables for small entities could interfere with achieving the goals of the statute and our proposals. Nevertheless, we solicit comment on whether different compliance requirements or timetables for small entities would be appropriate, and consistent with the purposes of Section 954 of the Act.[354]

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed rule and rule amendments can achieve their objective while lowering the burden on small entities;
- The number of small entities that may be affected by the proposed rule and rule amendments;
- Whether small entities should be exempt from the rule and rule amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and

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[353] See Sections II.A.1 and II.D, above, and related requests for comment.

[354] See Section II.F, above, and related requests for comment.

- How to quantify the impact of the proposed rule and rule amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule and rule amendments are adopted, and will be placed in the same public file as comments on the proposed rule and rule amendments themselves.

VII. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED AMENDMENTS AMENDMENTS

The amendments contained in this release are being proposed under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act, Sections 10D, 13, 14, 23(a) and 36 of the Exchange Act, and Sections 20, 30, and 38 of the Investment Company Act of 1940.

List of Subjects

17 CFR Parts 229, 240, 249 and 274

Reporting and recordkeeping requirements, Securities, Investment companies.

TEXT OF THE PROPOSED AMENDMENTS

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

1. The general authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-

1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

2. Further amend §229.402, as proposed at 78 FR 60559 [Oct. 1, 2013] and 80 FR 26329 [May 7, 2015], by:

a. revising paragraph (a)(1);

b. adding Instruction 5 to paragraph (c);

c. adding Instruction 5 to paragraph (n); and

d. adding paragraph (w).

The revision and additions read as follows:

§229.402 (Item 402) Executive compensation.

(a) General--

(1) Treatment of foreign private issuers. A foreign private issuer will be deemed to comply with this Item if it provides the information required by Items 6.B, 6.E.2 and 6.F of Form 20-F (17 CFR 240.220f), with more detailed information provided if otherwise made publicly available or required to be disclosed by the issuer's home jurisdiction or a market in which its securities are listed or traded, or paragraph (17) of General Instruction B of Form 40-F (17 CFR 240.240f), as applicable. A foreign private issuer that elects to provide domestic Item 402 disclosure shall provide the disclosure required by Item 402(w) in its annual report or registration statement, as applicable.

* * * * *

(c) * * *

Instructions to Item 402(c). * * *

5. Any amounts recovered pursuant to a listed registrant's erroneously awarded compensation recovery policy shall reduce the amount reported in the applicable Summary Compensation Table column for the fiscal year in which the amount recovered initially was reported as compensation, and shall be identified by footnote.

* * * * *

(n) * * *

Instructions to Item 402(n). * * *

5. Any amounts recovered pursuant to the erroneously awarded compensation recovery policy of a smaller reporting company that is a listed registrant shall reduce the amount reported in its applicable Summary Compensation Table column for the fiscal year in which the amount recovered initially was reported as compensation, and shall be identified by footnote.

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(w) <u>Disclosure of a listed registrant's action to recover erroneously awarded compensation</u>. If at any time during the last completed fiscal year either a restatement that required recovery of excess incentive-based compensation pursuant to the listed registrant's compensation recovery policy was completed or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, the listed registrant shall provide the following information:

(1) For each restatement:

(i) The date on which the listed registrant was required to prepare an accounting restatement, as defined in 17 CFR 240.10D-1(c)(2);

(ii) The aggregate dollar amount of excess incentive-based compensation attributable to such accounting restatement;

(iii) The estimates that were used in determining the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and

(iv) The aggregate dollar amount of excess incentive-based compensation that remains outstanding at the end of the last completed fiscal year;

(2) If during the last completed fiscal year the listed registrant decided not to pursue recovery from any individual subject to recovery of excess incentive-based compensation attributable to an accounting restatement, for each such individual, the name and amount forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery;

(3) The name of each individual from whom, as of the end of the last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the individual owed, and the dollar amount of outstanding excess incentive-based compensation due from each such individual; and

(4) The disclosure required to be provided pursuant to this paragraph (w) shall appear with, and in the same format as, the rest of the disclosure required to be provided pursuant to this Item 402 and, in addition, shall be electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard in accordance with the EDGAR Filer Manual (17 CFR 232.11) as an exhibit to definitive Schedule 14A (17 CFR 240.14a-101) or definitive Schedule 14C (17 CFR 240.14c-101), as applicable, and Form 10-K (17 CFR 249.310). The XBRL format disclosure required to be provided pursuant this paragraph (w) must be block-text tagged.

<u>Instructions to Item 402(w)</u>.

1. A listed registrant is a registrant that had a class of securities listed on a national securities exchange registered pursuant to section 6 of the Exchange Act (15 U.S.C. 78f) or a national securities association registered pursuant to section 15A of the Exchange Act (15 U.S.C. 78o-3) at any time during its last completed fiscal year.

2. A compensation recovery policy is the policy required by the listing standards adopted pursuant to 17 CFR 240.10D-1.

3. Excess incentive-based compensation is the erroneously awarded compensation computed as provided in 17 CFR 240.10D-1(b)(1)(iii) and the applicable listing standards for the listed registrant's securities.

4. For Item 402(w)(1), if the aggregate dollar amount of excess incentive-based compensation has not yet been determined, disclose this fact and explain the reason(s).

5. The information required by Item 402(w) must be disclosed only in proxy or information statements that call for Item 402 disclosure and the listed registrant's annual report on Form 10-K. The information required by this Item 402(w) will not be deemed to be incorporated by reference into any filing under the Securities Act, except to the extent that the listed registrant specifically incorporates it by reference.

* * * * *

3. Amend §229.404 by:

a. removing "or" at the end of Instruction 5.a.i. to the Instructions to Item 404(a);

b. removing the "." and adding in its place ";or" in Instruction 5.a.ii. to the Instructions to Item 404(a); and

c. adding Instruction 5.a.iii. to the Instructions to Item 404(a), to read as follows:

§229.404 (Item 404) Transactions with related persons, promoters and certain control persons.

* * * * *

Instructions to Item 404(a). * * *

5.a. * * *

iii. The transaction involves the recovery of excess incentive-based compensation, as defined in Instruction 3 to §229.402(w), that is disclosed pursuant to Item 402(w) (§229.402(w)).

* * * * *

4. Amend §229.601 by

a. revising the exhibit table in paragraph (a); and

b. adding paragraphs (b)(96) and (b)(97), to read as follows:

§229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table

* * * * *

Exhibit Table

	Securities Act Forms										Exchange Act Forms					
	S-1	S-3	SF-1	SF-3	S-4[1]	S-8	S-11	F-1	F-3	F-4[1]	10	8-K[2]	10-D	10-Q	10-K	ABS-EE

* * * * *

(95) * * *																

(96) Listed Registrant Policy Relating to Recovery of Erroneously Awarded Compensation															X	
(97) Listed Registrant Compensation Recovery Disclosure under Item 402(w) of Regulation S-K in XBRL Electronic Format															X	
(98) [Reserved]																

* * * * *

(b) * * *

(96) Listed Registrant Policy Relating to Recovery of Erroneously Awarded Compensation. A listed registrant must provide as an exhibit to its Exchange Act annual report the policy required by the applicable listing standards adopted pursuant to 17 CFR 240.10D-1. For purposes of this Item, a listed registrant is a registrant that had a class of securities listed on a national securities exchange registered pursuant to section 6 of the Exchange Act (15 U.S.C. 78f) or a national securities association registered pursuant to section 15A of the Exchange Act (15 U.S.C. 78o-3) at any time during its last completed fiscal year.

(97) Listed Registrant Compensation Recovery Disclosure under Item 402(w) of Regulation S-K in XBRL Electronic Format. The compensation recovery disclosure required to

be provided by a listed registrant under Item 402(w) of Regulation S-K (§229.402(w)) in electronic format using the XBRL interactive data standard in accordance with the EDGAR Filer Manual (17 CFR 232.11). The exhibit must be block-text tagged.

* * * * *

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

5. The authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5,78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-4, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 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.

* * * * *

6. Add §240.10D-1 to read as follows:

§240.10D-1 – Listing standards relating to recovery of erroneously awarded compensation.

(a) Pursuant to section 10D(a) of the Act (15 U.S.C. 78j-4(a)):

(1) National Securities Exchanges and Associations. The rules of each national securities exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f) and each national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3), to the extent such national securities association lists securities in an automated inter-dealer quotation system must, in accordance with the provisions of this section, prohibit the initial or continued listing of any

security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(2) Implementation.

(i) Each national securities exchange and national securities association that lists securities must file with the Commission, no later than 90 days after publication of this section in the Federal Register, proposed rules or rule amendments that comply with this section. Such rules or rule amendments that comply with this section must be approved by the Commission and be effective no later than one year after publication of this section in the Federal Register.

(ii) Each listed issuer shall adopt the recovery policy required by this section no later than 60 days following the effective date of the listing standard referenced in paragraph (a)(2)(i) of this section. Each listed issuer shall comply with that recovery policy for all incentive-based compensation received by executive officers on or after the effective date of this section that results from attainment of a financial reporting measure based on or derived from financial information for any fiscal period ending on or after the effective date of this section. Each listed issuer shall provide the required disclosures in the applicable Commission filings required on or after the effective date of the listing standard referenced in paragraph (a)(2)(i) of this section.

(b) Required standards. The requirements of this section are as follows:

(1) Recovery of Erroneously Awarded Compensation. The issuer shall adopt and comply with a written policy providing that, in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover the amount of erroneously awarded incentive-based compensation as provided below. The issuer shall file all disclosures

with respect to such recovery policy in accordance with the requirements of the federal securities laws.

(i) To be subject to the issuer's recovery policy, incentive-based compensation:

(A) Must have been received while the issuer has a class of securities listed on a national securities exchange or a national securities association; and

(B) Must have been received by an individual who served as an executive officer of the issuer at any time during the performance period for that incentive-based compensation.

(ii) The issuer's recovery policy shall apply to any incentive-based compensation received during the three completed fiscal years immediately preceding the date that the issuer is required to prepare a restatement of its previously issued financial statements to correct a material error. In addition to these last three completed fiscal years, the recovery policy shall apply to any transition period (that results from a change in the issuer's fiscal year) within or immediately following those three completed fiscal years. However, a transition period that comprises a period of nine to 12 months would be deemed a completed fiscal year. A "transition period" refers to the period between the last day of the issuer's previous fiscal year end and the first day of its new fiscal year. An issuer's obligation to recover excess incentive-based compensation is not dependent on if or when the restated financial statements are filed.

(iii) The amount of incentive-based compensation subject to the issuer's recovery policy (the "erroneously awarded compensation") shall be the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the accounting restatement, and shall be computed without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement:

(A) The amount shall be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the incentive-based compensation was received; and

(B) The issuer shall maintain documentation of the determination of that reasonable estimate and provide such documentation to the exchange or association.

(iv) The issuer must recover erroneously awarded compensation in compliance with its recovery policy except to the extent that it would be impracticable to do so. Recovery would be impracticable only if the direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered, or if recovery would violate home country law. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the issuer must first make a reasonable attempt to recover that erroneously awarded compensation. The issuer shall document such reasonable attempt(s) to recover, and provide that documentation to the exchange or association. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the issuer must obtain an opinion of home country counsel, not unacceptable to the applicable national securities exchange or association, that recovery would result in such a violation, and shall provide such opinion to the exchange or association. In addition, the home country law must have been adopted in such home country prior to the date of publication in the Federal Register of proposed Rule 10D-1. In either case, the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, shall make any determination that recovery would be impracticable.

(v) The issuer is prohibited from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation.

(vi) An issuer that has been delisted from any national securities exchange or national securities association for failing to comply with the recovery policy required by this section may not list its securities on any national securities exchange or national securities association until the issuer comes into compliance with that policy.

(2) General Exemptions. The requirements of this section shall not apply to the listing of:

(i) A security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q-1(b)(7)(A)).

(ii) A standardized option, as defined in §240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1).

(iii) Any security issued by a unit investment trust, as defined in 15 U.S.C. 80a-4(2).

(iv) Any security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company.

(c) Definitions. Unless the context otherwise requires, all terms used in this section have the same meaning as in the Act and the rules and regulations thereunder. In addition, unless the context otherwise requires, the following definitions apply for purposes of this section:

(1) Accounting restatement. For purposes of this rule, an accounting restatement is the result of the process of revising previously issued financial statements to reflect the correction of one or more errors that are material to those financial statements.

(2) Date on which an issuer is required to prepare an accounting restatement. For purposes of Section 10D of the Act (15 U.S.C. 78j-4), the date on which an issuer is required to prepare an accounting restatement is the earlier to occur of:

(i) The date 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, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error; or

(ii) The date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements to correct a material error.

Note to paragraph (c)(2): The date specified in paragraph (c)(2)(i) of this section generally is expected to coincide with the occurrence of the event described under Item 4.02(a) of Exchange Act Form 8-K (17 CFR 249.308). Neither date specified in paragraph (c)(2) of this section is predicated on if or when a Form 8-K is filed.

(3) Executive Officer. For purposes of Section 10D of the Act (15 U.S.C. 78j-4), an executive officer is the issuer's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance),

any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parent(s) or subsidiaries shall be deemed executive officers of the issuer if they perform such policy making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust.

Note to paragraph (c)(3): Policy-making function is not intended to include policy-making functions that are not significant. If pursuant to Item 401(b) of Regulation S-K (§229.401(b)) the issuer identifies a person as an executive officer, it is presumed that the Board of Directors has made that judgment and that the persons so identified are the executive officers for purposes of Section 10D of the Act (15 U.S.C. 78j-4), as are such other persons enumerated in this paragraph (c)(3) but not in Item 401(b).

(4) Incentive-Based Compensation. For purposes of Section 10D (15 U.S.C. 78j-4), incentive-based compensation is any compensation that is granted, earned or vested based wholly or in part upon the attainment of a financial reporting measure. Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measures that are derived wholly or in part from such measures, and stock price and total shareholder return. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission.

(5) Material noncompliance. For purposes of Section 10D (15 U.S.C. 78j-4), a restatement to correct an error that is material to previously issued financial statements shall be deemed to result from material noncompliance of the issuer with a financial reporting requirement under the securities laws.

(6) Received. For purposes of Section 10D (15 U.S.C. 78j-4), incentive-based compensation is deemed received in the issuer's fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period.

7. Amend Section 240.14a-101, by adding Item 22(b)(20) and Item 25 to read as follows:

§240.14a-101 Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

Item 22. * * *

(b) * * *

(20) In the case of a Fund that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) that is required to develop and implement a policy regarding the recovery of erroneously awarded compensation pursuant to §240.10D-1(b)(1), if at any time during the last completed fiscal year either a restatement that required recovery of excess incentive-based compensation pursuant to the Fund's compensation recovery policy was completed or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, the Fund shall provide the following information:

(i) For each restatement:

(A) The date on which the Fund was required to prepare an accounting restatement, as defined in §240.10D-1(c)(2);

(B) The aggregate dollar amount of excess incentive-based compensation attributable to such accounting restatement;

(C) The estimates that were used in determining the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and

(D) The aggregate dollar amount of excess incentive-based compensation that remains outstanding at the end of the last completed fiscal year;

(ii) If during the last completed fiscal year the Fund decided not to pursue recovery from any individual subject to recovery of excess incentive-based compensation attributable to an accounting restatement, for each such individual, the name and amount forgone and a brief description of the reason the Fund decided in each case not to pursue recovery; and

(iii) The name of each individual from whom, as of the end of the last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the individual owed, and the dollar amount of outstanding excess incentive-based compensation due from each such individual.

Instructions to paragraph 22(b)(20).

1. Information provided under this paragraph is deemed to satisfy the requirements of paragraphs (b)(8) and (b)(11) of Item 22 with respect to the recovery of erroneously awarded compensation pursuant to §240.10D-1(b)(1).
2. A compensation recovery policy is the policy required by the listing standards adopted pursuant to §240.10D-1.

3. Excess incentive-based compensation" is the erroneously awarded compensation computed as provided in §240.10D-1(b)(1)(iii) and the applicable listing standards for the Fund's securities.
4. If the aggregate dollar amount of excess incentive-based compensation has not yet been determined, disclose this fact and explain the reason(s).

* * * * *

Item 25. Exhibits.

Provide the information required to be disclosed by Item 402(w) of Regulation S-K (17 CFR 229.402(w)), or Item 22(b)(20) of this Schedule 14A, in an exhibit to this Schedule 14A electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard in accordance with the EDGAR Filer Manual (17 CFR 232.11). The exhibit must be block-text tagged.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

8. The authority citation for Part 249 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78a et seq., 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 80b-11, and 7201 et seq.; 12 U.S.C. 5461 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

9. Amend Form 20-F (referenced in §249.220f) by adding Item 6.F and Instructions to Item 6.F, and adding Instruction 17 to the Instructions as to Exhibits, of Form 20-F, to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

Item 6. Directors, Senior Management and Employees

* * * * *

F. <u>Disclosure of a listed issuer's action to recover erroneously awarded compensation</u>. If at any time during the last completed fiscal year either a restatement that required recovery of excess incentive-based compensation pursuant to the listed issuer's compensation recovery policy was completed or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, the listed issuer shall, in its annual report on Form 20-F, provide the following information:

(1) For each restatement:

(i) The date on which the listed issuer was required to prepare an accounting restatement, as defined in Rule 10D-1(c)(2) under the Exchange Act (17 CFR 240.10D-1(c)(2));

(ii) The aggregate dollar amount of excess incentive-based compensation attributable to such accounting restatement;

(iii) The estimates that were used in determining the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and

(iv) The aggregate dollar amount of excess incentive-based compensation that remains outstanding at the end of the last completed fiscal year;

(2) If during the last completed fiscal year the listed issuer decided not to pursue recovery from any individual subject to recovery of excess incentive-based compensation attributable to an accounting restatement, for each such individual, the name and amount forgone and a brief description of the reason the listed issuer decided in each case not to pursue recovery; and

(3) The name of each individual from whom, as of the end of the last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the individual owed, and the dollar amount of outstanding excess incentive-based compensation due from each such individual.

(4) The disclosure required to be provided by Item 6.F shall appear with, and in the same format as, the rest of the disclosure required to be provided by Item 6 and, in addition, shall be electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard in accordance with the EDGAR Filer Manual (17 CFR 232.11) as an exhibit to this Form. The XBRL format disclosure required to be provided by this Item 6.F must be block-text tagged.

Instructions to Item 6.F.

1. For purposes of this Item, a "listed issuer" is an issuer that had a class of securities listed on a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f) or a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3) at any time during its last completed fiscal year.

2. A "compensation recovery policy" is the policy required by the listing standards adopted pursuant to Rule 10D-1 under the Exchange Act (17 CFR 240.10D-1).

3. "Excess incentive-based compensation" is the erroneously awarded compensation computed as provided in Rule 10D-1(b)(1)(iii) under the Exchange Act (17 CFR 240.10D-1(b)(1)(iii)) and the applicable listing standards for the listed issuer's securities.

4. If the aggregate dollar amount of excess incentive-based compensation has not yet been determined, disclose this fact and explain the reason(s).

5. The information required by Item 6.F must be disclosed only in annual reports and does not apply to registration statements on Form 20-F. The information required by this Item 6.F will not be deemed to be incorporated by reference into any filing under the Securities Act, except to the extent that the listed issuer specifically incorporates it by reference.

* * * * *

Item 7. Major Shareholders and Related Party Transactions

* * * * *

Instructions to Item 7.B * * *

4. Disclosure need not be provided pursuant to this Item if the transaction involves the recovery of excess incentive-based compensation that is disclosed pursuant to Item 6.F.

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

96. A listed issuer must provide as an exhibit to its Exchange Act annual report on Form 20-F the compensation recovery policy required by the applicable listing standards adopted pursuant to Rule 10D-1 under the Exchange Act (17 CFR 240.10D-1). For purposes of this paragraph, a "listed issuer" is a registrant that had a class of securities listed on a national securities exchange registered pursuant to section 6 of the Exchange Act (15 U.S.C. 78f) or a national securities association registered pursuant to section 15A of the Exchange Act (15 U.S.C. 78o-3) at any time during its last completed fiscal year.

97. The compensation recovery disclosure is required to be provided by a listed issuer under Item 6.F in electronic format using the XBRL interactive data standard in accordance with the EDGAR Filer Manual (17 CFR 232.11). The exhibit must be block-text tagged.

17 through 95 and 98 through 99 [Reserved]

* * * * *

10. Amend Form 40-F (referenced in §249.240f) by adding paragraph (17) to General Instruction B and Instructions to paragraph (17) of General Instruction B to read as follows:

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 40-F

* * * * *

(17) Recovery of erroneously awarded compensation.

(a) A listed issuer shall include as exhibit 96 the compensation recovery policy required by the applicable listing standards adopted pursuant to Exchange Act Rule 10D-1 (17 CFR 240.10D-1).

(b) If at any time during the last completed fiscal year either a restatement that required recovery of excess incentive-based compensation pursuant to the listed issuer's compensation recovery policy was completed or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, the listed issuer shall, in its annual report on Form 40-F, provide the following information:

(1) For each restatement:

(i) The date on which the listed issuer was required to prepare an accounting restatement, as defined in Exchange Act Rule 10D-1(c)(2) (17 CFR 240.10D-1(c)(2));

(ii) The aggregate dollar amount of excess incentive-based compensation attributable to such accounting restatement;

(iii) The estimates that were used in determining the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and

(iv) The aggregate dollar amount of excess incentive-based compensation that remains outstanding at the end of the last completed fiscal year;

(2) If during the last completed fiscal year the listed issuer decided not to pursue recovery from any individual subject to recovery of excess incentive-based compensation attributable to an accounting restatement, for each such individual, the name and amount forgone and a brief description of the reason the listed issuer decided in each case not to pursue recovery; and

(3) The name of each individual from whom, as of the end of the last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the individual owed, and the dollar amount of outstanding excess incentive-based compensation due from each such individual.

(4) The disclosure required to be provided by paragraph (17) of General Instruction B shall appear with, and in the same format as generally required for, the rest of the disclosure required to be provided by General Instruction B and, in addition, shall be electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard in accordance with the EDGAR Filer Manual (17 CFR 232.11) as exhibit 97 to this Form. The XBRL format disclosure required to be provided by paragraph (17) of General Instruction B must be block-text tagged.

Instructions to paragraph (17).

1. For purposes of this paragraph, a "listed issuer" is an issuer that had a class of securities listed on a national securities exchange registered pursuant to section 6 of the Exchange Act (15 U.S.C. 78f) or a national securities association registered pursuant to section 15A of the Exchange Act (15 U.S.C. 78o-3) at any time during its last completed fiscal year.

2. A "compensation recovery policy" is the policy required by the listing standards adopted pursuant to Exchange Act Rule 10D-1 (17 CFR 240.10D-1).

3. "Excess incentive-based compensation" is the erroneously awarded compensation computed as provided in Exchange Act Rule 10D-1(b)(1)(iii) (17 CFR 240.10D-1(b)(1)(iii)) and the applicable listing standards for the listed issuer's securities.

4. If the aggregate dollar amount of excess incentive-based compensation has not yet been determined, disclose this fact and explain the reason(s).

5. The information required by paragraph (17) of General Instruction B must be disclosed only in annual reports and does not apply to registration statements on Form 40-F. The information required by this paragraph (17) will not be deemed to be incorporated by reference

into any filing under the Securities Act, except to the extent that the listed issuer specifically incorporates it by reference.

* * * * *

PART 274 — FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

11. The general authority citation for Part 274 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78j-4, 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

12. Amend Form N-CSR (referenced in 17 CFR 274.128) by:

a. revising General Instruction D;

b. redesignating Item 12 as Item 13;

c. adding new Item 12;

d. redesignating paragraph (a)(2) of newly designated Item 13 (Exhibits) as paragraph (a)(4); and

e. adding paragraphs (a)(2) and (a)(3) to redesignated Item 13 (Exhibits).

The additions read as follows:

Note: The text of Form N-CSR does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-CSR

* * * *.*

GENERAL INSTRUCTIONS * * *

D. Incorporation by Reference.

A registrant may incorporate by reference information required by Items 4, 5, 12, and 13(a)(1). No other Items of the Form shall be answered by incorporating any information by reference. The information required by Items 4, 5, and 12 may be incorporated by reference from the registrant's definitive proxy statement (filed or required to be filed pursuant to Regulation 14A (17 CFR 240.14a-1 et seq.)) or definitive information statement (filed or to be filed pursuant to Regulation 14C (17 CFR 240.14c-1 et seq.)) which involves the election of directors, if such definitive proxy statement or information statement is filed with the Commission not later than 120 days after the end of the fiscal year covered by an annual report on this Form. All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: Rule 10(d) of Regulation S-K under the Securities Act of 1933 (17 CFR 229.10(d)) (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document, and limits incorporation to documents filed within the last 5 years, with certain exceptions); Rule 303 of Regulation S-T (17 CFR 232.303) (specific requirements for electronically filed documents); Rules 12b-23 and 12b-32 under the Exchange Act (additional rules on incorporation by reference for reports filed pursuant to Sections 13 and 15(d) of the Exchange Act); and Rules 0-4, 8b-23, and 8b-32 under the Investment Company Act of 1940 (17 CFR 270.0-4, 270.8b-23, and 270.8b-32) (additional rules on incorporation by reference for investment companies).

* * * * *

Item 12. Recovery of Erroneously Awarded Compensation.

In the case of a registrant that is required to develop and implement a policy regarding the recovery of erroneously awarded compensation pursuant to Rule 10D-1(b)(1) under the Exchange Act (17 CFR 240.10D-1), if at any time during the last completed fiscal year either a restatement that required recovery of excess incentive-based compensation pursuant to the registrant's compensation recovery policy was completed or there was an outstanding balance of excess incentive-based compensation from the application of the policy to a prior restatement, the registrant shall provide the following information:

(a) For each restatement:

(1) The date on which the registrant was required to prepare an accounting restatement, as defined in Rule 10D-1(c)(2) under the Exchange Act (17 CFR 240.10D-1(c)(2));

(2) The aggregate dollar amount of excess incentive-based compensation attributable to such accounting restatement;

(3) The estimates that were used in determining the excess incentive-based compensation attributable to such accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and

(4) The aggregate dollar amount of excess incentive-based compensation that remains outstanding at the end of the last completed fiscal year;

(b) If during the last completed fiscal year the registrant decided not to pursue recovery from any individual subject to recovery of excess incentive-based compensation attributable to an accounting restatement, for each such individual, the name and amount forgone and a brief description of the reason the registrant decided in each case not to pursue recovery; and

(c) The name of each individual from whom, as of the end of the last completed fiscal year, excess incentive-based compensation had been outstanding for 180 days or longer since the date the issuer determined the amount the individual owed, and the dollar amount of outstanding excess incentive-based compensation due from each such individual.

Instructions

1. The information required by this Item is only required in an annual report on Form N-CSR.

2. A "compensation recovery policy" is the policy required by the listing standards adopted pursuant to Rule 10D-1 under the Exchange Act (17 CFR 240.10D-1).

3. "Excess incentive-based compensation" is the erroneously awarded compensation computed as provided in Rule 10D-1(b)(1)(iii) under the Exchange Act (17 CFR 240.10D-1(b)(1)(iii)) and the applicable listing standards for the listed registrant's securities.

4. If the aggregate dollar amount of excess incentive-based compensation has not yet been determined, disclose this fact and explain the reason(s).

Item 13. Exhibits.

(a) * * *

(2) Any policy required by the listing standards adopted pursuant to Rule 10D-1 under the Exchange Act (17 CFR 240.10D-1) by the registered national securities exchange or registered national securities association upon which the registrant's securities are listed.

Instruction to paragraph (a)(2).

The exhibit required by this paragraph (a)(2) is only required in an annual report on Form N-CSR.

(3) Unless the information required by Item 12 is answered by incorporating by reference from the registrant's definitive proxy statement or definitive information statement pursuant to General Instruction D, provide the information required to be disclosed by Item 12 in an exhibit to this Form electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard in accordance with the EDGAR Filer manual (17 CFR 232.11). The exhibit must be block-text tagged.

Instruction to paragraph (a)(3).

The exhibit required by this paragraph (a)(3) is only required in an annual report on Form N-CSR.

* * * * *

By the Commission.

July 1, 2015

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. 75343 / July 1, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31703 / July 1, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3668 / July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16672

In the Matter of **DELOITTE & TOUCHE LLP, ALPS FUND SERVICES, INC., and ANDREW C. BOYNTON,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, 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 pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 9(f) of the Investment Company Act of 1940 ("Investment Company Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice,[2] against Deloitte & Touche LLP ("D&T"), and pursuant to

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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 . . . (2) . . . to have engaged in . . . improper professional conduct . . . .

2 Rule 102(e)(1)(ii) provides, in pertinent part, that:

Section 9(f) of the Investment Company Act as to ALPS Fund Services, Inc. ("ALPS") and Andrew C. Boynton ("Boynton") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement ("Offers"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934, Section 9(f) of the Investment Company Act of 1940, and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. Overview

This matter arises from an independence-impairing business relationship between D&T's affiliate, Deloitte Consulting LLP ("DC"), and Andrew C. Boynton, while Boynton was serving on the boards of trustees and the audit committees of three D&T SEC-registrant audit clients. At all relevant times, both D&T and DC were subsidiaries of Deloitte LLP ("Deloitte"), and "associated entities" for purposes of Rule 2-01 of Regulation S-X.[4] The DC/Boynton Relationship involved DC's acquiring from Boynton and others, and then collaborating with Boynton in implementing, a proprietary brainstorming business methodology to serve both internal and external firm clients. The relationship spanned approximately five years—from 2006 until as late as 2011—during the entirety of which Boynton served as a member of the board of trustees and of the audit committee of Fund A, Fund B and Fund C, each of which was, during the entire period, both a D&T audit client and a registered investment company. As detailed below, Respondent D&T engaged in improper professional conduct, violated Rule 2-02(b) of Regulation S-X, and caused certain reporting violations by the Funds; Respondent Boynton was a cause of the same reporting violations; and Respondent ALPS caused certain violations by the Funds of Investment Company Act Rule 38a-1.

> The Commission may censure any person, or deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in. . . improper professional conduct.

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

[4] *See* Rule 2-01(f)(2) of Regulation S-X, defining "accounting firm" to include associated entities of the firm. D&T and its associated entities, including DC, are hereinafter referred to as the "firm."

B. Respondents

Deloitte & Touche LLP is organized as a limited liability partnership under the laws of the State of Delaware that is headquartered in New York, New York, and is a subsidiary of Deloitte. Since 2003, D&T has been registered, pursuant to the Sarbanes Oxley Act of 2002, with the Public Company Accounting Oversight Board ("PCAOB"), to prepare and issue audit reports of issuers and other SEC registrants. D&T served as the auditor to each of Funds A, B and C (defined below) until March of 2012.

ALPS Fund Services, Inc. is a Colorado corporation headquartered in Denver, Colorado. At all relevant times, it has provided various services to the investment management industry, including fund administrative services to registered investment companies. At all relevant times, ALPS served as the administrator to each of Funds A, B and C, and provided ALPS employees to serve as each Fund's Chief Compliance Officer, among other positions.

Andrew C. Boynton, age 59 and a resident of Concord, Massachusetts, served on the board of trustees and the audit committee of Fund A and Fund B beginning in March 2005, and served in the same capacities for Fund C beginning in March 2006, continuing in all the foregoing roles until September 2012. At all relevant times, Boynton worked in academia and business consulting.

C. Relevant Registrants

Fund A, **Fund B** and **Fund C** are closed-end management investment companies registered with the Commission pursuant to the Investment Company Act. Launched in 2004, 2005 and 2006, respectively, each Fund is a Delaware corporation that has, at all relevant times, been headquartered in Denver, Colorado. Also at all relevant times, each Fund's common shares have been listed on the NYSE MKT LLC.

D. Other Relevant Entity

Deloitte is organized as a limited liability partnership under the laws of the State of Delaware. It is the U.S. member firm of Deloitte Touche Tohmatsu Limited, a U.K. private company limited by guarantee. Client services are performed primarily by Deloitte's subsidiaries — D&T, DC, Deloitte Tax LLP, and Deloitte Financial Advisory Services LLP — which provide audit and enterprise risk services, consulting, tax, and financial advisory services, respectively.

E. FACTS

1. Establishment and Operation of the Relationship

On May 15, 2006, at a time when Boynton was serving on the boards and audit committees of three D&T registered investment company audit clients (Fund A, Fund B and Fund C), D&T's affiliate entered into the business relationship with Boynton that is the subject of this proceeding. The relationship entailed DC's purchase from Boynton and his business partners of intellectual property rights to a brainstorming business methodology, as well as the simultaneous agreement, integral to the purchase, for Boynton to serve as a consultant to DC for a three-year period to train firm personnel in the use of the methodology and assist the firm in serving both internal and external clients using that methodology. DC engaged Boynton infrequently following the conclusion of the initial three-year term of the consulting agreement. The last client facing engagement Boynton participated in was in February 2011. During its course, the DC/Boynton Relationship yielded remuneration to Boynton exceeding 10% of both his total earnings and his net worth.

Although Deloitte's policies required an independence consultation prior to entering into a new business relationship with a consultant, an independence consultation was not performed before DC entered into the business relationship with Boynton in 2006. Nor did Deloitte discover that the required initial independence consultation had not been performed until nearly five years after the DC/Boynton relationship had been established. Nor did the firm perform the initial independence consultation's steps at any subsequent point during the relationship, whether in connection with work on individual projects, or otherwise.

In the course of the DC/Boynton Relationship, Boynton provided both internally and externally focused consulting services. Within the firm, Boynton participated in trainings and workshops to educate firm personnel — including, on at least one occasion, D&T personnel— on the use and implementation of the methodology. The firm encouraged its partners to find ways to use the methodology in serving external clients, including audit clients, and they in turn did so. In addition, partners at other member firms of Deloitte Touche Tohmatsu also used the methodology with clients on occasion. With respect to externally focused consulting services, Boynton directly participated with DC personnel in several external client workshops utilizing the methodology. DC paid over $300,000 in consulting fees to Boynton for such external client work.

2. D&T Claimed Independence From Fund A, Fund B and Fund C

For the duration of the DC/Boynton Relationship, Boynton simultaneously served on the boards of all three Funds while D&T served as the Funds' outside-auditor, thereby impairing D&T's independence. Despite the DC/Boynton Relationship coinciding with either (a) periods covered by its audits, or (b) periods during which the work on those audits was performed — or both — D&T represented it was independent in its audit reports for all three Funds for fiscal years 2007 through 2011.[5] With D&T's knowledge and consent, those audit reports, and information about the "independent" auditors, respectively, were, in turn, included in their clients' annual reports on Form N-CSR and proxy statements, both of which were filed with the Commission throughout the relevant period. In addition, D&T expressly confirmed to Funds A, B and C at the end of each affected fiscal year that it was "independent" and therefore able to serve as each client's external auditor. These written confirmations—required by PCAOB Rule 3526—did not, at any time during the relevant period, disclose the DC/Boynton Relationship.

3. The Funds' Inadequate Policies and Procedures

For its part, ALPS contractually agreed to assist the Funds in discharging their responsibilities under Rule 38a-1, which requires each Fund, with board approval, to "adopt and

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[5] D&T's fees from its audits of Funds A, B and C over these five fiscal years totaled $497,438.

implement written policies and procedures reasonably designed to prevent violation of the Federal Securities Laws by the Fund[.]" *See* Rule 38a-1 of the Investment Company Act. D&T's audit engagement letters with each of the Funds also provided that ALPS, serving as "management" to each Fund, was responsible for "assist[ing] D&T in maintaining independence." As part of their policies and procedures, each Fund's Audit Committee Charter required its audit committee to, among other things, recommend the selection, retention, or termination of the auditors and to evaluate the independence of the auditors in accordance with the Commission's rules and regulations. None of the Funds, however, adopted sufficient additional written policies and procedures reasonably designed to prevent auditor independence violations, whether aimed at preventing or detecting independence-impairing business relationships or otherwise. ALPS did, during the relevant period, circulate trustee and officer ("T&O") questionnaires that, in part, were designed to identify conflicts of interest that could bear on auditor independence (though primarily directed at determining whether the trustees were "interested persons" as that term is defined under Section 2(a)(19) of the Investment Company Act). In particular, throughout the relevant period, these questionnaires asked each T&O to identify his "principal occupation(s) and other positions." Beginning in 2009, they also asked each T&O to identify any "direct or material indirect business relationship" he had with the Funds' auditor, D&T. Despite their significance to determining whether the auditor was independent, however, business relationships with the auditor's affiliates were neither expressly covered by these questionnaires nor by any other policy or procedure. Furthermore, the Funds did not have sufficient written policies and procedures reasonably designed to prevent violations of the broader auditor independence requirements beyond prohibited business relationships between the auditor and T&Os. Finally, the Funds did not provide sufficient training to assist the Funds' board members in the discharge of their responsibilities as to auditor independence.

4. The Funds' Independence Inquiries

For his part, as a member of the three Funds' boards and audit committees, Boynton was required to complete the annual T&O questionnaires described above. During each of the relevant years, Boynton's responses to the question calling for identification of his "principal occupation(s) and other positions" did not identify the DC/Boynton Relationship. Nor, relying on his personal understanding that DC was a separate legal entity from D&T, did Boynton identify the DC/Boynton Relationship in his responses to the question, appearing in the T&O questionnaires from 2009 onward, whether he had any "direct or material indirect business relationship" with D&T. Nor, on the same ground, did Boynton's participation in any of the annual audit committee votes to retain D&T as each Fund's auditor occasion any disclosure by Boynton of his business relationship with DC. Boynton never inquired, however, whether DC's and D&T's relationship to one another carried auditor independence or other conflict-of-interest implications, despite, among other things, his having worked directly with D&T personnel (not assigned to the Funds' audits) on brainstorming methodology projects.

5. Deloitte Discovers the Independence Impairing Relationship

On November 11, 2011, as a result of monitoring procedures Deloitte implemented as part of its efforts to enhance its independence quality controls, Deloitte's national independence office identified a payment to Boynton and discovered that independence clearance of Boynton had not been obtained, and notified the DC director responsible for the payment. This step led to an inquiry which led to the identification of the fact that Boynton was both a trustee of the Funds and an individual with whom DC had a business relationship. Boynton and D&T contemporaneously alerted ALPS and/or Fund counsel, and, at the conclusion of its inquiry, D&T reported its results first to the Funds' Audit Committee, and then, on March 2, 2012, to the Commission's Office of the Chief Accountant. Two weeks later, D&T's audit relationship with the Funds ended.

F. LEGAL ANALYSIS

1. Independence Principles Governing the DC/Boynton Relationship

The basic elements of an auditor independence violation in the business-relationship context are (1) an independence-impairing relationship; (2) existing during all or part of the period covered by the audit, or the period of the audit work, or both; followed by (3) issuance of an audit report asserting the auditor's independence from the client. *See* Rule 2-01(c)(3) of Regulation S-X.[6] Business relationships with persons associated with the audit client in a decision-making capacity, such as audit client directors, officers and substantial stockholders are embraced by this prohibition. *See* Rule 2-01(c)(3). Section 6.02.02.e of the Commission's Codification of Financial Reporting Policies ("Codification") (available at 7 Fed. Sec. L. Rep. (CCH) ¶ 73,272) provides, among other things, that:

> In addition to the relationships specifically prohibited by Rule 2-01, joint business ventures, limited partnership agreements, investments in supplier or customer companies, leasing interests, (except for immaterial landlord-tenant relationships) and sales by the accountant of items other than professional services are examples of other connections which are also included within this classification.

The DC/Boynton Relationship falls within Regulation S-X's prohibition. Boynton served as a D&T audit-client board member while simultaneously serving as a subcontractor and paid consultant to DC in a direct business relationship. Although Rule 2-01(c)(3) provides an exception for "consumer in the ordinary course of business" relationships, that exception has no application to consulting relationships that, like the instant one, included Boynton being a subcontractor in the provision of services to third parties.[7]

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[6] Rule 2-01(c)(3) provides:

> An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders. The relationships described in this paragraph do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

[7] *See Ernst & Young LLP*, Initial Decision Rel. No. 249, Admin. Proc. File No. 3-10933 (April 16, 2004) at 48-49, 59 (rejecting consumer exception where auditor and its client jointly developed and marketed software), *finality order*, Securities Act Rel. No. 8413, Exchange Act Rel. No. 49615, Accounting and Auditing Enforcement Rel. No. 1991 (Apr. 26, 2004); *accord Ernst & Young LLP*, Admin. Proc. File No. 3-13114 (Aug. 5, 2008) (settled case) (same, where auditor and audit-client director jointly pursued marketing campaign); *Deloitte & Touche*

2. Violation of Rule 2-02(b) of Regulation S-X

Each time D&T signed an audit report for Fund A, Fund B and Fund C, where either the period covered by the audit or the period of the audit work (or both) overlapped with the DC/Boynton Relationship, D&T directly violated Rule 2-02(b) of Regulation S-X. *See* Rule 2-02(b) (requiring accountant's report to "state whether the audit was made in accordance with generally accepted auditing standards" ["GAAS"] which, in turn, require auditors to maintain independence — both in fact and appearance — from their audit clients.[8]). Thus, the D&T year-end audit reports for Funds A, B and C's 2007 through 2011 fiscal years incorrectly stated that they were performed in accordance with GAAS.

3. Improper Professional Conduct

D&T's failure to meet the requirements of Rule 2-01 of Regulation S-X described above also constitutes improper professional conduct under Exchange Act § 4C and Rule 102(e)(1)(ii) of the Commission's Rules of Practice, which provides, in pertinent part, that the Commission may "censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it... to any person who is found... to have engaged in... improper professional conduct." Such conduct can be established by, *inter alia*, negligence in the form of either "a single instance of highly unreasonable conduct ... in circumstances [warranting] heightened scrutiny"[9] or of "repeated instances of unreasonable conduct..." *See* Rule 102(e)(1)(iv)(B)(1) and (2).

4. The Funds' Annual Report and Proxy Violations

Each time non-independent audit reports were filed with or incorporated in Fund A's, Fund B's and Fund C's annual reports, or other information concerning the "independent" auditors was provided in the proxy statements, the Funds violated federal securities statutes and rules requiring those Commission filings to disclose certain information concerning the independent auditors and audits. *See* Investment Company Act §§ 30(a) and 20(a) and Rule 20a-1 thereunder.[10] D&T and

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(South Africa), Admin. Proc. File No. 3-15129 (Dec. 13, 2012) (settled case) (same, where auditor's consulting affiliate and audit client director pursued cooperative services arrangement).

8 Securities Act Release No. 33-8422 (May 24, 2004) states that reference to GAAS are to mean PCAOB standards. Pursuant to PCAOB Professional Standards Rule 3200T, the PCAOB adopted certain preexisting generally accepted auditing standards, as described in AICPA SAS No. 95. Those standards include AU 161 and 220. PCAOB Rule 3600T also explicitly requires compliance with the independence standards described in AICPA's Code of Professional Conduct Rule 101 as in existence on April 15, 2003, to the extent not superseded or amended by the PCAOB.

9 Auditor independence is always an area warranting heightened scrutiny. *See* Adopting Release for Rule 102(e) [Rel. Nos. 33-7593, 34-40567, 1998 SEC LEXIS 2256 (Oct. 19, 1998)] ("Because of the importance of an accountant's independence to the integrity of the financial reporting system, the Commission has concluded that circumstances that raise questions about an accountant's independence always merit heightened scrutiny.")

10 Investment Company Act §30(a) requires investment companies to file annual reports in conformity with Section 13(a) of the Exchange Act, which in turn requires the annual reports to contain financial statements audited by "independent public accountants." Investment Company Act § 20(a) and Rule 20a-1 thereunder require investment companies' proxy statements to satisfy Exchange Act Regulation 14A and corresponding Rules,

Boynton each caused these reporting violations because each should have known the DC/Boynton Relationship would cause all three Funds to violate the provisions listed above.

5. The Funds' Lack of Adequate Compliance Procedures

As noted above, ALPS contractually agreed to assist the Funds in discharging their responsibilities under Rule 38a-1. To that end, ALPS furnished a Chief Compliance officer to each of the Funds who was, consistent with Rule 38a-1, responsible for administering the Funds' "written policies and procedures reasonably designed to prevent violation of the Federal Securities Laws by the Fund[.]" *See* Investment Company Act Rule 38a-1. Moreover, ALPS drafted, for approval and implementation by each of the three Funds' boards, Rule 38a-1 compliance policies and procedures. As drafted by ALPS and approved by the Funds' boards, the Funds' written policies and procedures governing auditor independence and, more generally, the selection, retention, and engagement of the auditor were, at all relevant times, inadequate. The Funds therefore each violated Rule 38a-1 of the Investment Company Act and ALPS should have known its conduct would cause this violation.

IV.

Findings

Based on the foregoing, the Commission finds that Respondent D&T (a) engaged in improper professional conduct pursuant to Exchange Act Section 4C(a)(2) and Rule 102(e)(1)(ii) of the Commission's Rules of Practice; (b) violated Rule 2-02(b) of Regulation S-X; and (c) caused Fund A, Fund B and Fund C to violate Sections 20(a) and 30(a) of the Investment Company Act, and Rule 20a-1 thereunder.

Based on the foregoing, the Commission further finds that Respondent ALPS caused Fund A, Fund B and Fund C to violate Rule 38a-1 of the Investment Company Act, and that Respondent Boynton caused Fund A, Fund B and Fund C to violate Investment Company Act Sections 20(a) and 30(a), and Rule 20a-1 thereunder.

V.

In determining to accept Respondent D&T's Offer, the Commission considered the steps taken by the firm, both before and after the firm's detection of the independence impairing relationship with Boynton, to enhance its independence quality control system. Since the conduct discussed in this Order, the firm has continued to improve its independence policies and procedures regarding business relationships. The firm has, among other things, established a database of audit client board members, officers and significant shareholders for use in independence-clearance processes throughout the firm; enhanced independence training throughout the firm; and increased the number and frequency of its procedures for prevention and

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which, among other things, require disclosures concerning the registrant's "Independent Public Accountants" (Item 9); and closed-end investment companies like Funds A, B and C also must disclose their communications with auditors concerning independence (Item 22(b)(16)(i), incorporating Reg S-K, Item 407(d)(3).

detection of independence-impairing business relationships as well as its monitoring to ensure the firm's independence controls are working effectively.

The Commission has also considered, in determining to accept Respondent ALPS's Offer, the remedial steps undertaken by ALPS in circumstances where ALPS furnishes a Chief Compliance Officer to a fund client. Since the conduct discussed in this Order, ALPS has, among other things, commenced working with such clients' boards and their counsel to enhance auditor independence policies and procedures. It has also commenced working with such clients' counsel to implement training concerning, *inter alia*, the business-relationship independence prohibitions; to enhance such clients' T&O questionnaires to ensure that business relationships with audit firm affiliates are inquired into; and has commenced working with counsel to such clients or their boards to enhance training of board members and officers concerning the discharge of their responsibilities as to auditor independence.

VI.

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

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

A. Respondent D&T be, and hereby is, censured.

B. Pursuant to Exchange Act Section 21C, Respondent D&T shall cease and desist from committing or causing any violations and any future violations of Rule 2-02 of Regulation S-X.

C. Pursuant to Investment Company Act Section 9(f), Respondents D&T and Boynton shall cease and desist from causing any violations and any future violations of Sections 20(a) and 30(a) of the Investment Company Act, and Rule 20a-1 thereunder, and Respondent ALPS shall cease and desist from causing any violations and any future violations of Rule 38a-1 of the Investment Company Act.

D. Respondent D&T shall, within ten (10) days of the entry of this Order, pay (i) disgorgement of $497,438, plus prejudgment interest of $116,478, for a total of $613,916, and (ii) a civil money penalty in the amount of $500,000, to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment of disgorgement is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If payment of a civil penalty is not timely made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

E. Respondent ALPS shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $45,000, to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If payment is not timely made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

F. Respondent Boynton shall, within ten (10) days of the entry of this Order, pay (i) disgorgement of $30,000, plus prejudgment interest of $5,328.71, for a total of $35,328.71, and (ii) a civil money penalty in the amount of $25,000, to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment of disgorgement is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If payment of a civil penalty is not timely made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

G. All payments required by this Order 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 as a Respondent in these proceedings, and the file number of these proceedings. A copy of the cover letter and check or money order, or documentation of whatever other form of payment is used, must be simultaneously sent to Stephen L. Cohen, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, DC 20549.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By Jill M. Peterson
Assistant Secretary

concern that audit committees are becoming the catch all of board committees by overseeing anything related to risk.[113]

In addition to the areas for comment identified above, we are interested in any other issues that commenters may wish to address and the benefits and costs relating to investors, issuers and other market participants of revising disclosure rules pertaining to the audit committee and the audit committee report included in Commission filings. Please be as specific as possible in your discussion and analysis of any additional issues. Where possible, please provide empirical data or observations to support or illustrate your comments.

By the Commission.

Date: July 1, 2015

Brent J. Fields
Secretary

[113] Michael Rapoport & Joann S. Lublin, *Meet the Corporate Board's "Kitchen Junk Drawer,"* Wall St. J. (Feb. 3, 2015).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 33-9862; 34-75344 File No. S7-13-15

RIN 3235-AL70

POSSIBLE REVISIONS TO AUDIT COMMITTEE DISCLOSURES

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Commission is publishing this concept release to seek public comment regarding audit committee reporting requirements, with a focus on the audit committee's reporting of its responsibilities with respect to its oversight of the independent auditor. Some have expressed a view that the Commission's disclosure rules for this area may not result in disclosures about audit committees and their activities that are sufficient to help investors understand and evaluate audit committee performance, which may in turn inform those investors' investment or voting decisions. The majority of these disclosure requirements, which exist in their current form principally in Item 407 of Regulation S-K, were adopted in 1999. Since then, there have been significant changes in the role and responsibilities of audit committees arising out of, among other things, the Sarbanes-Oxley Act of 2002, enhanced listing requirements for audit committees, enhanced requirements for auditor communications with the audit committee arising out of the rules of the Public Company Accounting Oversight Board, and changes in practice, both domestically and internationally.

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/concept.shtml); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-13-15 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 Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-13-15. 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 website (http://www.sec.gov/rules/concept.shtml). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Duc Dang, Special Counsel at (202) 551-3386; Jennifer McGowan, Professional Accounting Fellow, at (202) 551-8736; Kevin Stout, Senior Associate Chief Accountant, at (202) 551-5930, Office of the Chief Accountant; or Lindsay McCord, Associate Chief Accountant, at (202) 551-3417, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

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VII. ADDITIONAL REQUEST FOR COMMENT REGARDING AUDIT COMMITTEE DISCLOSURES

I. INTRODUCTION

The Commission has a long history of promoting effective and independent audit committees. The role and responsibilities of audit committees related to oversight of the independent auditor have evolved due to changes in both the securities laws and the national securities exchanges' listing requirements related to audit committees. Today, the audit committee of a listed issuer is directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer, and the independent auditor reports directly to the audit committee.[1] In addition, in

[1] See Section 10A(m) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. 78j-1(m)]. As noted in Section II.B., audit committees of listed issuers also have responsibilities with respect to the receipt, retention, and treatment of complaints regarding accounting, internal accounting controls, or auditing matters, including procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

connection with these oversight responsibilities, the audit committee has ultimate authority to approve all audit engagement fees and terms[2] and is responsible for resolving disagreements between management and the auditor regarding financial reporting.[3]

Requirements for the audit committee's reporting to shareholders are principally contained in Item 407 of Regulation S-K,[4] which have not changed substantively since 1999. As a result, some have expressed a view that the Commission's disclosure rules do not provide investors with sufficient useful information regarding the role of and responsibilities carried out by the audit committee in public companies.[5] The audit committee has a vital role in oversight of auditors, and the independent audits performed by those auditors have long been recognized as important to credible and reliable financial reporting and the functioning of our capital markets.[6] The reporting of additional information by the audit committee with respect to its oversight of the auditor may provide useful information to investors as they evaluate the audit committee's performance in connection with, among other things, their vote for or against directors who are members of the audit committee, the ratification of the auditor, or their investment decisions.

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[2] See Release No. 34-47654, *Standards Relating to Listed Company Audit Committees* (Apr. 9, 2003) [68 FR 18788].

[3] See Section 10A(m)(2) of the Exchange Act.

[4] 17 CFR 229.407

[5] See Audit Committee Collaboration, "Enhancing the Audit Committee Report, A Call to Action," (Nov. 20, 2013), available at http://www.thecaq.org/reports-and-publications/enhancing-the-audit-committee-report-a-call-to-action ("A Call to Action"). This collaboration consisted of the following organizations: the National Association of Corporate Directors, Corporate Board Member/NYSE Euronext, Tapestry Networks, the Directors' Council, the Association of Audit Committee Members, Inc., and the Center for Audit Quality ("CAQ").

[6] See Release No. 33-8177, *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002* (Jan. 23, 2003) [68 FR 5110] (acknowledging the audit committee's vital role in financial reporting, public disclosure, and corporate governance); and Release No. 34-14970, *Proposed Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, (Jul. 18, 1978) [43FR 31945] (citing Report to Congress on the Accounting Profession and the Commission's Oversight Role, Jul. 5, 1978).

Through this Concept Release, the Commission seeks public comment regarding the audit committee's reporting requirements, with a focus on the audit committee's reporting of its responsibilities and activities with respect to its oversight of the independent auditor. This concept release is focused on the audit committee and auditor relationship, but commenters may also provide views on other aspects of audit committee disclosures, such as those related to roles and responsibilities, audit committee qualifications, oversight of financial reporting, or oversight of internal control over financial reporting.

II. BACKGROUND

A. The Importance of Audit Committees

The audit committee plays an important role in protecting the interests of investors by assisting the board of directors in fulfilling its responsibility to oversee the integrity of a company's accounting and financial reporting processes and both internal and external audits. Since as early as 1940, the Commission, along with the auditing and corporate communities, has had a continuing interest in promoting effective and independent audit committees.[7] Largely with the Commission's encouragement,[8] the national securities exchanges and national securities associations (self-regulatory organizations or "SROs") first adopted audit committee

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[7] In 1940, the Commission investigated the auditing practices followed by the auditors of McKesson & Robbins, Inc., and the Commission's ensuing report prompted action on auditing procedures by the auditing community. In the Matter of McKesson & Robbins, Accounting Series Release (ASR) No. 19, Exchange Act Release No. 2707 (Dec. 5, 1940).

[8] For example, in 1972, the Commission recommended that companies establish audit committees composed of outside directors. See ASR No. 123 (Mar. 23, 1972). In 1974 and 1978, the Commission adopted rules requiring disclosures about audit committees. See Release No. 34-11147, *Notice of Amendments to Require Increased Disclosure of Relationships Between Registrants and Their Independent Public Accountants* (Dec. 20, 1974) and Release No. 34-15384, *Shareholder Communications, Shareholder Participation in Corporate Electoral Process and Corporate Governance Generally* (Dec. 6, 1978).

requirements in the 1970s.[9] Since that time, there has been support for strong, independent audit committees, including from the National Commission on Fraudulent Financial Reporting, also known as the Treadway Commission,[10] the General Accounting Office,[11] and others.[12]

In 1998, the New York Stock Exchange (the "NYSE") and the National Association of Securities Dealers (the "NASD") sponsored the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (the "Blue Ribbon Committee"). In its 1999 report, the Blue Ribbon Committee recognized the importance of audit committees and issued ten recommendations to improve their effectiveness.[13] In response to these recommendations, the NYSE and the NASD, among others, revised their listing standards relating to audit committees,[14] and the Commission adopted new rules requiring disclosure relating to the

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[9] See, e.g., Release No. 34-13346, *In the Matter of New York Stock Exchange, Inc.* (Mar. 9, 1977) [42 FR 14793] (Commission order approving NYSE rule change related to the audit committee).

[10] The Treadway Commission was sponsored by the American Institute of Certified Public Accountants, the American Accounting Association, the Financial Executives Institute (now Financial Executives International), the Institute of Internal Auditors and the National Association of Accountants (now Institute of Management Accountants). Collectively, these groups were known as the Committee of Sponsoring Organizations, or COSO. The Treadway Commission's report, the Report of the National Commission on Fraudulent Financial Reporting (October 1987), is available at www.coso.org.

[11] See e.g., U.S. General Accounting Office (now Government Accountability Office), "CPA Audit Quality: Status of Actions Taken to Improve Auditing and Financial Reporting of Public Companies," at 5 (GAO/AFMD-89-38, March 1989). The report is available at http://www.gao.gov/products/AFMD-89-38.

[12] See, e.g., Preliminary Report of the American Bar Association Task Force on Corporate Responsibility (July 16, 2002) reprinted in 58 Bus. Law. 189 (2002).

[13] See Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees, Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees, 54 THE BUSINESS LAWYER, 1067 (1999).

[14] See, e.g., Release No. 34-42231, *Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending Its Audit Committee Requirements* (Dec. 14, 1999) [64 FR 71523]; Release No. 34-42233, *Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Amending the Exchange's Audit Committee Requirements* (Dec. 14, 1999) [64 FR 71529]; Release No. 34-42232, *Order Approving Proposed Rule Change by the American Stock Exchange LLC Amending the Exchange's Audit Committee Requirements* (Dec. 14, 1999) [64 FR 71518]; and Release No. 34-43941, *Order Approving a Proposed Rule Change by the Pacific Exchange, Inc. Relating to Audit Committee Requirements for Listed Companies* (Feb. 7, 2001) [66 FR 10545].

functioning, governance and independence of corporate audit committees.[15]

Academic literature suggests that strong corporate governance, including the composition and actions of the audit committee, has a positive effect on the quality of the audit.[16] For example, some studies note that audit committee independence is associated with lower incidences of earnings management[17] and internal control problems at those issuers benefitting from independent audit committees,[18] while also shielding the external auditor from management's influence.[19]

B. The Impact of the Sarbanes-Oxley Act of 2002 and SRO Listing Standards on Audit Committees

In the early 2000's, multiple incidences of serious misconduct by corporate executives and independent auditors occurred in the financial markets raising concerns about the integrity and reliability of financial disclosures, and the adequacy of regulation and oversight of the accounting profession. This highlighted the need for strong, competent, and vigilant audit committees. In response, the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") was

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[15] See Release No. 34-42266, *Audit Committee Disclosure* (Dec. 22, 1999) [64 FR 73389].

[16] Goh, B. W., Audit Committees, Boards of Directors, and Remediation of Material Weaknesses in Internal Control, 26 CONTEMPORARY ACCOUNTING RESEARCH 549 (2009); and Hoitash and Hoitash, The Role of Audit Committees in Managing Relationships with External Auditors After SOX: Evidence from the USA, 24 MANAGERIAL AUDITING JOURNAL 368 (2009). The positive effects of audit committee oversight are also illustrated in studies using data taken prior to the enactment of the Sarbanes-Oxley Act of 2002 when important characteristics such as the composition and actions of the audit committee were less uniform among companies. See Klein, A., Audit Committee, Board of Director Characteristics, and Earnings Management, 33 JOURNAL OF ACCOUNTING AND ECONOMICS, 375 (2002); Krishnan, J., Audit Committee Quality and Internal Control: an Empirical Analysis, 80 THE ACCOUNTING REVIEW, 649 (2005); and Carcello, J and Neal. T., Audit Committee Composition and Auditor Reporting, 75 THE ACCOUNTING REVIEW, 453 (2000).

[17] Klein, A., Audit Committee, Board of Director Characteristics, and Earnings Management.

[18] Krishnan, J., Audit Committee Quality and Internal Control: an Empirical Analysis.

[19] Carcello, J and Neal. T., Audit Committee Composition and Auditor Reporting.

enacted.[20] Among other things, the Sarbanes-Oxley Act mandated a number of reforms to enhance corporate responsibility, enhance financial disclosures, and combat corporate and accounting fraud. The Sarbanes-Oxley Act also created a new regulatory and oversight regime for auditors of public companies, including the creation of the Public Company Accounting Oversight Board (the "PCAOB"), a nonprofit corporation, to oversee the audits of public companies in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.[21] During this time, the Commission also adopted significant corporate disclosure and financial reporting rules designed to improve the oversight and review processes of public companies related to their financial and other disclosures.[22]

The Sarbanes-Oxley Act amended the Exchange Act to define an audit committee as "(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and (B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer."[23] The Sarbanes-Oxley Act and the Commission's related implementation rules strengthened and expanded the role of the audit

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[20] Pub. L. 107-204, 116 Stat. 745 (2002); 15 U.S.C. 7201 et seq.

[21] Section 101 of the Sarbanes-Oxley Act.

[22] See, e.g., Release No. 33-8124, *Certification of Disclosure in Companies' Quarterly and Annual Reports* (Aug. 28, 2002) [67 FR 57276]; Release No. 34-47890, *Improper Influence on Conduct of Audits* (May, 20, 2003) [68 FR 31820]; Release No. 33-8177, *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002* (Jan. 23, 2003) [68 FR 5110]; Release No. 33-8182, *Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations* (Jan. 28, 2003) [68 FR 5982]; Release No. 33-8183, *Strengthening the Commission's Requirements Regarding Auditor Independence* (Jan. 28, 2003) [68 FR 6006]; and Release No. 33-8212, *Certification of Disclosure in Certain Exchange Act Reports* (Mar. 21, 2003) [68 FR 15600].

[23] See Section 3(a)(58) of the Exchange Act [15 U.S.C. 78c(a)(58)].

committee in overseeing a company's financial reporting process and independent auditor.

For example, Exchange Act Rule 10A-3,[24] which implemented Section 10A(m) of the Exchange Act, mandated that SROs prohibit the listing of any security of an issuer that does not comply with certain requirements, including:

- each member of the audit committee of the issuer must be independent according to specified criteria;
- the audit committee of each issuer must be directly responsible for the appointment, compensation, retention, and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review, or attest services for the issuer, and each such registered public accounting firm must report directly to the audit committee;
- each audit committee must establish procedures for the receipt, retention, and treatment of complaints regarding accounting, internal accounting controls, or auditing matters, including procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters;
- each audit committee must have the authority to engage independent counsel and other advisors, as it determines necessary to carry out its duties; and
- each issuer must provide appropriate funding for the audit committee.

[24] 17 CFR 240.10A-3.

The SROs also adopted additional listing requirements related to audit committees and strengthened the independence requirements for audit committee members.[25]

Also, Item 407(d)(5) of Regulation S-K, which was adopted to implement Section 407 of the Sarbanes-Oxley Act, defines the term "audit committee financial expert." This item requires issuers to disclose whether they have at least one audit committee member that satisfies that definition. The Commission defines an audit committee financial expert as a person who has:

- an understanding of generally accepted accounting principles and financial statements;
- the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;
- experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities;
- an understanding of internal control over financial reporting; and
- an understanding of audit committee functions.[26]

In addition to the listing requirements related to audit committees, Rule 2-07 of Regulation S-X was adopted to identify specific matters that auditors are required to report to audit committees.[27] Rule 2-07 requires public company auditors to report all critical accounting

[25] See Release No. 34-48745, *NASD and NYSE Rulemaking: Relating to Corporate Governance* (Nov. 4, 2003); NYSE Listed Company Manual, Sections 303A.02 and 303A.07(a); and NASDAQ Listing Rules 5605(a)(2) and 5605(c)(2). For example, the NYSE requires audit committees to, among other things: (i) at least annually obtain a report from the independent auditor discussing certain quality control issues and relationships with its client, (ii) meet with management and the independent auditor, as applicable, to discuss the company's annual audited and quarterly unaudited financial statements, its press releases and public earnings guidance, and its risk assessment and management policies, (iii) meet separately, periodically, with management, the internal auditors, and the independent auditors, and (iv) review with the independent auditor any audit problems or difficulties and management's response. See NYSE Listed Company Manual, Section 303A.07.

[26] Item 407(d)(5)(ii) of Regulation S-K. Neither the NYSE nor NASDAQ use the term audit committee financial expert. However, both amended their listing standards to clarify that a member that satisfies the definition of an audit committee financial expert would also satisfy their respective listing standards that require at least one audit committee member with accounting or related financial management expertise. See Release No. 34-48745.

[27] See Release No. 34-47265, *Strengthening the Commission's Requirements Regarding Auditor Independence* (Jan. 28, 2003) [68 FR 6005]; 17 CFR 210.2-07.

policies and practices, all alternative accounting treatments that have been discussed with management, and any other material written communications between the auditor and management.[28]

In the adopting release for Rule 2-07, the Commission referred to cautionary advice it issued in December 2001 regarding the disclosure of those accounting policies that management believes are most critical to the preparation of the issuer's financial statements.[29] These are often a subset of the accounting policies described in the issuer's financial statements. The cautionary advice indicated that "critical" accounting policies are those that are both most important to the portrayal of the issuer's financial condition and results and require management's most difficult, subjective or complex judgments, often as a result of the need to make estimates about the effect of matters that are inherently uncertain.[30] As part of that release, the Commission also advised:

> Prior to finalizing and filing annual reports, audit committees should review the selection, application and disclosure of critical accounting policies. Consistent with auditing standards, audit committees should be apprised of the evaluative criteria used by management in their selection of the accounting principles and methods. Proactive discussions between the audit committee and the company's senior management and auditor about critical accounting policies are appropriate.[31]

The way audit committees execute their oversight of auditors has evolved since the Sarbanes-Oxley Act. For instance, while the PCAOB does not have jurisdiction over audit committees, it collects information through its inspection program that could be useful for audit

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[28] PCAOB standards also require certain auditor communications with audit committees, as discussed in Section IV.E of this Release.

[29] See Release No. 34-47265.

[30] See Release No. 33-8040, *Cautionary Advice Regarding Disclosure About Critical Accounting Policies* (Dec. 12, 2001) [66 FR 65013]. See, also, Release No. 33-8350, *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations* (Dec. 19, 2003) [68 FR 75056].

[31] Release No. 33-8040.

committees in overseeing their companies' auditors. Among other responsibilities, the PCAOB is required to inspect registered public accounting firms annually (for firms that regularly provide audit reports for more than 100 issuers) or triennially (for firms that regularly provide audit reports for 100 or fewer issuers).[32] Consistent with the limitations of the Sarbanes-Oxley Act, the PCAOB makes certain information available publicly, such as public portions of inspection reports, disciplinary sanctions, and information in annual and special reports filed by audit firms. In addition, in part in response to audit committee members' requests, the PCAOB provides information to help audit committees better understand the PCAOB inspection process, including questions they may wish to ask their audit firms to better understand and assess the firm's inspection results and evaluate audit quality.[33] The PCAOB also includes an executive summary for its general inspection reports and provides insights within Staff Audit Practice Alerts to further assist audit committee oversight of the auditor.[34]

III. CURRENT AUDIT COMMITTEE DISCLOSURE REQUIREMENTS

A. Audit Committee Report and other Disclosures about the Audit Committee

In 1999, following the recommendations from the Blue Ribbon Committee's report, the Commission adopted new rules to improve disclosure relating to the functioning, governance and independence of audit committees and to enhance the credibility of financial statements of public

[32] Section 104 of the Sarbanes-Oxley Act.

[33] See http://pcaobus.org/Inspections/Documents/Inspection_Information_for_Audit_Committees.pdf.

[34] See, e.g. http://pcaobus.org/Inspections/Documents/Executive_Summary_02252013_Release_2013_001.pdf, http://pcaobus.org/Standards/QandA/10-24-2013_SAPA_11.pdf at 36 and http://pcaobus.org/Standards/QandA/9-9-14_SAPA_12.pdf at page 33.

companies.[35] These reporting requirements for audit committees[36] predate the Sarbanes-Oxley Act and the SRO listing standards, which expanded the role of the audit committee in the financial reporting process.

Disclosure requirements for the audit committee report are contained in Item 407 of Regulation S-K. The disclosure is only required in the proxy or information statement relating to a registrant's annual meeting where directors are elected or chosen by written consents.[37] An audit committee is required to make certain statements related to its responsibilities for overseeing financial reporting, internal control, and the audit. These statements include that the audit committee has:

- reviewed and discussed the audited financial statements with management;
- discussed with the independent auditor the matters required by AU sec. 380, *Communication with Audit Committees*;
- received the required written communications from the independent accountant concerning independence, as required by the rules of the PCAOB, and has discussed with the independent accountant his or her independence; and

[35] See, e.g., Release No. 34-42266 (stating that additional disclosures about a company's audit committee and its interaction with the company's auditors and management will promote investor confidence in the integrity of the financial reporting process).

[36] Audit committee reports are currently reported by issuers pursuant to the disclosure requirements of Regulation S-K and closed-end investment companies through the proxy statement requirements of Item 22(b)(16) of Schedule 14A.

[37] See Instruction 3 to Item 407(d) of Regulation S-K.

- recommended to the board of directors that the audited financial statements be included in the company's annual report on Form 10-K (or other form of annual report) for the last fiscal year for filing with the Commission.[38]

The name of each member of the company's audit committee must appear below these required disclosures.

Item 407 also requires disclosure of whether the audit committee members are independent, the number of meetings held, and certain information about member attendance at these meetings, in addition to the following:

- Whether or not the audit committee has a charter;[39]
- The circumstances surrounding any appointment of a director to the audit committee who is not independent;[40]
- Whether there is a separately-designated standing audit committee or a committee performing similar functions, and the identity of each member of such committee;[41] and
- Whether or not the registrant has at least one audit committee financial expert serving on its audit committee.[42]

If the audit committee has a charter, the registrant should either disclose where security holders may access a current copy of the audit committee's charter or include a copy of the

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[38] See Item 407(d)(3) of Regulation S-K.

[39] See Item 407(d)(1) of Regulation S-K.

[40] See Item 407(d)(2) of Regulation S-K.

[41] See Item 407(d)(4) of Regulation S-K.

[42] See Item 407(d)(5) of Regulation S-K.

charter in an appendix to the registrant's proxy or information statement that is provided to security holders at least once every three fiscal years, or sooner if the charter has been materially amended since the beginning of the registrant's last fiscal year.[43]

B. Disclosure Requirements Regarding Preapproval of Services and Auditor Fees

The Sarbanes-Oxley Act also enhanced the ability of audit committees to promote auditor independence. Section 202 of the Sarbanes-Oxley Act added Section 10A(i) of the Exchange Act, which gave the audit committee responsibility to preapprove all audit and permissible non-audit services provided by the independent auditor.[44] In 2003, the Commission finalized its rules to implement Section 10A(i) of the Exchange Act.[45] Under the rules, the audit committee is required to preapprove all permissible non-audit services and all audit, review, or attest engagements required under the securities laws. Additionally, the issuer must provide disclosure of the audit committee's preapproval policies and procedures in proxy statements related to the election of directors or the ratification of the independent public accountant.[46]

Concurrently, the Commission adopted rules that changed both the types of fees paid to the independent auditor that must be described and the number of years for which the disclosures must be provided.[47] As a result, an issuer is required to disclose the fees paid to its independent auditor for each of the two most recent fiscal years, separated into the following four categories:

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[43] See Item 407(d)(1) of Regulation S-K.

[44] Section 202 of the Sarbanes-Oxley Act; 15 U.S.C 78j-1(i)(1)(A).

[45] See Release No. 34-47265.

[46] See Item 9(e)(5) of Schedule 14A [17 CFR 240.14a-101].

[47] See Release No. 34-47265.

(1) Audit Fees, (2) Audit-Related Fees, (3) Tax Fees, and (4) All Other Fees.[48] Additionally, registrants are required to describe the nature of the services provided that are categorized as Audit-Related Fees and All Other Fees. The registrant is also required to disclose the percentage of services in the Audit-Related Fees, Tax Fees, and All Other Fees captions that were approved by the audit committee pursuant to its preapproval policies and procedures.[49]

C. Disclosure Requirements Regarding Proposal to Ratify Selection of Independent Auditors

While the audit committees of listed issuers are required to appoint the issuer's auditors, many issuers solicit the approval or ratification of the independent auditors from shareholders.[50] If such a proposal is solicited, the issuer must provide the information required by Item 9 of Schedule 14A. Specifically, in addition to the fee information and preapproval policies noted above, shareholders of listed issuers must receive disclosure of the following:

- the name of the auditor selected or being recommended for the current year;
- the auditor for the most recently completed fiscal year, if different from the one subject to the ratification;
- whether a representative from the auditor's firm will be present at the meeting, will have the opportunity to make a statement, and be available to respond to questions; and

[48] See Item 9(e) of Schedule 14A.

[49] Id.

[50] See Ernst & Young, "Audit Committee Reporting to Shareholders: Going Beyond the Minimum," (Feb. 2013), available at http://www.ey.com/Publication/vwLUAssets/Audit_committee_reporting_to_shareholders%3A_going_beyond_the_minimum/%24FILE/Audit_committee_reporting_CF0039.pdf (noting that more than 90 percent of Fortune 100 companies seek annual shareholder ratification of the auditor chosen by the audit committee); Ernst & Young, "Let's Talk: Governance - Audit Committee Reporting to Shareholders 2014 Proxy Season Update," (Aug. 2014), available at http://www.ey.com/Publication/vwLUAssets/ey-lets-talk-governance-august-2014/$FILE/ey-lets-talk-governance-august-2014.pdf.

- information regarding dismissed or resigned auditors as required by Item 304(a) of Regulation S-K.[51]

The rules do not require issuers to provide information about the audit committee's process and reasons that lead to the selection of the independent auditor subject to the ratification solicitation.

IV. REASONS TO SEEK COMMENT ON THE AUDIT COMMITTEE REPORTING REQUIREMENTS

While current audit committee reporting requirements provide information about the role of the audit committee with respect to its oversight of the auditor, these disclosures do not describe how the audit committee executes its responsibilities. The ways in which an audit committee discharges its responsibilities can be influenced by its composition and the environment in which it operates. As discussed below, the fact that a significant number of audit committees voluntarily provide information beyond the disclosures required by our current rules raises a question of whether there may be market demand for such information.[52] Similarly, during a series of roundtables attended by audit committee members from various jurisdictions, participants stated that investors and other stakeholders have requested greater transparency about audit committee activities.[53] However, there appears to be limited research as to why some companies provide voluntary disclosure regarding audit committee activities

[51] Item 9 of Schedule 14A (referring to Item 304(a) of Regulation S-K [17 CFR 229.304(a)]).

[52] See CAQ and Audit Analytics, "2014 Audit Committee Transparency Barometer," (Dec. 2, 2014), available at http://www.thecaq.org/docs/reports-and-publications/2014-audit-committee-transparency-barometer.pdf?sfvrsn=2 ("Audit Committee Transparency Barometer"). In addition, a report based on a 2014 review of proxy disclosures of Fortune 100 companies noted an upward trend in voluntary disclosures by audit committees since 2012. See also Ernst & Young, "Let's Talk: Governance - Audit Committee Reporting to Shareholders 2014 Proxy Season Update," (Aug. 2014).

[53] See Federation of European Accountants, the Institute of Chartered Accountants Australia and the CAQ, "Global Observations on the Role of the Audit Committee," (May 13, 2013), available at http://www.thecaq.org/docs/reports-and-publications/globalobservationsontheroleoftheauditcommittee.pdf?sfvrsn=2 ("Global Observations").

and whether and how such additional information impacts investors' investment or voting decisions. For instance, variability in the nature and extent of current voluntary disclosures could, to some extent, be the result of tailoring the disclosures to a company's facts and circumstances.

Providing additional disclosure about the audit committee's oversight of the independent auditor could further inform investors about the oversight process and provide them with useful context for audit committee decisions. It may also enable investors to differentiate between companies based on the quality of audit committee oversight, and determine whether such differences in quality of oversight may contribute to differences in performance or quality of financial reporting among companies. Therefore, the Commission is seeking feedback to better understand whether additional audit committee reporting requirements related to oversight of the auditor would be useful to investors and if so, what information would be useful.[54]

A. Public Discussion of the Need for Updated Audit Committee Reporting

Investors, organizations representing audit committee members, and auditors are among those that have expressed the need for audit committees to evaluate their disclosures and consider whether improvements can be made to provide investors with relevant information that more transparently conveys the oversight responsibilities performed by the audit committee relative to an issuer's auditor. For example, a group of corporate governance and policy organizations has expressed the view that public company audit committee reporting can and

[54] For example, an academic paper indicates that events that negatively impact the image of a company, such as a reporting failure, have a direct impact on turnover of audit committee members, while negative disclosures alone about audit committee members appear to have limited or mixed impact on member turnover. See Kachelmeier, S. et al., Why Do Ineffective Audit Committee Members Experience Turnover? (September 18, 2013), available at http://ssrn.com/abstract=1920850.

should be strengthened.[55] At a meeting in June of 2013, several delegates from the Audit Committee Chair Advisory Council acknowledged that "[f]rankly, we don't do a good job of communicating what we do. The public doesn't see all the work we do, quarter after quarter."[56]

Investors have also increased their focus on the activities and transparency of audit committees, including those activities related to enhancing audit quality through oversight of the independent auditor. Some investors have sought greater disclosure from audit committees of a number of public companies about matters such as the responsibility of the audit committee for the appointment, compensation, and oversight of the external auditor; audit firm tenure; audit firm fee determinations; and audit committee involvement in the selection of the audit engagement partner.[57] Institutional investor groups have called for additional audit committee disclosures as part of their published "good corporate governance policies."[58]

Internationally, there appears to be interest in improving the communication coming from audit committees. For example, one of the themes that emerged at a 2013 summit hosted by the members of the Audit Committee Leadership Networks in North America and Europe was the recognition that "[r]egulators, policy-makers, and many investors would benefit from a more robust understanding of what the public company audit committee does and how it oversees the

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[55] See A Call to Action supra note 2.

[56] Id. at 7, (quoting National Association of Corporate Directors ("NACD") Summary of Proceedings, Audit Committee Chair Advisory Council, at 6 (June 19, 2013), available at http://www.nacdonline.org/Resources/Article.cfm?ItemNumber=7284). The Audit Committee Chair Advisory Council is a group of audit committee chairs, shareholder representatives, regulators and other stakeholders that discuss ways to improve communications between corporations and stakeholders, improve audit committee practices, and give voice to audit committee members.

[57] See A Call to Action at 6 (describing investors' increasing interest and focus on the audit committee).

[58] See, e.g., Council of Institutional Investors, Policies on Corporate Governance, Section 2.13 (updated Sept. 27, 2013), available at http://www.cii.org/corp_gov_policies#BOD.

external audit firm and performs its other responsibilities."[59]

Some audit committee members, however, see additional reporting as possibly contributing to a state of "disclosure overload."[60] Some are also skeptical whether additional reporting would be helpful to "stakeholders," "in light of a lack of interest in audit committee reporting currently required."[61] Others have suggested the need for principles-based reporting to allow for flexibility and to avoid a "one size fits all" approach.[62] Given these varied views on the usefulness and relevance of audit committee disclosures, the Commission is seeking input on whether and how additional reporting may be useful to investors.

B. Divergence in Current Audit Committee Reporting Practice

Some issuers, including their audit committees, already provide disclosures that go beyond the required disclosures.[63] For example, a report by the CAQ and Audit Analytics reviewing the 2014 proxy disclosures of 1,500 Standard & Poor's ("S&P") composite companies, including the S&P 500 ("S&P 500") companies, the S&P MidCap 400 ("S&P MidCap") companies, and the S&P SmallCap 600 ("S&P SmallCap") companies noted the following:

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[59] See A Call to Action at 7, (citing Tapestry Networks, ViewPoints, Issue 22, p.1 (May 2, 2013), available at http://www.tapestrynetworks.com/initiatives/corporate-governance/global-audit-committee-leadership-networks/upload/Tapestry_EY_ACLS_Summit_View22-May13.pdf).

[60] See Global Observations at 7; See also Center for Capital Markets Competitiveness, Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation, (Jul. 28, 2014), available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/07/CCMC_Disclosure_Reform_Final_7-28-20141.pdf.

[61] Id.

[62] Id.

[63] See, e.g., A Call to Action at 7.

- 83% of S&P 500, 69% of S&P MidCap, and 58% of S&P SmallCap companies discussed how non-audit services may impact auditor independence;
- 47% of S&P 500, 42% of S&P MidCap, and 50% of S&P SmallCap companies disclosed the length of time an auditor has been engaged;
- 13% of S&P 500, 10% of S&P MidCap, and 8% of S&P SmallCap companies discussed the audit committee's considerations of qualifications, geographic reach, and firm expertise when appointing the auditor;
- 8% of S&P 500, 7% of S&P MidCap, and 15% of S&P SmallCap companies discussed the criteria considered when evaluating the audit firm;
- 3% of S&P 500, 2% of S&P MidCap, and 1% of S&P SmallCap companies disclosed the significant areas addressed with the auditor;
- 13% of S&P 500 and 1% of both S&P MidCap and S&P SmallCap companies included an explicit statement that the audit committee is involved in the selection of the audit engagement partner; and
- 13% of S&P 500, 4% of S&P MidCap and 1% of S&P SmallCap companies discussed audit fees and their connection to audit quality.[64]

These additional disclosures are voluntary, not consistently provided and may vary among registrants, depending on company characteristics.[65] Some audit committees may

[64] See Audit Committee Transparency Barometer.

[65] According to the observations of an accounting firm, variability in reporting may also be the result of, among other things, differences in regulatory and listing requirements across jurisdictions and interest by investors and others for disclosures that go beyond the minimum. See Ernst & Young, "Enhancing audit committee transparency: Themes in audit committee disclosures in Australia, Canada, Singapore, the UK and the US" (Mar. 2015), available at http://www.ey.com/Publication/vwLUAssets/EY-Enhanced-audit-committee-transparency-themes-in-audit-committee-disclosures/$FILE/EY-Enhanced-audit-committee-transparency-themes-in-audit-committee-disclosures.pdf.

disclose only what is specifically required, for a variety of reasons, for instance, to avoid legal exposure,[66] to avoid incremental associated efforts of the disclosure process, or because they do not believe such additional information would be useful to investors.

C. PCAOB Standard-Setting Projects

The PCAOB is engaged in standard-setting initiatives that could result in additional information being disclosed related to the auditor and its work. One project has been exploring a requirement that the auditor disclose, in the auditor's report, the name of the engagement partner as well as the names, locations, and extent of participation of other independent public accounting firms that took part in the audit and the locations and extent of participation of other persons not employed by the auditor that took part in the audit.[67]

Some investors have indicated that the engagement partner's track record compiled from the disclosure of the partner's name would be relevant in "overseeing the audit committees and determining how to cast votes on more than two thousand proposals that are presented annually

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[66] See NACD Summary of Proceedings, Audit Committee Chair Advisory Council, (June 19, 2013).

[67] See PCAOB Release No. 2013-009, *Improving Transparency Through Disclosure of Engagement Partner and Certain Other Participants in Audits* (Dec. 4, 2013), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029.aspx. Similar requirements exist in other jurisdictions, including but not limited to, the European Union, United Kingdom, Australia, Sweden, China, and Taiwan. Academic research has supported that, in at least these particular jurisdictions, information about individual audit partners, over and above information about the audit firm, is relevant to financial statement users for both public and private firms. See Carcello, J. and C. Li., Cost and Benefits of Requiring an Engagement Partner Signature: Recent Experience in the United Kingdom, 88 THE ACCOUNTING REVIEW, 1511 (2013); Aobdia, D. et al., Capital Market Consequences of Individual Audit Partners, THE ACCOUNTING REVIEW, (forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321333 (discussing Taiwan's mandate regarding disclosure of individual audit partners); Knechel, R. et al., Does the Identity of Engagement Partners Matter? An Analysis of Audit Partner Reporting Decisions, CONTEMPORARY ACCOUNTING RESEARCH, (forthcoming) available at https://www.caaa.ca/_files/file.php?fileid=filerSDAxJgThx&filename=file_Knechel__Vanstraelen__Zerni__Does_the_Identity_of_Engagement_Partners_Matter.pdf (discussing Sweden's disclosure requirement); Gul, F.A. et al., Do Individual Auditors Affect Audit Quality? Evidence From Archival Data, 88 THE ACCOUNTING REVIEW, 1993 (2013) (discussing China's disclosure requirement); and The Association of Chartered Certified Accountants and Macquarie University, The Drivers of Audit Quality: Views From Australian CFOs, (2014), available at http://www.accaglobal.com/content/dam/acca/global/PDF-technical/audit-publications/pol-tp-daq1(cfo)-drivers-audit-quality.pdf.

to shareholders on whether to ratify the board's choice of outside auditor."[68] Audit firms and other commenters questioned whether the auditor's report is the most appropriate place to provide this information, for example, due to potential liability concerns.[69] As a result, the PCAOB is seeking further comment on whether these concerns would be sufficiently addressed by providing the information in an alternative location, outside of the auditor's report and outside of the issuer's filing.[70]

Commenters on the PCAOB's proposal have also suggested that it may be more appropriate for any requirement for proposed disclosures to be considered by the Commission, rather than the PCAOB, because having these disclosures made by the issuer, in the audit committee report or proxy statement, appears aligned with the responsibilities outlined in Section 10A(m) of the Exchange Act.[71] Requiring any such disclosure by the audit committee would require Commission action because the PCAOB does not have authority over issuer disclosures.

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[68] See, Reproposed Rule Comment Letter of the Council of Institutional Investors (Aug. 15, 2014), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029Comments.aspx.

[69] Some commenters voiced the concern, for example, that the PCAOB's December 2013 reproposal on disclosure of the engagement partner and other participants in the audit may lead to the engagement partner and other participants (other independent public accounting firms and other persons not employed by the auditor) being deemed experts for purposes of liability under Section 11 of the Securities Act of 1933 ("Securities Act"). See, e.g., Reproposed Rule Comment Letters of Deloitte & Touche LLP (Feb. 3, 2014), PricewaterhouseCoopers LLP (Feb 4, 2014), Ernst & Young LLP (Feb 12, 2014), Society of Corporate Secretaries & Governance Professionals (Mar. 12, 2014), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029Comments.aspx.

[70] PCAOB Release No. 2015-004, *Supplemental Request for Comment: Rules to Require Disclosure of Certain Audit Participants on a New PCAOB Form* (June 30, 2015), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029.aspx.

[71] See Reproposed Rule Comment Letters of Dennis R. Beresford (Jan 6, 2014), Institute of Management Accountants (Jan 21, 2014), Charles Noski (Jan 13, 2014), James L. Fuehrmeyer, Jr. (Jan 22, 2014), Audit and Assurance Services Committee of the Illinois CPA Society (Feb 3, 2014), Professional Standards Committee of the Texas Society of Certified Public Accountants (Feb 3, 2014), CAQ (Feb 3, 2014), Auditing Standards and SEC Committees of the New York State Society of Certified Public Accountants (Feb 4, 2014), PricewaterhouseCoopers LLP (Feb 4, 2014), Ernst & Young LLP (Feb 12, 2014), Crowe Horwath (Feb 12, 2014), G. Lawrence Buhl, CPA (Mar 5, 2014), U.S. Chamber of Commerce, Center for Capital Market Competitiveness (Mar 10, 2014), KPMG LLP (Mar 13, 2014), Financial Management and Assurance, U.S. Government Accountability Office (Mar 17, 2014), Robert N. Waxman, CPA (Mar 17, 2014), and CohnReznik LLP (Mar 17, 2014), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029Comments.aspx.

Another PCAOB initiative could result in disclosure of additional information about the audit and the auditor, including the auditor's tenure, in the auditor's report.[72] Some commenters believe the disclosure of auditor tenure in the auditor's report would be useful because it could help investors evaluate the audit committee's oversight of the auditor (including its rationale for selecting or retaining the auditor) and develop a basis for shareholders to ratify the audit committee's selection of the auditor, when applicable.[73] Others raised concerns about the lack of evidence correlating auditor tenure and audit quality and whether the placement of this data in the auditor's report would imply that some correlation exists.[74] Some believe that issuer filings with the Commission would be a more appropriate location for this disclosure.[75]

D. Initiatives in Other Jurisdictions to Enhance Audit Committee Reporting

Other jurisdictions also have been exploring expanded reporting with respect to audit committees. For example, in 2012, the UK Financial Reporting Council adopted amendments to its Corporate Governance Code that require a separate section of the annual report that describes

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[72] See PCAOB Release No. 2013-005, *Proposed Auditing Standards on the Auditor's Report and the Auditor's Responsibilities Regarding Other Information and Related Amendments* (Aug. 13, 2013), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx.

[73] See, e.g., Proposed Rule Comment Letters of Counsel of Institutional Investors (Dec. 16, 2013), CFA Institute (Dec. 30, 2013), and Peter Clapman (Dec. 5, 2013), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034Comments.aspx.

[74] See, e.g., Proposed Rule Comment Letters of Deloitte and Touche, LLP (Dec. 11, 2013), NAREIT (Dec. 11, 2013), Tyson Foods, Inc. (Dec. 11, 2013), Nucor (Dec. 10, 2013), Williams (Dec. 4, 2013), Acuity Brands (Nov. 26, 2013), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034Comments.aspx. Despite commenters' views, there is some academic evidence connecting auditor tenure and audit quality, which is discussed in Section VI.C.3.

[75] See, e.g., Proposed Rule Comment Letters of National Association of Corporate Directors (Dec. 11, 2013) (suggesting that the Commission should consider inclusion of tenure information in proxy statements if there is sufficient investor interests), Federation of European Accountants (Dec. 11, 2013) (stating its belief that an auditor could disclose tenure if it is not already disclosed in management's report or annual financial statements), Institute of Management Accountants (Nov. 12, 2013) (objecting to inclusion in the auditor's report and noting that it may be a corporate governance matter included in the proxy statement), and BlackRock, Inc. (Oct. 30, 2013) (not objecting to the inclusion while noting that inclusion in an issuer filing may be preferable), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034Comments.aspx.

the work of the audit committee in discharging its responsibilities.[76] The report now includes, among other things, the significant issues considered in relation to the financial statements and how they were addressed; how the audit committee assessed the effectiveness of the audit process; the approach to appointing the auditor and how objectivity and independence are safeguarded relative to non-audit services; as well as information on the length of tenure of the current audit firm and when a tender was last conducted.

The International Auditing and Assurance Standards Board (the "IAASB") has also acknowledged the merits of enhanced disclosure around the activities of the audit committee. In connection with its efforts to develop a framework for audit quality, it has stated:

> While users are likely to conclude that the active involvement of a high-quality audit committee will have a positive impact on audit quality, there is considerable variability in the degree to which audit committees communicate to users the way they have fulfilled these responsibilities. There is potential for fuller disclosure of the activities of audit committees to benefit both actual audit quality and user perception of it. Consequently, some countries are actively exploring whether to include more information in annual reports about the activities of audit committees in relation to the external audit.[77]

An amendment to the Directive on Statutory Audits adopted by the European Union in April 2014[78] included measures to strengthen the independence of statutory auditors, make the audit report more informative, and strengthen audit supervision. The Directive amendment reinforces the role of the audit committee by expanding its responsibilities in ensuring the quality of the audit being performed, giving it responsibility for the auditor appointment process, and

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[76] Section C.3.8 of the UK Corporate Governance Code, available at https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx.

[77] IAASB, "A Framework for Audit Quality," p. 48 (Jan. 15, 2013), available at http://www.ifac.org/publications-resources/framework-audit-quality.

[78] See Directive 2014/56/EU of the European Parliament and Council of April 16, 2014, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0056&from=EN.

enhancing the auditor's reporting requirements to the audit committee.[79] Specifically, the Directive requires that the audit committee explain to the issuer's board how the auditor contributed to the integrity of the financial statements and how the committee assessed threats to the auditor's independence and implemented appropriate safeguards, and also requires the audit committee obtain a detailed report from the auditor on the results of the audit.

Corporate governance practices, regulations, and enforcement vary across countries.[80] Therefore, the Commission is interested in understanding whether enhanced audit committee disclosures would result in benefits for U.S. investors.

E. References to PCAOB Auditing Standards

With the Commission's approval of PCAOB Auditing Standard No. 16, *Communications with Audit Committees* ("AS 16") in 2012, changes to the required audit committee communications by the auditor, among others, were incorporated within PCAOB auditing standards and superseded the prior communication requirements in AU sec. 380.[81] As a result, Item 407(d) of Regulation S-K is no longer current because it references AU sec. 380. In addition to this outdated reference, there are required communications in other PCAOB standards that are not reflected in current audit committee disclosure requirements.[82] Moreover, the existing audit committee report does not address the Commission's communication requirements in Rule 2-07 of Regulation S-X.

[79] Id.

[80] OECD, "Corporate Governance Factbook," (Feb. 2014), available at http://www.oecd.org/daf/ca/CorporateGovernanceFactbook.pdf.

[81] See Release No. 34-68453, *Public Company Accounting Oversight Board; Order Granting Approval of Proposed Rules on Auditing Standard No. 16, Communications with Audit Committees, and Related and Transitional Amendments to PCAOB Standards* (Dec. 17, 2012) [77 FR 75689].

[82] Appendix B to AS 16 identifies other PCAOB rules and standards that require audit committee communications, such as communications related to an audit of internal control over financial reporting that is integrated with an audit of financial statements, related party transactions, fraud considerations, and illegal acts, among others.

The change to the communication requirements within the auditing standards without a corresponding change in the audit committee reporting requirements has resulted in divergent practices. For example, some companies' audit committee reports refer to matters required to be communicated under AS 16; others refer to matters required to be communicated under all PCAOB standards. Still others continue to refer to communications under AU sec. 380, even though AU sec. 380 has been superseded. These differences in reporting may result in confusion among readers of the audit committee reports as to whether appropriate auditor and audit committee communications have occurred and therefore, suggest a need to consider updating the audit committee disclosure requirements.

V. FOCUS ON AUDIT COMMITTEE OVERSIGHT OF THE AUDITOR

The Commission is interested in understanding whether changes should be made to required disclosures about audit committees regarding oversight of the audit and the auditor relationship. The Commission is also interested in understanding whether this additional information would help inform investment decisions and, where applicable, voting decisions regarding the ratification of auditors and the election of directors who are members of the audit committee.

<u>Request for Comment</u>

1. Do the current audit committee reporting requirements result in disclosures that provide investors with useful information? Why or why not? Are there changes to the current audit committee disclosure requirements that the Commission should consider that would better inform investors about the audit committee's oversight of the audit and the independent auditor?

2. Are there existing disclosure requirements in this area that should be revised, reconsidered or removed? If so, which ones? How and why should they be changed?
3. Would investors find additional or different audit committee reporting requirements useful given the committee's strengthened and expanded role in overseeing a company's independent auditor that resulted from the Sarbanes-Oxley Act? For example, to what extent is information regarding how the audit committee discharges its responsibilities useful to investors given the nature of the requirements and likely variability in performance? Also, are there particular audit committee responsibilities for which information would be likely more or less useful and why?
4. What, if any, are potential challenges that issuers or audit committees may face that the Commission should consider as it assesses potential changes to disclosures in this area?
5. Are there other areas where changes to the current audit committee disclosure requirements would be desirable? If so, what are they?
6. Should the audit committee provide disclosure of its work in other areas, for example, its oversight of the financial reporting process or the internal audit function? If so, what types of disclosures would be most useful and why?

VI. POTENTIAL CHANGES TO DISCLOSURES

The Commission is seeking comment on potential changes to required disclosures regarding an audit committee's role and responsibilities relative to the audit and the auditor, and other potential related changes. The Commission is seeking feedback on the disclosure requirements to determine the extent to which adding, removing, or modifying certain audit committee disclosures would enhance the usefulness of such disclosures for investors.

The purpose of the disclosures discussed below would be to address the audit committee's responsibilities with respect to the appointment, compensation, retention, and oversight of the work of the registered public accounting firm and better inform investors about how the audit committee executes those responsibilities. The Commission is seeking feedback on the content and scope of the audit committee disclosures, as well as commenters' views on which of these disclosures, if any, would be most useful in conveying how the audit committee executes its oversight of the auditor and whether such enhanced disclosures would be useful to investors' investment or voting decisions.

Such disclosures could provide information that frequently is either not readily available or inconsistently available today to investors. These disclosures could also minimize the "expectations gap" that some have expressed exists between investors and the audit committee regarding the role of the audit committee.[83] In a series of roundtables organized by the CAQ, the Federation of European Accountants, and the Institute of Chartered Accountants Australia in January and February of 2013, participants noted that stakeholders' expectations are not consistent with the audit committee's actual responsibilities and how they are discharged, which results in the current expectations gap.[84]

For purposes of this concept release, the Commission has categorized the specific audit committee disclosures about which the Commission is interested in receiving comment into three groups: the audit committee's oversight of the auditor, the audit committee's process for selecting the auditor, and the audit committee's consideration of the qualifications of the audit firm and certain members of the engagement team when selecting the audit firm. The

[83] See Global Observations.

[84] Id.

Commission is also interested in receiving comments on where the audit committee disclosures should be located and whether there are specific concerns relating to smaller reporting companies[85] and emerging growth companies.[86] In Section VII of this release, the Commission also asks more general questions with respect to any potential new disclosures.

A. Audit Committee's Oversight of the Auditor

1. Additional Information Regarding the Communications Between the Audit Committee and the Auditor

As noted in Section III.A, the audit committee report today discloses whether certain communications have occurred. Potential additional disclosures about the communications might provide additional information about the actions the audit committee has taken during the most recently completed fiscal year to oversee the auditor and the audit. Also, as previously discussed, current requirements for the audit committee report contain an outdated reference to AU sec. 380, which was superseded by AS 16. In addition to correcting this reference, the Commission is considering whether to require additional qualitative disclosures about the nature and timing of the required communications between the audit committee and the auditor.

For instance, the PCAOB has required that the auditor communicate with the audit committee prior to the issuance of the auditor's report.[87] The disclosure rules could require the audit committee to discuss not just whether and when all of the required communications occurred, but also the audit committee's consideration of the matters discussed. Such communications and related disclosures could address, for instance, the nature of the audit

[85] See Rule 12b-2 of the Exchange Act [17 CFR 240.12b-2].

[86] See Section 2(a)(19) of the Securities Act [15 U.S.C. 77b(a)(19)] and Section 3(a)(80) of the Exchange Act [15 U.S.C. 78c(a)(80)].

[87] See paragraph 26 of AS 16.

committee's communications with the auditor related to items such as the auditor's overall audit strategy, timing, significant risks identified, nature and extent of specialized skill used in the audit, planned use of other independent public accounting firms or other persons, planned use of internal audit, basis for determining that the auditor can serve as principal auditor, and results of the audit, among others, and how the audit committee considered these items in its oversight of the independent auditor.

Request for Comment

7. Should the Commission consider modifying any of the existing audit committee disclosure requirements regarding communications with the auditor? If so, which disclosure requirements should the Commission consider modifying and what modifications should be made?
8. Should the Commission update the existing disclosure requirements to include all communications required by Commission rules and PCAOB standards rather than only those required by AS 16? Would expanding the requirements to encompass all required communications create difficulties for issuers or audit committees in complying with the disclosure requirements? Why or why not?
9. Should there be disclosure about the audit committee's consideration beyond a statement that they have received and discussed the matters communicated by the auditor as required by PCAOB Rule 3526, *Communication with Audit Committees Concerning Independence*? If so, what should be included in the disclosure?
10. Currently, audit committees are only required to disclose whether the required communications occurred. Are statements confirming that required communications have occurred helpful disclosure? Why or why not?

11. Should there be disclosures regarding the nature or substance of the required communications between the auditor and the audit committee? Are there other types of communications between the audit committee and the auditor about which the Commission should consider mandating disclosure?

12. Should such discussion be required to address all required communication topics or a subset of overarching topics related to how the auditor planned and performed the audit? For instance, should the audit committee disclose information regarding how the audit committee considered the nature of the required communications that were made under paragraphs 9 and 10 of AS 16 as it relates to significant risks identified, nature and extent of specialized skill used in the audit, planned use of the company's internal auditors, involvement by other independent public accounting firms or other persons, and the basis for determining that the auditor can serve as the principal auditor in its oversight of the independent auditor? Should the audit committee disclose how it dealt with disagreements between company management and the auditor? If so, what should be included in the disclosure? Are there other categories of the communications between auditors and the audit committee that should be considered for disclosure?

13. For audits involving multiple locations, should the audit committee report disclose information regarding how the audit committee considered, in its oversight of the auditor, the scope of the audit, locations visited by the auditor, and the relative amount of account balances related to such locations compared to the consolidated financial statements?

14. Communications between the auditor and the audit committee may not be limited to the items required by Commission rules and PCAOB standards. Should the audit committee

report be required to disclose any information about the extent to which additional matters were discussed with the auditor? If so, what level of detail should be required?

15. Are there benefits, costs or unintended consequences that could result from requiring disclosure that goes beyond a statement that the required discussions have occurred? How would the disclosures be used by institutional and retail investors, investment advisers, and proxy advisory firms in making voting decisions and recommendations on matters such as director elections, executive compensation, or shareholder proposals, among others?
16. Would the potential disclosures referenced here be decision-useful to investors? If so, would it be sufficient for the disclosure to address the consideration given by the audit committee without necessarily disclosing the underlying substance? Would disclosing the substance of the communications between the audit committee and the auditor be useful to investors? Why or why not?
17. Could these potential disclosures chill communications between the audit committee and the auditor? If so, how? Could they reveal proprietary information about the issuer or the audit methodology? If so, how?

2. The Frequency with which the Audit Committee Met with the Auditor

The audit committee and auditor can determine the timing, frequency and forum (*e.g.*, in-person or telephonically and extent of committee participation) for meetings, provided that required communications are made in accordance with PCAOB standards and Commission rules.[88] Also, there are listing requirements that the audit committee meet separately and periodically with management, the internal auditor, and the independent auditor.[89] Recognizing

[88] AS 16 and Rule 2-07 of Regulation S-X.

[89] See NYSE Listed Company Manual, Section 303A.07(E) and the Commentary to Section 303A.07(E).

that the number of audit committee meetings is already required to be disclosed,[90] requiring additional disclosure about the specific meetings with the auditor may provide additional insight into the audit committee's oversight of the auditor.

Request for Comment

18. Should there be additional disclosures required about the meetings the audit committee has had with the auditor? If so, what type of disclosures should be made and why? If not, why not?

19. Should the audit committee report disclose the frequency with which it met privately with the auditor? Would confirmation that private conversations occurred be useful disclosure even if there are no disclosures about the topics discussed? Should there be a requirement to disclose the topics discussed?

3. Review of and Discussion About the Auditor's Internal Quality Review and Most Recent PCAOB Inspection Report

Pursuant to certain listing requirements, the audit committee must obtain and review a report by the independent auditor describing the firm's internal quality-control procedures,[91] any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, with respect to one or more independent audits carried out by the firm.[92] Audit committees not subject to these listing standards may choose to request or discuss this information with their auditors, but they are not required to do so.

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[90] See Item 407(b)(3) of Regulation S-K.

[91] Paragraphs .04-.07 of PCAOB QC Section 30, *Monitoring a CPA Firms Accounting and Auditing Practice*, discuss the requirements related to an audit firm's internal quality-control review.

[92] See NYSE Listed Company Manual, Section 303A.07(b)(iii)(A).

Information about the results of internal quality reviews, or a PCAOB inspection of a company's audit, as well as more general inspection results, can help an audit committee in carrying out its oversight role. Inspection reports can inform an audit committee about how its auditor performed in high-risk areas across audits. As the PCAOB has stated, "[t]he [Sarbanes-Oxley] Act does not permit the [PCAOB] to make public, or otherwise to share with an audit committee, all of the information obtained by the PCAOB that could assist an audit committee in carrying out its role. . . . Beyond the public portion of an inspection report, voluntary disclosure by the inspected audit firm is an audit committee's only means of obtaining information concerning a PCAOB inspection."[93] The PCAOB also has provided sample questions an audit committee may wish to ask auditors. Specifically, the PCAOB stated:

> [W]ithout necessarily framing discussions in terms of an inspection or an inspection report, an audit committee might benefit from having an understanding with its audit firm through which the audit committee receives timely information (both during the conduct of the inspection and when the Board has issued a final inspection report) about –
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> - whether anything has come to the firm's attention suggesting the possibility that an audit opinion on the company's financial statements is not sufficiently supported, or otherwise reflecting negatively on the firm's performance on the audit, and what if anything the firm has done or plans to do about it;
> - whether a question has been raised about the fairness of the financial statements or the adequacy of the disclosures;
> - whether a question has been raised about the auditor's independence relative to the company;
> - whether any of the matters described in the public portion of an inspection report on the firm, whether or not they involve the company's audit, involve issues and audit approaches similar to those that arise or could arise in the audit of the company's financial statements;
> - to the extent any such similarity exists, whether and how the firm has become comfortable that the same or similar deficiencies either did not occur in the audit of the company's financial statements or have been remedied; and how issues described by the Board in general reports summarizing inspection

[93] See PCAOB Release No. 2012-003, *Information for Audit Committees about the PCAOB Inspection Process* (Aug. 1, 2012), available at http://pcaobus.org/Inspections/Documents/Inspection_Information_for_Audit_Committees.pdf.

> results across groups of firms relate to the firm's practices, and potentially the audit of the company's financial statements, and how the firm is addressing those issues.[94]

Disclosure could be required as to whether this type of discussion has occurred. There also could be disclosure required about the nature of any discussions held with the auditor about the results of the firm's internal quality review and most recent PCAOB inspection. These disclosures may provide transparency with respect to the extent of the audit committee's oversight of the auditor.

Request for Comment

20. Would disclosure about the audit committee's review and discussion of the audit firm's internal quality-control review and most recent PCAOB inspection report be useful to investors? If so, what types of disclosures should be made in this regard? Would disclosures about the nature and extent of such discussions be useful without disclosure of the specific review or inspection results? Should the disclosures include information about how the audit committee considered any deficiencies described in the PCAOB inspection report on the audit process? If not, why not?
21. Is there a risk that the confidentiality of the nonpublic PCAOB inspection results could be undermined (e.g., if this information is sought and provided through the audit committee)? If so, what type of information could be presented that might be problematic?
22. Should we require disclosure about how the audit committee considered the results described in PCAOB inspection reports in its oversight of the auditor? Why or why not?
23. Are there particular issues or challenges in this area that should be considered? If so, please describe and provide data.

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[94] Id. at p. 10-11.

4. Whether and How the Audit Committee Assesses, Promotes and Reinforces the Auditor's Objectivity and Professional Skepticism

Through its interactions with the auditor, the audit committee may be in a position to assess, promote, and reinforce the auditor's objectivity and professional skepticism. Heightened oversight by the audit committee of the auditor's objectivity and professional skepticism should promote greater audit quality. The audit committee could disclose whether, and if so how, as part of its oversight of the auditor, it assesses, promotes, or reinforces the auditor's objectivity and professional skepticism. Additionally, the audit committee could disclose the results of its evaluation of the auditor's objectivity and professional skepticism.

Request for Comment

24. Would investors find disclosure about whether, and if so how, the audit committee assesses, promotes, and reinforces the auditor's objectivity and professional skepticism useful? Why or why not?

25. What specific types of disclosures could the audit committee make in this regard? For example, should the audit committee disclose whether, and if so how, it evaluated the auditor's objectivity and professional skepticism, as well as the results of such an evaluation? Commenters are encouraged to provide examples of such disclosures.

B. Audit Committee's Process for Appointing or Retaining the Auditor

For listed issuers, the audit committee is responsible for appointing the auditor and deciding whether to retain an auditor.[95] However, satisfying this requirement can involve a wide range of activities. In fulfilling this responsibility, the audit committee may conduct an assessment of the current auditor. It may also decide to seek requests for proposals from other

[95] Even for non-listed issuers, the audit committee may have a role in the selection of the auditor. See, e.g., paragraphs 4-7 of AS 16.

auditors. Potential disclosures could provide information about the actions the audit committee took in reaching a decision about which auditor to select for the upcoming fiscal year's audit.

1. How the Audit Committee Assessed the Auditor, Including the Auditor's Independence, Objectivity and Audit Quality, and the Audit Committee's Rationale for Selecting or Retaining the Auditor

Disclosure about the process the audit committee undertook and the criteria used to assess the auditor and the audit committee's rationale for selecting or retaining the auditor could provide transparency into how the audit committee oversees the auditor and the rigor with which the audit committee exercises its responsibility to appoint a new, or retain an existing, auditor. In addition to the steps involved in the process to assess the auditor, disclosure also could be provided regarding the specific elements or criteria the audit committee considered during the process. Disclosures could, for example, include a description of the nature of the audit committee's involvement in evaluating and approving the auditor's compensation.

There are also numerous ongoing efforts to identify ways to assess audit quality ("audit quality indicators") and these efforts may result in published metrics and criteria that could be used for providing insight into audit quality.[96] Audit committees may choose to use the output from these efforts to guide discussion with the auditor about audit quality. To the extent the audit committee uses such indicators or metrics in assessing the quality of the auditor and the audit, disclosure about the use and consideration of such metrics may provide useful information about the audit committee's process for assessing the auditor and determining whether to select or retain the auditor.

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[96] Organizations such as the PCAOB, IAASB, and CAQ have discussed projects related to audit quality frameworks or indicators. The CAQ has published, "The CAQ Approach to Audit Quality Indicators" available at http://www.thecaq.org/docs/reports-and-publications/caq-approach-to-audit-quality-indicators-april-2014.pdf?sfvrsn=2.

Request for Comment

26. What types of disclosures could be made regarding the process the audit committee undertook to evaluate the external audit and performance and qualifications of the auditor, including the rationale for selecting or retaining the auditor?

27. Should the disclosures include a description of the nature of the audit committee's involvement in approving the auditor's compensation, including how compensation is determined and evaluated? Should the disclosures include the criteria or elements the audit committee considered? Should the audit committee provide additional disclosure about the nature and extent of non-audit services and its evaluation on how such services relate to its assessment of independence and objectivity?

28. If audit quality indicators are used in the evaluation of the auditor, should there be disclosure about the indicators used, including the nature, timing, and extent of audit quality indicators considered by the audit committee?[97] If audit quality indicators are not used in the evaluation of the auditor, what, if any, disclosures regarding the assessment of audit quality should be provided?

2. If the Audit Committee Sought Requests for Proposal for the Independent Audit, the Process the Committee Undertook to Seek Such Proposals and the Factors They Considered in Selecting the Auditor

The audit committee may periodically seek requests for proposals for the independent audit. Disclosures about the process the audit committee undertook, including the number of auditors that were asked to propose, information on how those auditors were selected, and the information that the audit committee used in its decision, may provide information about the

[97] See PCAOB Release No. 2015-005, *Concept Release on Audit Quality Indicators* (June 30, 2015).

audit committee's process in selecting or retaining an auditor and about the quality and qualifications of the auditor selected. Additionally, academic research is mixed as to whether companies engage in "opinion-shopping."[98] The Commission is interested in knowing whether relevant disclosures of the audit committee's process in selecting the auditor might be useful to investors.

Request for Comment

29. What types of disclosures could be made about requests for proposals for the audit, including the process undertaken and the factors considered in selecting the audit firm?
30. Should there be disclosure as to whether the audit committee sought proposals for the audit (including the reason the request for proposal was made), or whether the audit committee has a policy in this regard?

3. The Board of Directors' Policy, if any, for an Annual Shareholder Vote on the Selection of the Auditor, and the Audit Committee's Consideration of the Voting Results in its Evaluation and Selection of the Audit Firm

In those cases where a company voluntarily seeks ratification of its auditor, requiring additional disclosure may be useful to promote informed voting decisions. The Commission is interested in feedback on potential disclosure about the board of directors' policy, if any, for annual shareholder vote on the selection of the auditor, and the audit committee's consideration

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[98] See Lennox, C., Do Companies Successfully Engage in Opinion-Shopping? Evidence from the UK, 29 JOURNAL OF ACCOUNTING AND ECONOMICS, 321 (2000); and Chan, H.K. et al., A Political-Economic Analysis of Auditor Reporting and Auditor Switches, 11 REVIEW OF ACCOUNTING STUDIES, 21 (2006), both of which provide evidence that opinion shopping may occur. In contrast, in the United States, a study of auditor changes from the four largest U.S. accounting firms to small, not mid-market, audit firms found market reactions that support the notion of auditor changes in the post-Sarbanes-Oxley Act and PCAOB inspection era as being driven by better services. These results refute a notion of opinion shopping or shopping for lower audit fees. These authors also note that academic research in the 1980s and 1990s indicated that opinion shopping is generally unsuccessful. Chang, H. et al., Market Reaction to Auditor Switching from Big 4 to Third-Tier Small Accounting Firms, 29 AUDITING: A JOURNAL OF PRACTICE AND THEORY, 85 (2010).

of the voting results in evaluating and selecting the audit firm, including situations where the audit firm fails to achieve majority support. Such disclosure could provide useful information to shareholders as to how and why the board is seeking ratification of the auditor, as well as the implication of the shareholder vote being solicited.

Request for Comment

31. Would additional disclosures in this area provide meaningful additional information with respect to the selection of the auditor? If so, what types of disclosures should the Commission require to be made in this regard? For example, in addition to disclosure of whether there is a policy about shareholder ratification, should there also be disclosure of the factors the board considered in establishing the policy?
32. If there are a significant number of votes against the ratification, and the board nevertheless proceeds with the auditor in question, should the audit committee report provide the reasons why the board determined to go forward with that auditor? If not in the audit committee report, where should this information be provided and when should it be provided?
33. If it is determined that additional disclosure is required in this area, should voting on ratifications of independent auditors continue to be considered a "routine matter" allowing for discretionary voting by brokers on such ratifications pursuant to NYSE Rule 452?[99]

C. Qualifications of the Audit Firm and Certain Members of the Engagement Team Selected By the Audit Committee

In the course of carrying out its responsibilities related to auditor oversight, an audit committee is likely to gain an understanding of the key participants in the audit, their experience, and their qualifications to perform a high-quality audit. The key participants in the audit can

[99] NYSE General Rules, Operation of Member Organizations, Rule 452 available at http://nyserules.nyse.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_2&manual=/nyse/rules/nyse-rules/.

vary, but at a minimum include the engagement partner and engagement quality reviewer. Given this knowledge, the audit committee is in a position to evaluate the independence and qualifications of both the audit firm and key members of the engagement team, including the engagement partner, and determine whether to select or retain the auditor. Disclosures could convey the factors the audit committee considered most relevant in selecting or retaining the auditor and provide information about the auditor selected by the audit committee for the upcoming fiscal year's audit.

1. Disclosures of Certain Individuals on the Engagement Team

Disclosure could be provided with the name of the engagement partner, alone or with the name(s) of other key members of the audit engagement team (*e.g.*, the engagement quality reviewer), the length of time such individual(s) have served in that role and any relevant experience.[100] Regarding experience, information could be provided about the number of prior audit engagements performed and whether they were in the same industry. To the extent it is known that the individual(s) disclosed will be changing for the upcoming year's audit, that information could also be disclosed.

Request for Comment

34. Would disclosure of the name of the engagement partner be useful to investors? Would disclosure of any additional members of the engagement team be useful and, if so, which? (For example, should the names of all partners who are required to rotate under SEC independence rules be disclosed? Why or why not?) Should there be other disclosures about

[100] Both the PCAOB and the IAASB have been pursuing projects that would require naming the engagement partner in the audit report. See PCAOB Release No. 2013-009; PCAOB Release No. 2015-004; and the IAASB final rule *International Standard on Auditing (ISA) 700 (Revised), Forming an Opinion and Reporting on Financial Statements)*, including paragraph 45 of ISA 700, available at http://www.ifac.org/publications-resources/international-standard-auditing-isa-700-revised-forming-opinion-and-reporting.

the engagement team or others involved in the audit? If so, what additional information should be disclosed? Are there any costs to such disclosure?

35. Are there incremental benefits to disclosing the name (such as increased accountability)? Is disclosure of the name helpful in promoting audit quality? Are current risks of potential legal liability, regulatory sanction and significant reputational costs strong enough incentives to develop a team that is capable of executing the audit in accordance with professional standards? Why or why not? In addition to disclosure of the name, there could be disclosure regarding other qualifications, such as the length of time the individual has served in that role, professional licenses, or his or her experience. What, if any, additional information should be disclosed? Why?
36. Is the audit committee the appropriate party to provide such disclosure? If not, what other party or parties should provide the disclosure and why?
37. Would such disclosure be more appropriately disclosed in the auditor's report? Why or why not? Would it be better disclosed in a separate filing with the PCAOB? Why or why not? If the disclosure is provided in a separate filing with the PCAOB, what information should the disclosure include?
38. If the name of the engagement partner is available elsewhere (e.g., included in the auditor's report or a supplemental filing with the PCAOB), would investors benefit from having it also reported as part of the audit committee's disclosures? Why or why not? Also, if the name of the engagement partner is available elsewhere, should the audit committee's report refer to where the disclosure is otherwise located?
39. If the name of the engagement partner is reported in the audit committee report, would investors benefit from this information also being available in one location for all audits?

40. If disclosures are required and it is known that the person(s) disclosed will change for the next audit, should there be disclosure of this fact including who will, or is expected to, take on the role for the next audit? Why or why not?

41. If there is a change in the engagement partner during the year, should this be disclosed sooner than in the next annual update? If other named individuals change during the year, should this be disclosed as well?

42. Are there any liability implications (*e.g.*, for engagement partners, audit committee members, the company or other participants) with respect to disclosure of participants in the audit? If so, what are these implications? Do the implications change based on where or how the disclosure is made?

2. Audit Committee Input in Selecting the Engagement Partner

The audit committee may provide input into an audit firm's assignment of the individual who will serve as the engagement partner for the upcoming audit. Disclosures about the involvement of the audit committee in this selection, and any input the audit committee had in the decision, may provide transparency and insight into the exercise of the audit committee's responsibilities in overseeing the auditor.

<u>Request for Comment</u>

43. Should the audit committee be required to disclose what it considered in providing input to the firm's assignment of the engagement partner? If so, what information should such disclosures contain?

44. Should the disclosures be limited to whether the audit committee participated in the selection of the engagement partner, or should there be more detail regarding the audit committee's input?

3. The Number of Years the Auditor has Audited the Company

The number of years the auditor, or its predecessor(s) in the case of merged audit firms, has audited the company may be a relevant consideration to the audit committee's determination of whether or not to engage or retain the auditor. The role of auditor tenure in audit quality has attracted significant attention over the past few years.[101] Most academic research indicates that engagements with short-term tenure are relatively riskier or that audit quality is improved when auditors have time to gain expertise in the company under audit and in the related industry.[102] However, some academic research suggests that both short and long tenure can have detrimental effects on audit quality.[103] Audit committees may view auditor tenure as a positive or negative influence on audit quality, depending on the length of such tenure. In light of the public interest in the subject of auditor tenure, disclosure of this data could provide insight into the audit committee's overall decision to engage or retain the auditor.

Request for Comment

45. Should the audit committee's report include information about the length of the audit relationship? What types of disclosures could the audit committee make in this regard? Should it be just the years of auditor tenure?

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[101] See, e.g., PCAOB Release No. 2011-006, *Concept Release on Auditor Independence and Audit Firm Rotation* (Aug. 16, 2011), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket037.aspx; and PCAOB Release No. 2013-005, *Proposed Auditing Standards on the Auditor's Report and the Auditor's Responsibilities Regarding Other Information and Related Amendments* (Aug. 13, 2013), available at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx.

[102] See Myers, J. et al., Exploring the Term of the Auditor-Client Relationship and the Quality of Earnings: A Case for Mandatory Auditor Rotation? 78 THE ACCOUNTING REVIEW, 779 (2003); and Carcello, J. and Nagy, A., Audit Firm Tenure and Fraudulent Financial Reporting, 23 AUDITING: A JOURNAL OF PRACTICE AND THEORY, 55 (2004).

[103] See, e.g., Davis, L. et al., Auditor Tenure and the Ability to Meet or Beat Earnings Forecasts, 26 CONTEMPORARY ACCOUNTING RESEARCH, 517 (2009).

46. Should there also be disclosure as to whether and, if so, how auditor tenure was considered by the audit committee in retaining the auditor? Should there be disclosure of how tenure was considered in evaluating the auditor's independence and objectivity? Why or why not?

47. Would disclosure of auditor tenure be more appropriately disclosed in the auditor's report? Why or why not? Would it be better disclosed somewhere else (such as in a form filed with the PCAOB)? Why or why not?

4. Other Firms Involved in the Audit

In many audits, especially audits of companies with multiple locations and international operations, the firm signing the auditor's report involves other affiliated accounting firms, non-affiliated accounting firms, and other third-party participants, such as tax advisors or actuaries, in the conduct of a portion of the audit work. The auditor is required to communicate to the audit committee the names, locations, and planned responsibilities of other independent public accounting firms or other persons, who are not employed by the auditor, that perform audit procedures in the current period audit. Specifically, paragraph 10 of AS 16 requires:

> As part of communicating the overall audit strategy, the auditor should communicate the following matters to the audit committee, if applicable:
>
> - the nature and extent of specialized skill or knowledge needed to perform the planned audit procedures or evaluate the audit results related to significant risks;
> - the extent to which the auditor plans to use the work of the company's internal auditors in an audit of financial statements;
> - the extent to which the auditor plans to use the work of internal auditors, company personnel (in addition to internal auditors), and third parties working under the direction of management or the audit committee when performing an audit of internal control over financial reporting;
> - the names, locations, and planned responsibilities of other independent public accounting firms or other persons, who are not employed by the auditor, that perform audit procedures in the current period audit; and
>
> Note: The term "other independent public accounting firms" in the context of this communication includes firms that perform audit procedures in the current period audit regardless of whether they otherwise have any relationship with the auditor.

- the basis for the auditor's determination that the auditor can serve as principal auditor, if significant parts of the audit are to be performed by other auditors.[104]

After receiving the above information from the auditor, the audit committee may choose to meet with and discuss with the auditor, the other firms, or other persons who will be performing work on the audit. The audit committee is not required to disclose these communications with the auditor to investors.

Request for Comment

48. Should the Commission require any additional disclosures in this regard? For example, should the names of the other independent public accounting firms and other persons involved in the audit be disclosed? Should the extent of involvement by these other participants be disclosed? Why or why not?

49. Should the names of other participants be included in the required disclosure instead of in the auditor's report? Should the names be disclosed elsewhere? If so, why? Would investors benefit from having all of the information located in the audit committee report?

D. Location of Audit Committee Disclosures in Commission Filings

As noted in Section III, current audit committee disclosures can appear in different places. None of the disclosures are specifically listed in the registration statement forms used for public offerings. As such, audit committee disclosures are not generally included in the prospectus delivered to investors for initial public offerings. Some of the audit committee disclosures are required in an issuer's annual report on Form 10-K filed with the Commission.[105]

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[104] AS 16.

[105] Item 10 of Form 10-K references the disclosure requirements in Items 407(d)(4) and (5) of Regulation S-K. A similar requirement is also included in Item 7(b) of Schedule 14A.

These disclosures would be considered part of the prospectus when the registration statements incorporate an issuer's annual report by reference.[106]

The audit committee report[107] and the disclosure of the function and number of meetings held by the audit committee[108] is not generally considered part of the prospectus in a registered offering, since it is not required by the Securities Act registration forms or the annual report on Form 10-K.[109] As the audit committee disclosures may inform investors' investment decisions, the Commission solicits feedback regarding the placement of current and potential additional audit committee disclosures, including the audit committee report.

Request for Comment

50. Would investors benefit from the audit committee disclosures being presented in one location? If so, where should the disclosures appear and how would investors benefit? If not, why is the existing location of the various audit committee disclosures appropriate?
51. Should all or any of the audit committee disclosures, including the audit committee report, be included in registration statements filed pursuant to the Securities Act? If not, why not? If so, why and should the disclosure requirements be included within Securities Act registration

[106] In practice, many registrants provide the Items 407(d)(4) and (5) disclosures in their definitive proxy statements in reliance on General Instruction G(3) of Form 10-K. Once the definitive proxy statements are filed, the information is incorporated by reference into their Form 10-K, which is then incorporated by reference into any currently effective Form S-3 or other registration statement subsequently filed, as applicable.

[107] Item 407(d)(3) of Regulation S-K.

[108] Item 407(b)(3) of Regulation S-K.

[109] Pursuant to Instruction 1 to Item 407(d) of Regulation S-K, the information required by Items 407(d)(1), (2), and (3) is not deemed to be soliciting material or filed with the Commission, except to the extent that a registrant specifically requests such information be treated as soliciting material or is incorporated by reference into a Securities Act registration statement.

statement forms or as a Form 10-K disclosure requirement that may then be incorporated by reference into Securities Act registration statements?

52. With respect to the additional disclosures discussed in this release, where should they be made? If required, should they be in the audit committee report, a separate section of the proxy statement, the annual report, on the company's website, or elsewhere? Please provide an explanation as to why the disclosure should be made in a suggested location. If required, should the disclosure be furnished but not filed? Why or why not?

E. Smaller Reporting Companies and Emerging Growth Companies

Item 407(g) of Regulation S-K provides the only audit committee disclosure accommodation within Item 407 that is specific to smaller reporting companies.[110] The Jumpstart Our Business Start-Ups Act (the "JOBS Act")[111] did not change the audit committee disclosure requirements for emerging growth companies. As such, the Commission is soliciting feedback regarding the application of the current and potential audit committee disclosure requirements to smaller reporting companies and emerging growth companies.

Request for Comment

53. Should current audit committee disclosure requirements be changed for smaller reporting companies or emerging growth companies? If so, which requirements and why? Would investors in smaller reporting companies or emerging growth companies find this information any more or less useful than similar disclosure requirements for other issuers? If so, how, and why?

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[110] 17 CFR 229.407(g).

[111] Pub. L. No. 112-106, 126 Stat. 306 (2012).

54. With respect to the additional disclosures discussed in this release, should any disclosure requirements, if adopted, apply to smaller reporting companies or emerging growth companies? If so, which requirements and why? If not, why not? Would different disclosure requirements impact the issuers (e.g., secondary market liquidity)?

VII. ADDITIONAL REQUEST FOR COMMENT REGARDING AUDIT COMMITTEE DISCLOSURES

In addition to seeking public comment on the foregoing topics for disclosure, the Commission seeks public comment in response to the following questions about the disclosures as a whole. If views of these questions would differ based on what type of disclosure is being considered, please differentiate and explain why.

Request for Comment

55. Should additional disclosures, such as those presented in Section VI, be required, or should they be voluntary as they are today? Should the Commission consider requiring specific disclosures, or requiring certain categories of disclosures? If so, which categories?
56. Are there specific issuer, industry, audit committee member, or auditor characteristics that should be considered in establishing new disclosure requirements? Are there particular disclosures that should always be required and, if so, which? Are there particular disclosures that should only be required if certain conditions or characteristics are present and, if so, which disclosures and under what circumstances? Are there particular disclosures for which specificity in the requirement is important and, if so, for which disclosures and elements of disclosures should the requirements be specific?
57. Would the disclosures prompt the audit committee to change how it oversees the auditor? If so, how?

58. Would such disclosures provide insight into the nature, timing, and extent of the audit committee's oversight of the auditor?

59. Would the disclosures promote audit quality? If so, how?

60. Would the disclosures discussed herein result in boilerplate information? If so, how could the requirements be crafted to avoid boilerplate disclosure?

61. Would any of the additional disclosures discussed in this concept release result in disclosure that is not useful to investors? Why or why not?

62. Would additional information need to be disclosed in order to place any or all of the disclosures discussed above in the appropriate context? If so, what additional disclosures might be needed, and should they be required or discretionary?

63. If the Commission were to proceed with requiring some or all of the disclosures proposed above, should the disclosures be made by all issuers? For example, should the disclosures be required only for those subject to the proxy rules? Should they be required for foreign private issuers?[112] Why or why not? Should there be accommodations made for certain types of companies or certain circumstances? If so, what should they be?

64. If the Commission proceeds with requiring some or all of the disclosures proposed above, should there be a requirement to update these disclosures for changes between proxy or information statements? If so, what should trigger amended disclosures? Should any such updates be made quarterly or more frequently?

65. If the Commission proceeds with requiring some or all of the disclosures discussed above, should the disclosures be required to be provided in an interactive data format? If so, what

[112] Foreign private issuers are not subject to the proxy rules. See Rule 3a12-3(b) of the Exchange Act [17 CFR 240.3a12-3(b)].

elements of disclosure should be provided in that manner and in what format should the information be provided?

66. The audit committee disclosure requirements may reference other documents, such as an audit committee charter. Should such documents be provided along with the required disclosures? If not, should information be provided to help locate the information referenced? Why or why not? Should information be hyperlinked? If so, are there any unintended consequences or implementation challenges that may result from information being presented in this manner?

67. If the Commission proceeds with requiring some or all of the disclosures proposed above, under existing reporting deadlines, would there be sufficient time to prepare these disclosures? Would there be difficulties in making these disclosures?

68. Would the additional disclosures discussed above help minimize information asymmetries that may exist between management and investors? If so, how? What other benefits may accrue from providing this information?

69. Expanded disclosures may have direct and indirect economic impacts on market participants. What direct and indirect economic impacts would these disclosures have on market participants? Are there any unintended consequences that could result from such disclosures with respect to audit firms, individual audit partners, audit committee members, audit committees, issuers, investors, or others? For instance, could potential changes chill or overly formalize audit committee communications with auditors? Are there specific liability implications with respect to additional disclosure made by the audit committee? If so, please describe.

70. Would other categories of disclosures about the audit committee's role relative to the auditor be useful? If so, what other categories?

71. How should the Commission address potential changes in the auditor's report with respect to audit committee oversight of the auditor?

72. If audit committees are required to provide disclosure that relates to information provided by the auditor (and it is not currently required to be communicated by the auditor under existing PCAOB auditing standards), would changes to PCAOB auditing standards be necessary to ensure that additional information beyond existing required communications is provided to the audit committee?

73. Are there improvements that the Commission should consider to the reporting on the audit committee's oversight of the accounting and financial reporting process or internal audits? For instance, should the audit committee disclose how it interacts with the company's management?

74. Should the Commission consider the potential for changes that would affect the role and responsibilities of the audit committee, such as those related to qualifications of members of the audit committee or areas for which audit committees should (or should not) be responsible? Should the audit committee disclose its role, if any, in risk governance? Should the audit committee report on other areas of oversight? For example, audit committees may be charged with overseeing treatment of complaints, cyber risks, information technology risks, or other areas. Would this disclosure distract from the report's focus on oversight of the audit function? In this regard, we note that commentators have recently indicated

Commissioner Aguilar - Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75345 / July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16142

In the Matter of JOHN JORDAN, Respondent.	ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

On September 22, 2014, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against John Jordan ("Jordan" or "Respondent").

II.

In response to these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C 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[1] that:

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

Summary

These proceedings arise out of a fraudulent scheme in which insiders of publicly-traded penny stock companies paid secret kickbacks to a purported corrupt hedge Fund Manager, who was in fact an undercover agent with the Federal Bureau of Investigation ("Fund Manager"), in exchange for the Fund Manager's purchase of restricted stock of the penny stock companies on behalf of his purported hedge fund ("the Fund"), which did not actually exist.

Respondent

1. Jordan, age 62, is a resident of Shingle Springs, California. During the period August 22, 2011 through September 18, 2011, while Jordan was the Chief Executive Officer, President, Chief Financial Officer and a member of the Board of Directors of Vida-Life International, Ltd. ("Vida-Life"), he participated in an offering of Vida-Life stock, which is a penny stock. On May 3, 2013, Jordan was convicted after a jury trial of one count of conspiracy to commit securities fraud, four counts of wire fraud, and one count of mail fraud and was sentenced on August 16, 2013 to 30 months' imprisonment to be followed by 12 months' supervised release in *U.S. v. John Jordan, et al.*, 11-CR-10415-NMG (D. Mass.). He was also ordered to pay a fine of $4,000 and to forfeit $16,000.

Other Relevant Entities and Individuals

2. Vida-Life International, Ltd. is a Nevada corporation in the business of developing and selling animal nutritional products. Its common stock was registered with the Commission under Exchange Act Section 12(g), but on May 23, 2014, the Commission suspended trading in the securities of Vida-Life for ten days pursuant to Exchange Act Section 12(k), and revoked the registration of its common stock on July 29, 2014 pursuant to Exchange Act Section 12(j). Vida-Life's stock was publicly quoted on OTC Link under the symbol "VILF," but OTC Link has discontinued the display of quotes.

Background

3. On or around August 22, 2011, Jordan and another individual met with the Fund Manager (the "August 22 Meeting"). The Fund Manager explained to Jordan that he was prepared to invest Fund monies of up to $5 million in Vida-Life stock in exchange for a secret fifty percent kickback, enabling the Fund Manager to keep for himself half of the money he was supposedly investing on behalf of the Fund.

4. At the August 22 Meeting, the Fund Manager also explained the mechanics of the funding, informing Jordan that, while the Fund Manager could commit to an investment of up to $5 million of the Fund's money, with up to $2.5 million being kicked back to the Fund Manager, the Fund Manager did not want to invest the entire amount at once. Therefore, the Fund Manager told Jordan, he would invest the money over time in tranches, or installments, of increasing amounts.

5. At the August 22 Meeting, the Fund Manager further discussed with Jordan the mechanics of how monies would be kicked back to the Fund Manager. The Fund Manager arranged with Jordan that Vida-Life would execute a consulting agreement with a nominee consulting company that the Fund Manager purportedly controlled, but that the Fund Manager would not actually provide any consulting services. Jordan was told that invoices would be issued by the Fund Manager's nominee company to Vida-Life in order to disguise the kickbacks.

6. At the August 22 Meeting, Jordan agreed to the funding/kickback arrangement and executed a consulting agreement between Vida-Life and the Fund Manager's nominee consulting company. On various dates between August 23, 2011 and September 18, 2011, Jordan sent the Fund Manager documents related to the kickback transaction, including stock purchase agreements between Vida-Life and the Fund.

7. On or about August 29, 2011, in accordance with wiring instructions provided by Jordan, $32,000 was sent by wire transfer from a bank account maintained in Boston, Massachusetts purportedly belonging to the Fund to a Vida-Life corporate bank account outside of Massachusetts. This wire transfer represented the first tranche of funding to Vida-Life.

8. On or about September 2, 2011, Jordan caused a total of $16,000 to be sent by four separate wire transfers, three in the amount of $5,000 and one in the amount of $1,000, from two Vida-Life corporate bank accounts outside of Massachusetts to a Citizens Bank account held in the name of the Fund Manager's nominee company in Massachusetts. These wire transfers represented Jordan's kickback to the Fund Manager from the first tranche of funding to Vida-Life.

9. On or about September 7, 2011, Jordan caused a stock certificate representing the purchase by the Fund of Vida-Life shares to be sent to the Fund Manager.

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

IV.

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

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

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

B. Respondent Jordan be, and hereby is:

prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]; and

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

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

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. 75347 / July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16673

In the Matter of Anmore, Inc., and Bakery Acquisition Corp., Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Anmore, Inc. and Bakery Acquisition Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Anmore, Inc. (CIK No. 1252278) is a dissolved Florida corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Anmore 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 $12,304 for the prior nine months.

2. Bakery Acquisition Corp. (CIK No. 1130202) is a void Delaware corporation located in Longwood, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Bakery Acquisition is delinquent in its periodic

filings with the Commission, having not filed any periodic reports since it filed a Form 10 registration statement on December 19, 2000.

B. DELINQUENT PERIODIC FILINGS

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

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

5. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/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. 75348 / July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16674

In the Matter of **Baxter Capital Co.,** **BF Acquisition Group III, Inc., and** **BF Acquisition Group V, 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 Baxter Capital Co., BF Acquisition Group III, Inc., and BF Acquisition Group V, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Baxter Capital Co. (CIK No. 1099216) is a dissolved Florida corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Baxter Capital is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended January 31, 2003.

2. BF Acquisition Group III, Inc. (CIK No. 1089776) is a merged Florida corporation located in Newark, Delaware with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BF Acquisition Group III 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, which reported a net loss of $23,945 for the prior nine months.

3. BF Acquisition Group V, Inc. (CIK No. 1089778) is a dissolved Florida corporation located in Wilmington, Delaware with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BF Acquisition Group V 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, 2008, which reported a net loss of $3,527 for the prior three 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. 4135 / July 1, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31700 / July 1, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16670

In the Matter of **ALPHABRIDGE CAPITAL MANAGEMENT, LLC, THOMAS T. KUTZEN, AND MICHAEL J. CARINO,** **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 AlphaBridge Capital Management, LLC, Thomas T. Kutzen, and Michael J. Carino (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement ("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, 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' Offers, the Commission finds[1] that:

SUMMARY

1. These proceedings arise out of a fraudulent scheme orchestrated by a registered investment adviser to inflate the valuations of certain mortgage-backed securities held in the portfolio of private investment funds managed by the adviser. The scheme boosted the funds' net asset values and thus increased the management and performance fees that the adviser collected and eventually disbursed to the advisory firm's principals. The firm and its principals consequently breached their fiduciary duty to their advisory clients.

2. Since the funds' inception in 2001, the adviser told the funds' investors, administrator, and auditor (including a valuation group working for the auditor) that the adviser obtained independent, market-grounded price quotes for the securities at issue from registered representatives of two reputable broker-dealers. However, the process changed over time, and, by 2010, the adviser supplied its valuations to the registered representatives for them to pass off as their own to the funds' administrator and auditor. As the adviser's prices became increasingly divergent from other valuation sources in 2011 and 2012, the auditor asked to speak directly to the registered representatives who supposedly could provide market-based support for the prices. The adviser agreed to make one of the two registered representatives available to the auditor, but, unbeknownst to the auditor, the adviser scripted the registered representative's responses to the auditor's inquiries, thereby further misleading and deceiving the auditor and ultimately the funds' investors.

RESPONDENTS

3. AlphaBridge Capital Management, LLC ("AlphaBridge") is a Delaware limited liability company with its principal place of business in Greenwich, Connecticut. Since November 2000, AlphaBridge has been registered with the Commission as an investment adviser (File No. 801-58162).

4. Thomas T. Kutzen ("Kutzen") is AlphaBridge's founder, majority owner, managing member, president, chief executive officer, and chief investment officer. Kutzen is 61 years old and resides in Riverside, Connecticut.

5. Michael J. Carino ("Carino") is AlphaBridge's chief compliance officer and minority owner. Carino is 43 years old and resides in Greenwich, Connecticut.

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

FACTS

Background

6. Since February 2001, AlphaBridge has provided investment advisory services to the AlphaBridge Fixed Income Master Fund, Ltd. and its two feeder funds, the AlphaBridge Fixed Income Fund, Ltd. and AlphaBridge Fixed Income Partners, LP, all of which are private investment funds (collectively, "AlphaBridge Funds" or "Funds").

7. At all times, the AlphaBridge Funds were AlphaBridge's sole advisory clients, and AlphaBridge was the general partner or manager of the Funds.

8. At all times, Kutzen and Carino were co-portfolio managers of the Funds, and Carino had primary day-to-day responsibility for oversight of the Funds.

9. AlphaBridge collected a management fee equal to 2% per annum of the Funds' assets, payable on a monthly basis. AlphaBridge also was entitled to collect an annual incentive or performance fee equal to 20% of the net profits of the Funds for achieving positive year-over-year returns.

Securities in the Funds' Portfolio

10. The primary investment objective of the AlphaBridge Funds, as stated in the Funds' offering memoranda, was to invest in a broad range of fixed income securities, including mortgage-backed securities and U.S. Treasury securities.

11. At all times, the Funds' holdings included securities known as interest-only ("IO") and inverse, interest-only ("IIO") floaters, which are strips or tranches of collateralized mortgage obligations ("CMOs"). CMOs are pools of mortgage loans that receive cash flows from the underlying mortgages and are organized into different payment classes based on the varying characteristics of the underlying mortgages. The IO and IIO classes of a CMO receive a coupon payment that fluctuates based on changes in prevailing interest rates.

12. IOs and IIOs are unlisted, thinly-traded securities and are commonly valued based on discounted future cash flows.

13. Determining future cash flows for IOs and IIOs depends heavily on the conditional prepayment rate ("CPR"), which is the percentage of a CMO pool that is or is expected to be prepaid within a given period. Lower interest rates tend to correlate with higher prepayment rates (because more borrowers tend to refinance in a lower interest rate environment), and higher interest rates tend to correlate with lower prepayment rates. Historical CPR is an actual past prepayment percentage. Projected CPR is an estimate of a future prepayment percentage.

14. The projected CPR is an important factor for valuing IOs and IIOs. All other factors being equal, the greater the number of loans in a CMO pool that have been prepaid, the lower the overall income stream, and the lower the payment to the IO and IIO holder. Thus, all

other factors being equal, higher projected CPRs (or faster prepayment rates) tend to correlate with lower projected cash flows and lower IO and IIO values, while lower projected CPRs (or slower prepayment rates) tend to correlate with higher projected cash flows and higher IO and IIO values.

Misleading and Fraudulent Conduct Concerning Price Quotes

15. From at least 2001 through at least April 2013, AlphaBridge made various representations to the Funds' investors, the administrator of the Funds ("Administrator"), and the Funds' auditor ("Auditor") concerning AlphaBridge's process for valuing the IOs and IIOs in the Funds' portfolio. In the Funds' financial statements, in responses to due diligence questionnaires and in other oral and written statements to investors and potential investors in the Funds, and (beginning in 2011) in AlphaBridge's written valuation policy, AlphaBridge, through Kutzen and Carino, stated that AlphaBridge obtained monthly price quotes for the IOs and IIOs from two independent and reputable broker-dealers and used the arithmetic average of these quotes as AlphaBridge's price for these securities. Fundamentally, AlphaBridge represented, and the Funds' investors, Administrator and Auditor understood and expected, that the broker-dealers providing price quotes to AlphaBridge were independent of and not controlled or influenced by AlphaBridge. However, by 2010, AlphaBridge was providing its valuations to registered representatives of the broker-dealers to provide to the Administrator without disclosing this practice to the Funds' investors, Administrator, and Auditor.

16. Since the Funds' inception in 2001, AlphaBridge has purported to obtain price quotes for the IIOs in the Funds' portfolio from the same two registered representatives, both of whom had long-term business relationships with AlphaBridge. Other than commissions for transactions executed for AlphaBridge or the Funds, the registered representatives did not receive compensation or remuneration from AlphaBridge for providing the price quotes.

17. One of these individuals ("Person A") was a registered representative (typically in a salesperson role) at several different Commission-registered broker-dealers in succession between 2000 and 2013. During that period, AlphaBridge was consistently one of Person A's largest customers. Commissions from trades for AlphaBridge accounted for at least 10% of Person A's commissions in most years, more than 30% in some years, and nearly 60% in 2011.

18. During the same period, the other individual ("Person B") was a registered representative and salesperson successively at two Commission-registered broker-dealers. Person B conducted significant business with AlphaBridge during this period, but AlphaBridge was a smaller percentage of Person B's business than it was of Person A's business.

19. Between at least 2008 and 2013, AlphaBridge, through Kutzen and Carino, routinely and repeatedly refused requests from investors or potential investors in the Funds (or their consultants) to identify or provide contact information for Person A and Person B.

20. Since the Funds' inception in 2001, Person A and Person B provided written price quotes monthly to the Administrator and annually to the Auditor.

21. From approximately 2001 to 2008, Person A and Person B both received lists from Carino of the securities in the Funds' portfolio, and both of them asked traders at their respective broker-dealers for price quotes for these securities. Person A and Person B in turn provided these prices to Carino and, at Carino's request, thereafter sent them to the Administrator and Auditor.

22. Between 2008 and 2010, as the number of IOs and IIOs in the Funds' portfolio grew to over 100 securities, both Person A and Person B encountered resistance from traders at their respective broker-dealers because the pricing process for AlphaBridge was becoming increasingly time-consuming and subjective. Person A and Person B both told Carino of the traders' resistance.

23. Sometime during this period between 2008 and 2010, to expedite the monthly pricing process, Carino suggested to both Person A and Person B that he share AlphaBridge's prices for the IO and IIO securities in the Funds' portfolio with each of them. Carino told Person A and Person B that he generated AlphaBridge's prices by using his own valuation model.

24. When Carino began sharing AlphaBridge's prices with Person A and Person B, he initially did so strictly orally. According to Person A, Carino would email a list of the Funds' holdings to Person A and then would read aloud AlphaBridge's prices to Person A over the telephone. At Carino's direction, Person A wrote down the prices, then typed them into the spreadsheet, and later sent them on to the Administrator and/or Auditor. For some period, Carino followed a similar practice with Person B, but, by 2012, Carino was sending spreadsheets to Person B via electronic mail with prices already populated.

25. When Carino began sharing AlphaBridge's prices with Person A and Person B, Carino told them each to review his prices and, if they agreed, to pass along the prices to the Administrator and the Auditor. However, in practice, as Carino knew or was reckless in not knowing, Person A and Person B did little or nothing to review or check the validity of AlphaBridge's prices.

26. By 2010, the prices that Person A and Person B sent to the Administrator and the Auditor—as if they were generated by Person A and Person B—in fact were AlphaBridge's prices as generated by Carino. Person A and Person B had few if any disagreements with Carino concerning the prices, and any questions Person A or Person B raised were generally resolved in AlphaBridge's favor. Also, for monthly pricing, oftentimes there was a very short turnaround time between Carino providing AlphaBridge's prices to Person A and Person B and Person A and Person B transmitting their price quotes to the Administrator, which Carino knew or was reckless in not knowing because Person A and Person B typically copied Carino on their transmittals to the Administrator. By 2012, Person B was sending Carino's price sheets to the Administrator—unaltered—within a few hours, and sometimes within an hour, of receiving the price sheets from Carino.

27. In approximately mid-2010, Person A told Carino that AlphaBridge's prices were not in line with prices that Person A was seeing in actual or potential market transactions in the same or comparable securities. According to Person A, Carino told Person A that AlphaBridge

was switching to a long-term valuation model for the Funds' portfolio, as opposed to a fair value standard, and that the Auditor had approved this change. Carino told the Auditor, in conversations and in a valuation memorandum that Carino prepared, that a longer term view of CPRs was appropriate because CPRs fluctuated significantly on a month-to-month basis, and that Person A, as a market participant, would agree with the longer-term view of CPRs. Person A accepted Carino's explanation and agreed to continue to pass along Carino's prices, as if they were generated by Person A, to the Administrator and the Auditor until April 2013.

28. Person B continued the practice of passing along AlphaBridge's prices, as if they were generated by Person B, to the Funds' Administrator and Auditor through December 31, 2012. In early 2013, Person B told Carino that Person B's employer had a new, centralized process for providing pricing information to customers and that, if Carino wanted to continue to obtain price quotes from Person B, Carino would need to go through the new formalized process. Carino declined and thereafter did not seek further pricing from Person B.

29. Neither Person A nor Person B told the Administrator or Auditor that Carino was sharing his prices with each of them or that the prices they each transmitted to the Administrator and Auditor were generated by Carino.

30. Person A and Person B also did not tell their various respective employers during the relevant period that they were providing price quotes to the AlphaBridge Funds. Carino knew or was reckless in not knowing that the broker-dealers that employed Person A and Person B did not authorize them to provide price quotes for the Funds and therefore institutionally did not stand behind the quotes. Despite his knowledge or reckless disregard, Carino suggested to the Auditor at various times that price quotes from Person A and Person B were trustworthy because their employers were reputable broker-dealers.

31. In May 2013, Person A was terminated for providing price quotes for the AlphaBridge Funds in contravention of the policies and procedures of Person A's employer. According to Person A, Person A informed both Carino and Kutzen of the termination in telephone calls. Neither Carino nor Kutzen relayed this information to the Auditor.

32. In July 2013, Person B was terminated for providing price quotes for the AlphaBridge Funds in contravention of the policies and procedures of Person B's employer.

<u>Fraudulent Conduct During Audits</u>

33. At all times, the Funds' financial statements stated that they were prepared in accordance with accounting principles generally accepted in the United States ("GAAP"). The Funds' financial statements (as well as the Funds' offering documents) stated that the value of fund assets that do not trade on an exchange or for which there is no other ready market would be determined in accordance with principles of fair value. Financial Accounting Standards Board Accounting Standards Codification Topic 820, *Fair Value Measurement* ("ASC 820") defines fair value as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." The

Funds' financial statements characterized the IOs and IIOs in the Funds' portfolio as "Level 3" assets in the ASC 820 fair value hierarchy.

34. From at least 2006 through 2013, the Auditor conducted an annual audit of the Funds' financial statements. Kutzen, as AlphaBridge's managing member, signed annual management representation letters to the Auditor on AlphaBridge's behalf. These letters included representations about the independence of Person A and Person B.

35. At all relevant times, the Auditor understood and expected that Person A and Person B were independent third parties and not controlled or influenced by AlphaBridge or its principals. The Auditor credited the IIO prices and other information it received from Person A and Person B because the Auditor believed that they were independent third parties and that evidence from independent third parties, as opposed to evidence derived from Firm management, was more inherently reliable. AlphaBridge also represented to the Auditor that Person A and Person B and their respective broker-dealers were market participants trading IOs and IIOs, which carried greater weight with the Auditor in light of the fair value standard in ASC 820.

36. Beginning with the 2008 year-end audit of the AlphaBridge Funds, the Auditor requested and received the assistance of a team of valuation professionals ("Valuation Group") to assess the validity of AlphaBridge's methodology for pricing the IIOs in the Funds' portfolio.

37. In connection with the 2011 and 2012 year-end audits, Carino drafted and sent to the Auditor memoranda detailing AlphaBridge's valuation process. The memos included representations about the reputability of Person A and Person B and their respective broker-dealers. The memos also stated that, as a check against the prices from Person A and Person B, AlphaBridge undertook its own analysis using a proprietary valuation model. For both years, the memos concluded that quotes from Person A and Person B were reasonable, that AlphaBridge's own analysis corroborated the quotes from Person A and Person B, and that therefore AlphaBridge's prices "reflect a market based view from external brokers in the markets." In light of the fact that, by 2011 and 2012, Carino was sharing AlphaBridge's prices with Person A and Person B for them to pass along to the Administrator as if they were generated by Person A and Person B, AlphaBridge's representations in the memos were false or misleading.

2011 Audit

38. In connection with the 2011 year-end audit, after noting a greater disparity than in past years between AlphaBridge's IIO prices and the prices reflected in the Valuation Group's internal pricing database (which contained inputs from various industry pricing vendors), the Auditor and Valuation Group asked to speak to Person A and Person B. Carino agreed to arrange a telephone call with Person A.

39. Unbeknownst to the Auditor or Valuation Group, Carino spent a significant amount of time preparing Person A for the call, including coaching Person A on what Person A should say on particular topics, including Person A's view on CPRs.

40. After the telephone call with Person A, the Valuation Group posed a series of additional questions for Carino to pass on to Person A. These questions included requests for

trade data (including bids) on securities in the Funds' portfolio or, alternatively, trade data for purportedly comparable securities and the reasoning for the use of any data for purportedly comparable securities. When emailing the questions to Carino, the Auditor noted that "it would be good for [sic] an audit corroboration perspective for [Person A] to respond directly to [the Auditor or the Valuation Group]." Carino agreed he would ask Person A to respond directly.

41. Carino emailed the Auditor's questions to Person A along with Carino's proposed responses. Person A made slight edits to the responses that Carino drafted, but Person A ultimately sent the responses, largely as Carino had drafted them, to the Auditor and Valuation Group. The responses included CPR projections on the sample securities in the Funds' portfolio and information on trades, bids and offers for IIOs that were purportedly comparable to those in the Funds' portfolio. Unbeknownst to the Auditor, the CPR projections were not Person A's, but were Carino's. Also, some of the transaction data provided by Carino for two purportedly comparable securities contained certain inaccuracies.

42. After receiving the responses from Person A, the Auditor and Valuation Group posed more questions for Carino to pass along to Person A, including asking why CPR forecasts from various industry sources were substantially higher than AlphaBridge's CPR assumptions. Carino again emailed the Auditor's questions to Person A, along with Carino's suggested responses. Carino copied Kutzen on this email. As with the prior round of questions, Carino and Person A exchanged drafts of the responses. Ultimately, Carino indicated by email that Person A's revision "looks fine to send," after which Person A sent the responses—again, largely drafted by Carino—to the Auditor and Valuation Group. In substance, the responses urged the Auditor to rely on the previously submitted data for the purportedly comparable securities and expressed the opinion that dealer CPR forecasts were not reliable.

43. Only after speaking with and receiving the written responses from Person A, the Valuation Group accepted AlphaBridge's prices, and the Auditor completed the 2011 year-end audit. Relying specifically on Person A's responses as independent, third-party corroborative evidence, and attaching a copy of the response it received from Person A to a memo to the Auditor summarizing its work and analyses, the Valuation Group narrowly concluded that AlphaBridge's prices were within the range of the prices of the comparable securities that, unknown to the Auditor, Person A had obtained from AlphaBridge to transmit to the Auditor.

44. Neither the Auditor nor the Valuation Group knew that Carino had crafted the responses that they received from Person A or that the supporting data was gathered by Carino and not by Person A.

2012 Audit

45. As the Valuation Group began its work assisting the Auditor on the 2012 year-end audit, it observed that AlphaBridge's IIO prices had diverged even further from the prices in its internal pricing database. Of particular concern to the Auditor and the Valuation Group was the fact that, even though actual historical CPRs remained relatively-high (at least in part because of sustained low interest rates) during the course of 2012, AlphaBridge continued to use the same lower CPR assumptions that it had used the year before.

46. The Auditor and Valuation Group again posed a series of questions for, and asked to speak to, Person A and Person B. Similar to what occurred in connection with the 2011 audit, AlphaBridge made Person A available, and Carino formulated Person A's oral and written responses to the Auditor's and Valuation Group's questions, unbeknownst to them. However, the responses were not sufficient to address the Auditor's concerns.

47. AlphaBridge used the same CPR (which was significantly lower than the historical average CPR) for all the IOs and IIOs in the Funds' portfolio throughout 2011 and 2012. However, market data did not support or justify AlphaBridge's across-the-board use of such a CPR in these years. AlphaBridge's use of an unreasonably low CPR thus resulted in materially inflated valuations for the IOs and IIOs in the Funds' portfolio in these years.

The Audit is Suspended and the Funds' NAV is Reduced

48. In late April 2013, the Auditor suspended the 2012 year-end audit to permit AlphaBridge to propose an alternate methodology for valuing the IOs and IIOs in the Funds' portfolio. Ultimately, AlphaBridge retained an outside consultant and switched to a model-based valuation methodology for these securities.

49. In January 2014, the Funds' NAV for 2012 was written down more than 65%, from approximately $138 million to approximately $48 million, and only then did the Auditor complete the 2012 year-end audit of the Funds.

Respondents' Gains From the Fraud

50. During 2011 and 2012, AlphaBridge collected management fees from the Funds that were calculated based on overstated NAVs, causing ill-gotten gains to AlphaBridge and, as AlphaBridge's principals, individually to Kutzen and Carino.

51. As of year-end 2011 and 2012, AlphaBridge also collected performance fees from the Funds based on purported gains in the Funds. However, because the Funds' NAVs were overstated during these periods, AlphaBridge was not entitled to collect a performance fee for either year, and thus the performance fees constitute ill-gotten gains to AlphaBridge and, as AlphaBridge's principals, individually to Kutzen and Carino.

Misstatements in Form ADV

52. At all relevant times, AlphaBridge was required to file and did file Form ADV annual amendments with the Commission, which Carino signed on AlphaBridge's behalf.

53. At all relevant times, in its Form ADV annual amendments filed with the Commission, AlphaBridge reported its total assets under management and the net assets of the feeder Funds. Because the Funds' NAV was inflated as described above, AlphaBridge's Form ADV annual amendments filed with the Commission in 2012 and 2013 overstated the feeder Funds' net assets and AlphaBridge's assets under management.

Inadequate Compliance Procedures

54. At all relevant times, AlphaBridge was required to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and rules thereunder.

55. AlphaBridge's valuation policy variously provided that the Funds' assets would be valued based on broker-dealer price quotes and/or in accordance with fair value standards. AlphaBridge failed to implement its valuation policy because, as described above, AlphaBridge did not obtain independent price quotes or otherwise comply with fair value standards in valuing the IOs and IIOs in the Funds' portfolio.

56. AlphaBridge's Form ADV stated that Carino, as AlphaBridge's chief compliance officer, would be responsible for developing and enforcing AlphaBridge's compliance policies and procedures. By his conduct as described above, Carino aided and abetted and caused AlphaBridge's failure to implement such policies and procedures.

VIOLATIONS

57. Based on the conduct described above, AlphaBridge willfully violated[2] Section 206(1) of the Advisers Act, which prohibits an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client, and Carino willfully aided and abetted and caused AlphaBridge's violation.

58. Based on the conduct described above, AlphaBridge willfully violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud upon any client or prospective client, and Carino and Kutzen willfully aided and abetted and caused AlphaBridge's violation.

59. Based on the conduct described above, AlphaBridge willfully violated Section 206(4) of the Advisers Act, which prohibits an investment adviser from engaging in any fraudulent act, practice, or course of business as may be proscribed by Commission rules, and Rule 206(4)-7 promulgated thereunder, which requires an investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and rules thereunder, and Carino willfully aided and abetted and caused AlphaBridge's violations.

60. Based on the conduct described above, AlphaBridge willfully violated Section 206(4) of the Advisers Act, which prohibits an investment adviser from engaging in any act,

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

practice, or course of business which is fraudulent, deceptive, or manipulative, and Rule 206(4)-8 promulgated thereunder, which makes it unlawful for any investment adviser to a pooled investment vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading to any investor or potential investor in the pooled investment vehicle, or otherwise to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or potential investor in the pooled investment vehicle, and Carino and Kutzen willfully aided and abetted and caused AlphaBridge's violations.

61. Based on the conduct described above, AlphaBridge and Carino 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 or omit any material fact in any report filed with the Commission.

UNDERTAKINGS

Respondents have undertaken the following:

62. Independent Monitor.

a. Before the entry of this Order, Respondents, in conjunction with the Funds' Boards of Directors, had begun winding down the operations of the Funds and shall continue that process. As part of that process, Respondents had discontinued the solicitation or acceptance of any new investments for the Funds from third parties. Respondents shall continue not to solicit or accept any new investments for the Funds from third parties.

b. Within thirty (30) days of the date of this Order, Respondents Kutzen and Carino shall cause AlphaBridge to engage, at its own expense, an independent monitor ("Monitor") who is not unacceptable to the Commission staff, to:

i. oversee Respondents' activities relating to the wind down of the Funds;

ii. submit to the Commission staff a quarterly report describing the status of the wind down, all the assets of the Funds, and the operations of AlphaBridge; and

iii. report on an ongoing basis to the Commission staff any potential irregularities at AlphaBridge or any misconduct by the Respondents;

c. Respondents shall fully cooperate with the Monitor and shall provide the Monitor with access to any and all documentation, files and other materials that the Monitor requests for review in the course of its duties, including, but not limited to a quarterly status report on the wind down of the Funds, monthly trial balance reports, monthly balance sheets, monthly cash flow statements, and monthly portfolio holdings reports; and

d. Respondents Kutzen and Carino shall cause AlphaBridge to retain the Monitor until the wind down of the Funds is complete.

63. Compensation. Respondents shall not receive any fees or other compensation from the Funds for services rendered after the date of this Order.

64. Audit. Respondents Kutzen and Carino shall cause AlphaBridge to have prepared annual audited financial statements for the Funds until the wind down of the Funds is complete.

65. Notices. Within thirty (30) days of the entry of this Order, Respondents Kutzen and Carino shall cause AlphaBridge to provide a copy of this Order to the Funds' Boards of Directors, and to all current and former investors in the Funds between at least January 1, 2011 and the date of the entry of this Order, by mail, electronic mail or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.

66. Withdrawal of Registration. Within thirty (30) days of the wind down of the Funds, Respondents Kutzen and Carino shall cause AlphaBridge to withdraw its registration as an investment adviser registered with the Commission.

67. Certifications of Compliance. Respondents shall certify, in writing, their compliance with the undertakings set forth above. The certifications shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certifications and supporting material shall be submitted to Robert B. Baker, Assistant Regional Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110, with a copy to the Office of Chief Counsel of the Division of Enforcement, no later than thirty (30) days from the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest, and necessary for the protection of investors to impose the sanctions agreed to in Respondents' 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. Respondent AlphaBridge shall cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rules 206(4)-7 and 206(4)-8 promulgated thereunder.

B. Respondent Carino shall cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rules 206(4)-7 and 206(4)-8 promulgated thereunder.

C. Respondent Kutzen shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder.

D. Respondent AlphaBridge shall be and hereby is censured.

E. Respondent Kutzen shall be and hereby is censured.

F. Respondent Carino shall be and hereby is:

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

(ii) prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission; provided, however, that Respondent Carino, subject to the terms and conditions set forth in this Subsection F, may continue to be associated with AlphaBridge solely for the purposes of (a) engaging in activities and taking actions that are reasonably necessary to wind down the Funds, subject to the oversight of the Monitor, pursuant to the terms and conditions set forth in Paragraphs 62-67 of Section III above, until the completion of the wind down of the Funds, and (b) performing such functions as are reasonably necessary for the administration of the Distribution Fund, as described in Subsection L below. During the foregoing period of continued association, Respondent Carino may receive compensation from AlphaBridge (but not from the Funds), but only until the earlier of the completion of the wind down of the Funds or a period of six (6) months following the date of this Order, and the monthly rate of such compensation shall be commensurate with and shall not exceed the maximum base rate of monthly compensation Respondent Carino received from AlphaBridge at any time prior to the date of the entry of this Order (not including bonuses or other partner draws or capital distributions from the Funds). After the wind down of the Funds and the administration of the Distribution Fund are complete, Respondent Carino immediately shall resign as an officer and/or managing member of AlphaBridge and divest his ownership interest in AlphaBridge. In the event Respondent Carino fails to comply with any of the undertakings set forth in Paragraphs 62-67 of Section III above or the provisions of this Subsection F or Subsection L below, Respondent Carino shall no longer be permitted to remain associated with or compensated by AlphaBridge and shall be required immediately to resign as an officer and/or managing member of AlphaBridge and divest his ownership interest in AlphaBridge.

G. Any reapplication for association by Respondent Carino 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.

H. Respondents, jointly and severally, shall, within ten (10) days of the entry of this Order, pay $4,025,000, which amount represents disgorgement of profits gained as a result of the conduct described herein. Payment shall be made in the manner described in Subsection L below. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

I. Respondent AlphaBridge shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $725,000. Payment shall be made in the manner described in Subsection L below. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

J. Respondent Carino shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $200,000. Payment shall be made in the manner described in Subsection L below. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

K. Respondent Kutzen shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $50,000. Payment shall be made in the manner described in Subsection L below. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

L. With respect to the Respondents' payment of the disgorgement and penalty amounts set forth in Subsections H-K above:

(1) Within ten (10) days after the date of the entry of this Order, Respondents shall deposit the foregoing amounts, totaling $5,000,000, into an interest-bearing escrow account not unacceptable to the Commission staff ("Distribution Account") and shall provide the Commission staff with proof of such deposit in a form not unacceptable to the Commission staff. If

timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and/or 31 U.S.C. § 3717.

(2) Respondents shall distribute the total amount of $5,000,000 ("Distribution Fund") to affected current and former investors in the Funds to reimburse them for the overpayment of certain fees by the Funds based on the overstated net asset value of the Funds during 2011 and 2012 as alleged in this Order. No portion of the Distribution Fund shall be paid to any of the Respondents or to any account in which any of the Respondents has a direct or indirect financial interest.

(3) Respondents shall be responsible for administering the Distribution Fund at their own expense in accordance with the provisions of this Subsection L.

(4) Respondents shall be responsible for any and all tax compliance responsibilities associated with the Distribution Fund and shall retain, within thirty (30) days of the date of entry of this Order, the services of an accountant or similar professional ("Accountant") that is not unacceptable to the Commission staff to oversee such tax compliance and to monitor the activity in the Distribution Account, to which the Accountant shall have access. Respondents shall provide to the Accountant such information as the Accountant may reasonably request for the purpose of carrying out the Accountant's responsibilities under this Subsection L. The costs and expenses of the Accountant shall be borne by Respondents and shall not be paid out of the Distribution Fund. Respondents shall not be responsible for payment of any income taxes investors may owe on the portion of the Distribution Fund they receive.

(5) Within sixty (60) days of the date of entry of this Order, Respondents shall submit to the Commission staff for its review and approval a plan to distribute the Distribution Fund ("Distribution Plan"). The Distribution Plan at a minimum should identify (i) each current and former investor in the Fund that will receive a portion of the Distribution Fund ("Eligible Investors"); (ii) the exact amount of the payment to each Eligible Investor; and (iii) the methodology used to determine the amount of the payment to each Eligible Investor. Respondents shall also provide to the Commission staff such additional information and supporting documentation as the Commission staff may reasonably request for the purpose of its review. In the event of one or more objections by the Commission staff to Respondents' proposed Distribution Plan and/or any of the information or supporting documentation, Respondents shall submit a revised Distribution Plan for the review and approval of the Commission staff, and/or additional information or supporting documentation, within ten (10) days of the date that Respondents are notified of the objection, which revised Distribution

Plan shall be subject to all of the provisions of this Subsection, unless such time period is extended as provided in paragraph 11 of this Subsection L.

(6) Respondents, with the participation and/or oversight of the Accountant, shall arrange for the transmission of all amounts payable to Eligible Investors pursuant to the Distribution Plan, as approved by the Commission staff, within one hundred and twenty (120) days of the date of the entry of the Order, unless such time period is extended as provided in paragraph 11 of this Subsection L.

(7) If Respondents do not distribute any portion of the Distribution Fund for any reason, including the inability to locate an investor in the Funds, the non-receipt or return of any payment, or any factors beyond Respondents' control, Respondents shall transfer such undistributed funds to the Commission for transmittal to the United States Treasury after the final accounting provided for in paragraph 8 of this Subsection L is approved by the Commission. Respondents shall transfer such undistributed funds to the Commission in the manner described in Subsection M below. Respondents shall make reasonable efforts to locate prospective payees and payees whose payment is returned, including arranging for the Accountant to assist with such efforts.

(8) Within one hundred and eighty (180) days after the date of entry of this Order, Respondents shall submit to the Commission staff for its approval a final accounting and certification of the disposition of the Distribution Fund. The final accounting shall be on a standardized fund accounting form to be provided by the Commission staff, or other form not unacceptable to the Commission staff, and shall include and identify, but not be limited to, the following information: (i) name of each payee; (ii) amount paid to each payee; (iii) date of each payment; (iv) check number or other identifier of money transferred or proof of payment made; (v) date and amount of any returned payment; (vi) a description of any efforts made to locate a prospective payee or a payee whose payment was returned; and (vii) any amounts to be forwarded to the Commission for transfer to the United States Treasury. In addition, Respondents shall provide to the Commission staff a cover letter certifying that all of the requirements of this Subsection L have been completed, that the information requested has been accurately reported to the Commission, and that the Respondents' proposed methodology for calculating payments to Eligible Investors from the Distribution Fund was fair and reasonable.

(9) Respondents shall submit proof and supporting documentation of the payments made from the Distribution Fund to Eligible Investors (whether in the form of cancelled checks, wire receipts, or otherwise) in a form not unacceptable to the Commission staff. Respondents also shall provide any

and all supporting documentation for the final accounting and certification to the Commission staff upon its request and shall cooperate with any additional reasonable requests by the Commission staff in connection with the final accounting and certification.

(10) After Respondents have submitted the final accounting to the Commission staff, the staff shall submit the final accounting to the Commission for approval and shall seek Commission approval to send any remaining amounts in the Distribution Fund to the United States Treasury and to terminate the Distribution Fund.

(11) The Commission staff may extend any of the procedural dates set forth in this Subsection L for good cause shown.

M. To the extent Respondents do not distribute any portion of the Distribution Fund as provided in Subsection L above, Respondents shall transfer such undistributed funds to the Commission, for eventual transfer to the United States Treasury, 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 made by check or money order pursuant to this subsection must be accompanied by a cover letter identifying Respondents by name as Respondents in these proceedings, and the file number of these proceedings, and describing the payments; and a copy of the cover letter and check or money order must be sent to Robert B. Baker, Assistant Regional Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110.

N. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties and disgorgement described above for distribution to affected investors. 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 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.

O. Respondents shall comply with the undertakings set forth in Paragraphs 62-67 of Section III 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 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

Commissioner Gallagher
Commissioner Piwowar
Disapproved

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-31704; File No. 812-14460]

Macquarie Capital (USA) Inc., et al.; Notice of Application and Temporary Order

July 6, 2015

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order ("Temporary Order") exempting them from section 9(a) of the Act, with respect to an injunction entered against Macquarie Capital (USA) Inc. ("Macquarie Capital") on April 1, 2015 by the United States District Court for the Southern District of New York ("District Court"), until the Commission takes final action on an application for a permanent order (the "Permanent Order," and with the Temporary Order, the "Orders"). Applicants also have applied for a Permanent Order.

Applicants: Macquarie Capital, Delaware Management Business Trust ("DMBT"), on behalf of its series, Delaware Management Company ("DMC") and Delaware Investments Fund Advisers ("DIFA"), Four Corners Capital Management, LLC ("FCCM"), Macquarie Capital Investment Management LLC ("MCIM"), Macquarie Funds Management Hong Kong Limited ("MFMHK"), and Delaware Distributors, L.P. ("Delaware Distributors") (collectively, the "Applicants").

Filing Dates: The application was filed on May 15, 2015 and amended on June 10, 2015.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on July 31, 2015, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: Macquarie Capital and MCIM: 125 West 55th Street, 22nd Floor, New York, NY 10019, DMBT, FCCM and Delaware Distributors: 2005 Market Street, Philadelphia, PA 19103, and MFMHK: One International Finance Center, 1 Harbour View Street, Central, Hong Kong SAR.

For Further Information Contact: Robert H. Shapiro, Senior Counsel, at (202) 551-7758, or Mary Kay Frech, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

Supplementary Information: The following is a temporary order and a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at http://www.sec.gov/search/search.htm, or by calling (202) 551-8090.

Applicants' Representations:

1. Macquarie Capital, a Delaware corporation, is an indirect, wholly-owned subsidiary of Macquarie Group Limited ("MGL") and a broker-dealer registered under the Securities Exchange Act of 1934 (the "Exchange Act"). MCIM, a Delaware limited liability company, is an indirect, wholly-owned subsidiary of MGL and an investment adviser registered under the

Investment Advisers Act of 1940 (the "Advisers Act"). DMC and DIFA are series of DMBT, which is a Delaware statutory trust and an indirect, wholly-owned subsidiary of MGL. DMBT is an investment adviser registered under the Advisers Act. FCCM, a Delaware limited liability company, is a wholly-owned subsidiary of a series of DMBT and an investment adviser registered under the Advisers Act. Delaware Distributors, a Delaware limited partnership, is an indirect, wholly-owned subsidiary of MGL and a broker-dealer registered under the Exchange Act. MFMHK is an indirect, wholly-owned subsidiary of MGL and an investment adviser registered under the Advisers Act. DMC and DIFA, as series of DMBT, MCIM, FCCM, and MFMHK (collectively, the "Adviser Applicants") each serve as investment adviser or investment sub-adviser to investment companies registered under the Act, or series of such companies (each, a "Fund")[1] and Delaware Distributors provides principal underwriting services to certain Funds. The Adviser Applicants and Delaware Distributers are collectively referred to as the "Fund Servicing Applicants."

2. While no existing company of which Macquarie Capital is an affiliated person within the meaning of section 2(a)(3) of the Act ("Affiliated Person"), other than the Fund Servicing Applicants, currently serves as an investment adviser or depositor of any Fund or principal underwriter (as defined in section 2(a)(29) of the Act) for any open-end registered investment company ("Open-End Fund"), registered UIT, or registered FACC (such activities, "Fund Services Activities"), Applicants request that any relief granted also apply to any existing company of which Macquarie Capital is an Affiliated Person and to any other company of which Macquarie Capital may become an Affiliated Person in the future (together with the Fund

[1] The term "Fund" refers to any registered investment company, including any registered unit investment trust ("UIT") or registered face amount certificate company ("FACC"), as well as any business development company and employees' securities company.

Servicing Applicants, the "Covered Persons")[2] with respect to any activity contemplated by section 9(a) of the Act.

3. On March 27, 2015, the Commission filed a complaint (the "Complaint") in the District Court. According to the Complaint, Macquarie Capital was the lead underwriter on a 2010 secondary public stock offering by Puda Coal, Inc. ("Puda Coal"), which traded on the New York Stock Exchange at the time and purportedly owned a coal company in the People's Republic of China. According to the Complaint, in the offering documents, Puda Coal falsely claimed that it held a 90-percent ownership interest in the Chinese coal company. According to the Complaint, Macquarie Capital repeated those statements in its marketing materials for the offering despite obtaining a report showing that Puda Coal did not possess an ownership interest in the coal company. The Complaint alleges that two former Macquarie Capital employees were negligent by failing to act on due diligence information about the true ownership interest in the Chinese coal company and instead moving forward with the offering.[3] The Complaint alleges that Macquarie Capital was negligent as an organization by underwriting and marketing the offering while in possession of this information.

4. On April 1, 2015, the District Court entered an order (the "Court Order") enjoining Macquarie Capital from violating sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933

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2 Macquarie Capital is a party to the application, but does not and will not engage in Fund Services Activities, and is not a Covered Person.

3 The Commission also charged former Macquarie Capital managing director Aaron Black and former Macquarie Capital investment banker William Fang for failing to exercise appropriate care in their due diligence review. Black and Fang each consented to the entry of court orders containing the same injunctions as the Court Order (as defined below).

(the "Injunction").[4] The Court Order also requires Macquarie Capital to pay $12 million in disgorgement and prejudgment interest and a civil monetary penalty in the amount of $3 million. Macquarie Capital consented to the entry of the Court Order without admitting or denying the allegations in the Complaint (other than those relating to the jurisdiction of the District Court and the jurisdiction of the Commission over the Conduct[5]).

5. Applicants represent that escrow accounts have been established into which have been or will be deposited amounts equal to the advisory fees paid by the Funds to the Adviser Applicants for the period from April 1, 2015 through May 15, 2015.

Applicants' Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any Open-End Fund, UIT or FACC. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that, taken together, sections 9(a)(2) and 9(a)(3) have the effect of precluding the Fund Servicing Applicants and Covered Persons from engaging in Fund Services Activities as a result of the Injunction

[4] *Securities and Exchange Commission v. Macquarie Capital (USA) Inc., et al.*, Civil Action No. 15-CV-02304 (S.D.N.Y. April 1, 2015) (Final Judgment as to Defendant Macquarie Capital (USA) Inc.).

[5] The alleged conduct giving rise to the Injunction is referred to herein as the "Conduct."

entered against Macquarie Capital because Macquarie Capital is an Affiliated Person of each Fund Servicing Applicant and Covered Person.

2. Section 9(c) of the Act provides that, upon application, the Commission shall by order grant an exemption from the disqualification provisions of section 9(a) of the Act, either unconditionally or on an appropriate temporary or other conditional basis, to any person if that person establishes that: (a) the prohibitions of section 9(a), as applied to the person, are unduly or disproportionately severe or (b) the conduct of the person has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a Temporary Order and a Permanent Order exempting the Fund Servicing Applicants and other Covered Persons from the disqualification provisions of section 9(a) of the Act. The Fund Servicing Applicants and other Covered Persons may, if the relief is granted, in the future act in any of the capacities contemplated by section 9(a) of the Act subject to the applicable terms and conditions of the Orders. On May 15, 2015, Applicants received a temporary conditional order from the Commission exempting the Covered Persons from section 9(a) of the Act with respect to the Injunction from May 15, 2015 until the Commission takes final action on an application for a Permanent Order or, if earlier, July 14, 2015.

3. Applicants believe they meet the standards for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has not been such as to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged Conduct giving rise to the Injunction did not in any way involve any of the Fund Servicing Applicants acting in their capacity as investment adviser, sub-adviser or principal underwriter for the Funds. Applicants also state that the Conduct did not involve any Fund or Fund assets with respect to which Fund Servicing Applicants engaged in Fund Services Activities. In addition, Applicants state that none of the Funds to which Fund Servicing Applicants provide Fund Services Activities purchased, held, or hold securities issued in the 2010 Puda Coal stock offering.

5. Applicants state that: (i) none of the current or former directors, officers or employees of the Fund Servicing Applicants had any involvement in the Conduct and (ii) the personnel who were involved in the Conduct have had no, and will not have any, involvement in providing Fund Services Activities and will not serve as an officer, director, or employee of any Covered Person providing Fund Services Activities. Applicants assert that because the personnel of the Fund Servicing Applicants did not have any involvement in the Conduct, shareholders of Funds that received investment advisory, depository and principal underwriting services from the Fund Servicing Applicants were not affected any differently than if those Funds had received services from any other non-affiliated investment adviser, depositor or principal underwriter.

6. Applicants submit that section 9(a) should not operate to bar them from serving the Funds and their shareholders in the absence of improper practices relating to their Fund Services Activities. Applicants state that the section 9(a) disqualification could result in substantial costs to the Funds to which the Fund Servicing Applicants provide investment advisory services, and such Funds' operations would be disrupted, as they sought to engage new advisers or sub-advisers. Applicants assert that these effects would be unduly severe given the Fund Servicing Applicants' lack of involvement in the Conduct. Moreover, Applicants state that Macquarie

Capital has taken remedial actions to address the Conduct, including reviewing its due diligence policies and procedures with the assistance of a number of different outside law firms, as outlined in the application. Thus, Applicants believe that granting the exemption from section 9(a), as requested, would be consistent with the public interest and the protection of investors.

7. Applicants state that the inability of the Fund Servicing Applicants to continue to provide investment advisory services to Funds would result in those Funds and their shareholders facing unduly and disproportionately severe hardships. Applicants assert that imposing the section 9(a) disqualifications upon the Adviser Applicants would deprive the shareholders of certain Funds of the advisory or sub-advisory services that they expected to receive when they decided to invest in the Funds. Applicants state that many shareholders have long-standing investments and relationships with the Funds. Applicants represent that each Adviser Applicant has developed a familiarity and expertise with a particular Fund's operations, and that replacing the Adviser Applicants with another adviser would result in inefficiencies and potential investment losses during a transition period. Applicants assert that disqualification from providing these services would disrupt investment strategies and could potentially result in large net redemptions of shares of the Funds, which in turn could both frustrate efforts to effectively manage the Funds' assets and increase the Funds' expense ratios to the detriment of non-redeeming shareholders. Applicants also note that any effort to find suitable replacement investment advisers and/or sub-advisers would necessarily take time, during which the Funds would lack advisory services, and that the cost to the Funds of obtaining shareholder approval for the new investment advisory or sub-advisory services would be substantial. Applicants further assert that the disqualification of Delaware Distributors would cause the Funds to expend time and resources to find and engage

substitute principal underwriters, and that the substitute underwriters would not be able to replicate the selling network established by Delaware Distributors.

8. Applicants also represent that the boards of directors or trustees (the "Boards") of those Funds for which a Fund Servicing Applicant serves as the primary adviser or principal underwriter have been apprised of the consequences to the relevant Fund Servicing Applicants as a result of the issuance of the Injunction, and that such Boards have requested that the relevant Fund Servicing Applicants continue to provide services to their Funds. Applicants further state that for those Funds for which a Fund Servicing Applicant serves as a sub-adviser, Applicants have provided the primary investment advisers with written materials describing the Conduct, the Injunction, the disqualification under section 9(a) of the Act, and the process for obtaining exemptive relief under section 9(c) of the Act, and that none of the sub-advised Funds or their primary advisers has requested that the Fund Servicing Applicants cease providing sub-advisory services.

9. Applicants state that, once a Permanent Order is issued, the Fund Servicing Applicants will, as soon as reasonably practicable, distribute additional written materials with updated information to the Boards of the Funds. The written materials will include an offer to meet in person with the Boards, including the directors who are not "interested persons" of such Funds as defined in section 2(a)(19) of the Act and their independent legal counsel as defined in rule 0-1(a)(6) under the Act.

10. Applicants represent that they have undertaken to develop procedures reasonably designed to prevent violations of section 9(a) by Fund Servicing Applicants and their affiliated persons. Applicants state that as part of this process their legal and compliance groups have issued a firm-wide communication establishing a procedure whereby the legal and compliance

personnel in each of MGL's business groups globally must identify and escalate potential cross-divisional and cross-jurisdictional impacts from a regulatory enforcement matter or litigation, including disqualifying events under applicable securities laws and regulations, to central legal and compliance management, which will further assess the event to determine, among other things, whether there exists any disqualification events under federal securities laws.

11. Applicants represent that they will engage an independent consultant ("Independent Consultant") to review and test the existing procedures relating to compliance with section 9(a) and to recommend appropriate enhancements to ensure that the procedures are reasonably designed to prevent violations of section 9(a) by Covered Persons. Applicants state that, as part of this process, the Independent Consultant specifically will consider enhancements to the procedures to provide for the escalation of information regarding potential disqualifying events under section 9(a) so that the information may be appropriately analyzed in a timely manner. Applicants further represent that, based on the recommendations of the Independent Consultant, Applicants will implement, within 60 days of the date of the Permanent Order, enhancements to the procedures that are reasonably designed to prevent violations of section 9(a) by Covered Persons. Applicants state that, in the case of Covered Persons that are registered investment advisers, such procedures will be part of their written policies and procedures adopted and implemented pursuant to rule 206(4)-7 under the Advisers Act. In addition, Applicants state that, in the case of Delaware Distributors or any other Covered Person that serves as a principal underwriter to a registered investment company in the future, such procedures will be part of their Written Supervisory Procedures. Applicants represent that the Board of each Fund that has a Covered Person as its primary investment adviser and/or principal underwriter also will review the adequacy of these procedures and the effectiveness of their implementation at or before the

next annual review of the policies and procedures of the relevant primary investment adviser and/or principal underwriter in accordance with rule 38a-1 under the Act. Applicants further represent that, for each sub-advised Fund, the Fund Servicing Applicants will transmit such procedures to each Fund's primary investment adviser for consideration by the relevant Board in accordance with rule 38a-1 under the Act.

12. Applicants state that if the Fund Servicing Applicants were barred under section 9(a) of the Act from providing investment advisory services to the Funds, and were unable to obtain the requested exemption, the effect on their businesses and employees would be unduly and disproportionately severe because they have committed substantial capital and other resources to establishing an expertise in advising Funds. Applicants further state that prohibiting the Fund Servicing Applicants from engaging in Fund Services Activities would not only adversely affect their businesses, but would also adversely affect their employees who are involved in those activities. Applicants state that many of these employees working for the Fund Servicing Applicants could experience significant difficulties and/or delays in finding alternative fund-related employment.

13. Applicants state that none of the Applicants has previously applied for an exemptive order under section 9(c) of the Act.

Applicants' Conditions:

Applicants agree that any order granted by the Commission pursuant to the application will be subject to the following conditions:

1. As a condition to the Temporary Order, Applicants will continue to hold in escrow amounts equal to all advisory fees paid by the Funds to the Adviser Applicants for the period from April 1, 2015 through May 15, 2015. Amounts paid into the escrow accounts will be

disbursed to the relevant Funds and/or Adviser Applicants after the Commission has acted on the application for a Permanent Order and discussions with the relevant Funds.

2. Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

3. Each Applicant and Covered Person will adopt and implement policies and procedures reasonably designed to ensure that it will comply with any terms and conditions of the Orders within 60 days of the date of the Permanent Order.

4. Macquarie Capital will comply with the Court Order.

5. Applicants will provide written notification to the Chief Counsel of the Commission's Division of Investment Management with a copy to the Chief Counsel of the Commission's Division of Enforcement of a material violation of the terms and conditions of the Orders or Court Order within 30 days of discovery of the material violation.

Temporary Order:

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that the Fund Servicing Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a) effective forthwith, solely with respect to the Injunction, subject to the representations and conditions in the application, until the date the Commission takes final action on their application for a Permanent 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. 75362 / July 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16675

In the Matter of

Wisteria Global, Inc. and
Hiroshi Fujigami,

Respondents.

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 CEASE-AND-DESIST ORDERS

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 Wisteria Global, Inc. ("Wisteria") and Hiroshi Fujigami ("Fujigami") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, 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, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders ("Order"), as set forth below.

III.

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

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

Summary

1. These proceedings involve investments in Luca To-Kalon Energy, LLC and Luca Oil, LLC, which were formed to invest in oil and gas ventures in Texas, Montana, North Dakota and onshore wells in the Gulf of Mexico. From 2011 to 2013, Fujigami, through his wholly-owned and controlled business Wisteria, solicited investments of about $30.8 million in Luca To-Kalon and Luca Oil from more than 400 Japanese investors, who invested in pooled investment groups. Wisteria was paid a total of approximately $3.6 million in commissions in connection with Fujigami's solicitation. Respondents retained about $1.8 million of the commissions. Respondents were not registered with the Commission in any capacity.

2. By effecting securities transactions for the Japanese investors, Wisteria and Fujigami acted as unregistered broker-dealers in violation of Section 15(a) of the Exchange Act.

Respondents

3. Wisteria Global, Inc. is a California corporation with its principal place of business in Saratoga, California. Wisteria is owned and controlled by Fujigami and is not registered with the Commission in any capacity. Wisteria received $3.6 million in transaction-based compensation, which Fujigami split with his Japanese partner.[2]

4. Hiroshi Fujigami is the principal and owner of Wisteria. He retained approximately $1.8 million of the $3.6 million that Wisteria received in commissions based on his solicitation of Japanese investors. Fujigami has never held securities licenses or been registered with the Commission in any capacity. Fujigami, age 44, is a resident of Saratoga, California.

Other Relevant Entities and Individuals

5. Luca To-Kalon Energy, LLC ("Luca To-Kalon") is a Texas limited liability company through which Japanese investors purportedly invested in oil and gas development projects. Luca To-Kalon was formed for the purported purpose of acquiring, developing and operating oil and natural gas wells in Texas, Montana, North Dakota and the Gulf of Mexico. Wisteria and Fujigami raised about $9 million for the Luca To-Kalon fund.

6. Luca Oil, LLC ("Luca Oil") is a Texas limited liability company through which investors purportedly invested in oil and gas development projects. Luca Oil was formed for the purported purpose of acquiring, developing and operating oil and natural gas wells in Montana, North Dakota and the Gulf of Mexico. Wisteria and Fujigami raised about $21 million for the Luca Oil fund.

7. Bingqing Yang ("Yang") is the President and Chief Executive Officer of Luca Resources Group, LLC, which is the manager of both the Luca To-Kalon and Luca Oil funds. Yang controls all of the Luca entities. Yang, age 44, is a resident of Fremont, California.

[2] Fujigami's business partner is a Japanese national who lives in Macau.

8. Luca Resources Group, LLC ("Luca Resources") is a Delaware limited liability company organized in 2011 with its principal place of business in Houston, Texas. Luca Resources is owned and controlled by Yang. Luca Resources serves as manager to Luca Oil and Luca To-Kalon, providing management services relating to identifying and developing oil and gas prospects.

Luca Oil and Luca To-Kalon's Oil and Gas Investments

9. Yang marketed the Luca Oil, Luca To-Kalon and other Luca investment vehicles as having successful oil and gas holdings, primarily to Chinese-American investors in the United States and to Japanese investors in Japan. Yang made material misrepresentations or omissions to these investors, engaged in a fraudulent scheme and misappropriated investor funds.

10. Since 2008, Luca Oil has solicited investors and pooled the investments to buy interests in oil and gas ventures in Texas, Montana, North Dakota and the Gulf of Mexico. Since 2011, Luca To-Kalon has solicited investors and pooled the investments to buy interests in oil and gas ventures in Montana, North Dakota and the Gulf of Mexico. Luca Oil and Luca To-Kalon were both managed by a manager, Luca Resources, that was purportedly to select the wells or exploration properties for the Funds, sell the oil and gas produced, and distribute any profits to the investors. Yang controlled Luca Resources and selected the wells that Luca Oil and Luca To-Kalon participated in and determined how much each fund would invest in each well.

Respondents' Solicitations

11. Starting in 2011, Fujigami, through Wisteria, and his Japanese business partner recruited more than 400 hundred Japanese investors to invest in Luca Oil and Luca To-Kalon. Fujigami arranged an investment seminar in Japan in 2011 at which Yang directly solicited Japanese investors. Fujigami also arranged for Yang to meet with Japanese investors on at least three occasions at Luca's offices in Fremont, California and Houston, Texas, where they also toured oil fields. Fujigami acted as facilitator and translator during all of Yang's contacts with Japanese investors, including the meetings in the U.S. and through YouTube videos directed at the Japanese investors.

12. As a result of Fujigami and Wisteria's solicitations, the Japanese investors invested a total of about $30.8 million in Luca Oil and Luca To-Kalon. Respondents were compensated as a percentage of the investor funds they raised, and retained $1,793,783 of the $3.6 million they received in transaction-based compensation.

Violations

13. As a result of the conduct described above, Respondents acted as unregistered broker-dealers in willful violation of Section 15(a) of the Exchange Act,[3] which prohibits certain

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

(continued . . .)

persons from inducing or attempting to induce the purchase or sale of securities unless registered with the Commission as brokers or dealers.

Civil Penalties, Disgorgement and Prejudgment Interest

14. Wisteria and Fujigami have submitted sworn Statements of Financial Condition dated March 17, 2015 and March 27, 2015, and other evidence, and have asserted their inability to pay a civil penalty, prejudgment interest and full disgorgement.

Undertaking

15. Respondent Fujigami has undertaken to:

(i) appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoint Respondent Fujigami's attorney as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, waive the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent Fujigami's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consent to personal jurisdiction over Respondent Fujigami in any United States District Court for purposes of enforcing any such subpoena.

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 15(b)(6) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondents Wisteria and Fujigami shall cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Respondent Wisteria is censured.

C. Respondents Wisteria and Fujigami shall, within one year of the entry of this Order, pay disgorgement of $1,793,783, which represents profits gained as a result of the conduct described herein to the Securities and Exchange Commission, but payment of such amount except for $1,138,985 and prejudgment interest are waived based on Wisteria and Fujigami's sworn

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(. . . continued)
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)).

representations in their Statements of Financial Information dated March 17, 2015 and March 27, 2015, respectively. Payment of the initial $104,198 of disgorgement shall be made within ten (10) days of the entry of this Order. Payment of an additional $46,142 of disgorgement shall be made within sixty (60) days of the entry of this Order. The payment required by this Order shall be made to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) 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

D. Payments by check or money order must be accompanied by a cover letter identifying Hiroshi Fujigami and Wisteria Global, Inc. 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 Erin E. Schneider, Associate Regional Director, U.S. Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104, with a copy to Steven D. Buchholz, Assistant Regional Director, U.S. Securities and Exchange Commission at the same address. Based upon Wisteria and Fujigami's sworn representations in their Statements of Financial Information dated March 17, 2015 and March 27, 2015, respectively, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondents.

E. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement referenced in paragraph IV.C above. Such Fair Fund may be added to or combined with any other fair fund created in a related civil injunctive action or any proceeding arising from the same or substantially similar facts as those alleged herein. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil 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 by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

F. The 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.

G. Respondent Fujigami 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.

H. Any reapplication for association by Respondent Fujigami 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 Respondents, 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.

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
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 31706 / July 7, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16676

In the Matter of **Macquarie Capital Investment Management LLC; Delaware Management Company; Delaware Investments Fund Advisers; Four Corners Capital Management, LLC; Macquarie Funds Management Hong Kong Limited; and Delaware Distributors, L.P.,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, 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 9(f) of the Investment Company Act of 1940 ("Investment Company Act"), against Macquarie Capital Investment Management LLC ("MCIM"), Delaware Management Company ("DMC"), Delaware Investments Fund Advisers ("DIFA"), Four Corners Capital Management, LLC ("FCCM"), Macquarie Funds Management Hong Kong Limited ("MFMHK"), and Delaware Distributors, L.P. ("Delaware Distributors") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, each of the Respondents has submitted an Offer of Settlement (collectively, "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 each of the Respondents and the subject matter of these proceedings, which are admitted, each of the Respondents consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 9(f) of the Investment Company Act of 1940, Making Findings and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Respondents

1. **MCIM**, a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Macquarie Group Limited ("MGL"), a global financial services firm headquartered in Australia, and an investment adviser registered with the Commission under the Investment Advisers Act of 1940 ("Advisers Act") that provides investment advisory services and sub-advisory services to certain investment companies registered under the Investment Company Act.

2. **DMC** is a series of the Delaware Management Business Trust ("DMBT"), which is a Delaware statutory trust. DMC provides investment advisory services and sub-advisory services to certain investment companies registered under the Investment Company Act. DMBT is an indirect, wholly-owned subsidiary of MGL and an investment adviser registered with the Commission under the Advisers Act.

3. **DIFA** is a series of DMBT and provides investment sub-advisory services to certain investment companies registered under the Investment Company Act.

4. **FCCM**, a Delaware limited liability company, is a wholly-owned subsidiary of a series of DMBT and an investment adviser registered with the Commission under the Advisers Act that provides investment sub-advisory services to an investment company registered under the Investment Company Act.

5. **MFMHK** is an indirect, wholly-owned subsidiary of MGL and an investment adviser registered with the Commission under the Advisers Act that provides investment sub-advisory services to an investment company registered under the Investment Company Act.

6. **Delaware Distributors**, a Delaware limited partnership, is an indirect, wholly-owned subsidiary of MGL and a broker-dealer registered with the Commission under the Securities Exchange Act of 1934 ("Exchange Act") that serves as a principal underwriter to certain open-end investment companies registered under the Investment Company Act.

Other Relevant Entity

7. **Macquarie Capital (USA) Inc. ("MCUSA")**, a Delaware corporation, has been registered with the Commission as a broker-dealer under the Exchange Act since 1994. MCUSA is an indirect, wholly-owned subsidiary of MGL.

Background

8. On March 27, 2015, the Commission filed a complaint in the United States District Court for the Southern District of New York against MCUSA and two former MCUSA bankers ("SEC Action"), alleging violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 ("Securities Act") in connection with MCUSA's role as the lead underwriter on a secondary public stock offering in December 2010 by Puda Coal, Inc. which traded on the New York Stock Exchange at the time and purported to own a coal company in the People's Republic of China.

9. On April 1, 2015, the United States District Court for the Southern District of New York entered final consent judgments in the SEC Action that, in relevant part, permanently enjoined MCUSA and its two former bankers from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act.

10. In advance of its consent to the judgment in the SEC Action, MCUSA received and relied on advice from its outside counsel regarding potential collateral consequences of the proposed injunction.

11. The Respondents served as an investment adviser, sub-adviser, or principal underwriter to registered investment companies after the entry of the permanent injunction against MCUSA on April 1, 2015 ("Injunction"). When the Injunction was entered, the Respondents did not have exemptive relief from Section 9(a) of the Investment Company Act.

12. After becoming aware of the Injunction, the Respondents contacted Commission staff on April 7, 2015 to commence the process for obtaining exemptive relief from Section 9(a) of the Investment Company Act.

13. On May 15, 2015, the Division of Investment Management, acting under delegated authority from the Commission, granted temporary exemptive relief from Section 9(a) of the Investment Company Act with respect to the Injunction.

Activities Prohibited By The Investment Company Act

14. Section 9(a)(2) of the Investment Company Act provides, in relevant part, that it shall be unlawful for a person to serve or act as, among other things, an investment adviser or depositor of any registered investment company, or as a principal underwriter for any registered open-end investment company, registered unit investment trust or registered face amount certificate company (collectively, "Fund Service Activities"), if such person is "by reason of any misconduct," among other things, "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice in connection with . . . the purchase or sale of any security."

15. Pursuant to Section 9(a)(2) of the Investment Company Act, the entry of the Injunction disqualified MCUSA from engaging in Fund Service Activities as of April 1, 2015.

16. Section 9(a)(3) of the Investment Company Act extends the prohibitions of Section 9(a)(2) to any company, any "affiliated person" of which is disqualified from performing Fund Service Activities under the provisions of Section 9(a)(2). The term "affiliated person" is defined in Section 2(a)(3) of the Investment Company Act to include, among others, "any person directly or indirectly controlling, controlled by, or under common control with, such other person."

17. Although MCUSA did not and does not engage in Fund Service Activities, MCUSA is an affiliated person of each of the Respondents within the meaning of Section 2(a)(3) of the Investment Company Act. As a result of the entry of the Injunction against MCUSA, Sections 9(a)(2) and 9(a)(3) of the Investment Company Act together also prohibited the Respondents from engaging in Fund Service Activities as of April 1, 2015.

18. Each of the Respondents was engaged in one or more Fund Service Activities as of April 1, 2015 and, notwithstanding the entry of the Injunction on that date, continued to engage in one or more Fund Service Activities after April 1, 2015, and as noted above, the Respondents did not contact the Commission staff to begin the process of obtaining exemptive relief until April 7, 2015.

Violations

19. As a result of the conduct described above, each of the Respondents violated Section 9(a) of the Investment Company Act.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 9(f) of the Investment Company Act, each of the Respondents cease and desist from committing or causing any violations and any future violations of Section 9(a) of the Investment Company Act.

B. Each of the Respondents shall, within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of $20,000 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 the payor as one of the Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sanjay Wadhwa, Senior Associate Regional Director, New York Regional Office, Securities and Exchange Commission, New York Regional Office, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281.

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. 75379 / July 7, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16677

In the Matter of **The American Corp. (a/k/a American Corp.), Madison Acquisition Ventures, Inc., and NuGen Holdings, 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 The American Corp. (a/k/a American Corp.), Madison Acquisition Ventures, Inc., and NuGen Holdings, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. The American Corp. (a/k/a American Corp.) (CIK No. 1188212) is a void Delaware corporation located in Charlotte, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). The American Corp. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed its initial registration statement on June 11, 2003.

2. Madison Acquisition Ventures, Inc. (CIK No. 1398605) 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). Madison Acquisition Ventures 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 $3,820 for the prior nine months.

3. NuGen Holdings, Inc. (CIK No. 1415603) is a void Delaware corporation located in Ashburn, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NuGen 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 $577,235 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'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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75382 / July 7, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3669 / July 7, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15877

In the Matter of **BRYCE WALKER, CA and SPENCE WALKER, CA, CPA** **Respondents.**	**ORDER AMENDING ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

On May 20, 2014, the Securities and Exchange Commission ("Commission") issued an order instituting public administrative and cease-and-desist proceedings pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice (the "2014 Order") against Bryce Walker, CA, and Spence Walker, CA, CPA ("Respondents").

II.

Respondents consented to the entry of the 2014 Order. Among other things, the 2014 Order required Respondents to pay, jointly and severally, $128,000 in disgorgement and prejudgment interest of $10,954.

III.

Respondents have submitted an Amended Offer of Settlement (the "Offer") proposing to amend the sum of disgorgement ordered paid in the 2014 Order. Solely for the purpose of these proceedings, and any other proceedings brought by or on behalf of the Commission, and to which the Commission is a party, and without admitting or denying the findings in the 2014 Order, 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 Amending Order Instituting Public Administrative Cease-and-Desist Proceedings pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, as set forth below.

IV.

The Commission deems it appropriate and in the public interest to amend the 2014 Order as agreed to in Respondent's Offer.

Accordingly, IT IS HEREBY ORDERED that:

A. Section IV.H. of the 2014 Order is amended as follows to order:

Respondents Bryce Walker and Spence Walker, jointly and severally, shall, within sixty (60) days of the entry of this Order, pay disgorgement of $93,135.16 and prejudgment interest of $11,233.05 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) 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 Spence Walker or Bryce Walker 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 John T. Dugan, Division of Enforcement, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, MA 02110.

B. All other provisions of the 2014 Order remain in effect:

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. 75383 / July 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16678

In the Matter of **Arrin Corporation,** **Gundaker/Jordan American Holdings (a/k/a Jordan American Holdings, Inc.),** **Liberty Petroleum Corporation,** **Mikojo Incorporated,** **Royal Invest International Corp., and** **San Joaquin Bancorp,** **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. Arrin Corporation ("ARRI") (CIK No. 1427433) is a revoked Nevada corporation located in Bradenton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ARRI 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 $8,488 for the prior three months. As of July 7, 2015, the common stock of ARRI was quoted on OTC Link operated by OTC Markets Group Inc.

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

(formerly "Pink Sheets") ("OTC Link"), had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Gundaker/Jordan American Holdings, Inc. (a/k/a Jordan American Holdings, Inc.) ("JAHI") (CIK No. 855663) is a Florida corporation located in Excello, Missouri with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). JAHI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of $98,757 for the prior nine months. As of July 7, 2015, the common stock of JAHI was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Liberty Petroleum Corporation ("LBPE") (CIK No. 59270) is a Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LBPE 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, 1987. As of July 7, 2015, the common stock of LBPE was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Mikojo Incorporated ("MKJI") (CIK No. 1411085) 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). MKJI 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 $301,430 for the prior nine months. As of July 7, 2015, the common stock of MKJI was quoted on OTC Link, had two market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Royal Invest International Corp. ("RIIC") (CIK No. 1079574) is a void Delaware corporation located in Westport, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RIIC 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 $6,373,041 for the prior nine months. As of July 7, 2015, the common stock of RIIC was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. San Joaquin Bancorp ("SJQU") (CIK No. 1368883) is a suspended California corporation located in Bakersfield, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SJQU is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2009, which reported a net loss of $20,035,000 for the prior six months. As of July 7, 2015, the common stock of SJQU was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

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. 75385 / July 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16679

In the Matter of **International Hi-Tech Industries Inc., Mark One Global Industries, Inc., Nortel Networks Corporation, and Silverado Gold Mines Ltd.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. International Hi-Tech Industries Inc. ("IHITF") (CIK No. 921887) is a Canadian corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IHITF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2005, which reported a net loss of $8,068,400 Canadian for the prior year. As of July 7, 2015, the common shares of IHITF was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had five 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. Mark One Global Industries, Inc. ("MKGLF") (CIK No. 1000791) is a British Columbia corporation located in Olathe, Kansas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MKGLF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2009, which reported a net loss of $33,125 for the prior year. As of July 7, 2015, the common shares of MKGLF 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. Nortel Networks Corporation ("NRTLQ") (CIK No. 72911) is a Canadian corporation located in Mississauga, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NRTLQ 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, including non-controlling interests, of $187,000,000 for the prior six months. On January 14, 2009 filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was still pending as of June 30, 2015. As of July 7, 2015, the common shares of NRTLQ was quoted on OTC Link, had fifteen market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Silverado Gold Mines Ltd. ("SLGLF") (CIK No. 731727) is a defaulted British Columbia corporation located in Surrey, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SLGLF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended August 31, 2011, which reported a net loss of $2,352,160 for the prior nine months. As of July 7, 2015, the common shares of SLGLF 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.

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

III.

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

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the 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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34-75388; File No. S7-07-14]

RIN: 3235-AL58

Freedom of Information Act Regulations: Fee Schedule, Addition of Appeals Time Frame, and Miscellaneous Administrative Changes

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to its regulations under the Freedom of Information Act ("FOIA") to allow the Commission to collect fees that reflect its actual costs, add an appeals time frame that will create a more practical and systematic administrative process and clarify other issues in the regulations.

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: John Livornese, FOIA/PA Officer, Office of FOIA Services, (202) 551-3831; Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to its FOIA regulations at 17 CFR 200.80 and 17 CFR 200.80e.

I. INTRODUCTION

On June 20, 2014 the Commission proposed amendments to its regulations under the Freedom of Information Act.[1] The proposed amendments would amend the Commission's FOIA

[1] *See Freedom of Information Act Regulations: Fee Schedule, Addition of Appeal Time Frame and Miscellaneous Administrative Changes*, Release No. 34-72440 (June 20, 2014), 79 FR 36443 (June 27, 2014).

fee schedule for searching and reviewing records; establish an appeals time frame; allow for submission of appeals by additional methods; and allow the Commission's Office of FOIA Services to issue responses to FOIA requests indicating that no records were located. The proposing release requested comment on all aspects of the proposal.

The Commission received three comments regarding the proposed amendments to its regulations under the Freedom of Information Act.[2] One commenter wholly supported the Commission's amendment of the regulations related to its FOIA fee schedule. The other two commenters disagreed with the proposed time frame for FOIA appeals, and one also objected to the proposed fee amendments. The comments are discussed in more detail below. In adopting this final rule, the Commission has reviewed and considered all of the comments received.

II. DISCUSSION OF THE FINAL RULES

As discussed in further detail below, the Commission is adopting the rules largely as proposed, with the exception of the provision concerning the FOIA appeals time frame, which has been revised in response to comments received.

A. Changes to Fee Regulations

The fees the Commission charges for searching, reviewing, and duplicating records pursuant to FOIA requests are currently set forth in 17 CFR 200.80e, Appendix E--Schedule of fees for records services. The Commission is updating the fee schedule for searching and reviewing records in accordance with Uniform Freedom of Information Act Fee Schedule and Guidelines promulgated by the Office of Management and Budget.[3]

[2] *See* letter from Sheldon Mark Patnett (July 14, 2014) (the Patnett letter); letter from the National Archives and Records Administration's Office of Government Information Services (July 28, 2014) (the OGIS letter), and letter from David K. Colapinto of Kohn, Kohn & Colapinto, LLP (July 28, 2014) (the Colapinto letter).
[3] *See* 52 FR 10011 (March 27, 1987).

The OMB Guidelines, pursuant to the Freedom of Information Reform Act of 1986, require that each agency's fees be based upon its "direct reasonable operating costs of providing FOIA services."[4] The guidelines state that "[a]gencies should charge fees that recoup the full allowable direct costs they incur."[5] Direct costs include "the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits)."[6] OMB recognized that costs would necessarily vary from agency to agency and directed that each agency promulgate regulations specifying the charges for search, review, and duplication. The OMB Guidelines state that "agencies should charge at the salary rate[s] [i.e. basic pay plus 16 percent] of the employee[s] making the search" or, "where a homogeneous class of personnel is used exclusively . . . agencies may establish an average rate for the range of grades typically involved."[7]

The Commission's current regulation contains set rates for FOIA request search and review activities: $16/hour for grade 11 and below; and $28/hour for grade 12 and above. The Commission proposed to revise this regulation to reflect the formula contained in the OMB Guidelines (basic pay plus 16 percent) rather than setting forth a fixed price. The proposal would establish a representative rate for each of the three different groups of grades typically involved: personnel in grades SK-8 or below; personnel in grades SK-9 to SK-13; and personnel in grades SK-14 or above.[8] The Commission's website will contain current rates for search and review fees for each class. The rates will be updated as salaries change and will be determined

[4] *Id.* at 10015.
[5] *Id.* at 10018.
[6] *Id.* at 10017.
[7] *Id. at 10018.*

[8] In the proposing release, while the preamble set forth these three groupings, the draft rule text erroneously listed the groupings as: Grades SK-9 or below; Grades SK-10 to SK-14; and Grades SK-15 or above. That was a typographical error and was inconsistent with the text of the preamble of the proposal. Only one commenter addressed the specific amount of the fees, and in making its comment, that commenter used the correct grouping as stated in the preamble of the proposing release.

by using the formula in the regulation. For the current calendar year, the fees would be assessed as follows: SK-8 or below: $29/hour; SK-9 to 13: $61/ hour; and SK-14 or above: $89/hour.[9] The proposed regulation would allow the Commission to charge FOIA requesters in quarter-hour increments at the rates established by reference to the OMB Guidelines.[10] The Commission also proposed to remove the first sentence of 17 CFR 200.80(e)(1) which provides that up to one half hour of staff time devoted to searching for and reviewing Commission records will be provided without charge.

One commenter asserted, without providing any data, that increasing FOIA fees would make it more difficult for individuals to obtain information from the SEC and will "put the FOIA process out of reach of the average citizen."[11] All changes to the Commission's FOIA fee schedule are in conformity with the FOIA and guidance set forth by the Office of Management and Budget. The OMB Guidelines, pursuant to the Freedom of Information Reform Act of 1986, require that each agency's fees be based upon its "direct reasonable operating costs of providing FOIA services." The Commission has not increased its fees for processing FOIA requests in over 20 years, despite increased costs to the agency.

Under the proposal, fees would not be charged under either the FOIA or the Privacy Act where the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee or where the requester has met the requirements for a statutory fee waiver. The new language is based upon that of 5 U.S.C. 552(a)(4)(A)(iv) (providing that no fee may be charged

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[9] The SK-8 and below rate is estimated using the maximum and minimum annual salary of a Washington, DC-based SK-6 staffer. For 2014 this is [($41,619 + $63,307)/2][1/2087 hours per year][1.16 OMB markup factor] = $29 per hour. Similarly, the SK-9 through SK-13 category is estimated by using the maximum and minimum annual salary of a Washington, DC-based SK-12 staffer, who typically does most of the work of a FOIA request. For 2014 this is [($82,037 + $138,211)/2][1/2087 hours/year][1.16 OMB markup factor] = $61/hour. Finally, the SK-14 and above category is estimated by using the maximum and minimum salary of a Washington, DC-based SK-15 supervisor. For 2014 this is [($118,743 + $200,033)/2][1/2087 hours per year][1.16 OMB markup factor] = $89/hour.

[10] As per the OMB Guidelines, fees for searches of computerized records will continue to be based on the actual cost to the Commission which includes machine and operator time. 17 CFR 200.80(e)(9)(i).

[11] *See* Colapinto letter.

if the fee exceeds the costs of collecting and processing the fee). No comments addressed this provision, and the Commission is adopting the amendments as proposed. Currently, the cost of the average fee collection activity is $20, so no fee will be charged of $20 or less.

One commenter also recommended that the Commission allow documents to be released generally without any charge or at a reduced charge at its discretion and/or if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.[12] 17 CFR § 200.80(e)(4)(i) allows the Commission's Office of Freedom of Information and Privacy Act [Services] to waive or reduce search, review, and duplication fees if: (A) Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (B) Disclosure is not primarily in the commercial interest of the requester. Thus, much of what the commenter suggested is already allowed by existing rules. Possible changes to that section, including allowing for purely discretionary waivers or reduction of fees as suggested by the commenter, are not the subject of this rulemaking. This portion of the rule will be adopted as proposed.

B. *Changes to FOIA Appeals Time Frames*

The FOIA requires federal agencies to notify requesters of their right to appeal any adverse determination. 5 U.S.C. 552(a)(6)(A)(i). Although the FOIA does not require agencies to establish an appeals time frame, neither does it preclude them from doing so. The Commission proposed to establish an appeals time frame of 30 days in order to allow more efficient and improved appeals processing by the Commission's Office of the General Counsel. Under the proposal, an appeal from an adverse decision "must be received within thirty (30)

[12] *See* OGIS letter.

calendar days of the date of the adverse decision." The proposing release noted that the implementation of a 30 day appeals time frame is consistent with the practices of a number of other federal agencies. Commission staff has reviewed the practices at twenty-two separate federal agencies. Of these, ten have a FOIA appeals time frame of 30 days, one has a 30 business day time frame, one has a 35 day time frame, two have a 45 day time frame, seven have a 60 day time frame and one has a 90 day time frame.[13]

Two comment letters opposed the 30 day time frame. One suggested that the Commission consider allowing a 60 day time frame for appeals.[14] The sole reason offered was the commenter's observation that mail screening by Federal agencies can slow the amount of time it takes appeals to reach their destination. Another commenter similarly objected to the imposition of a 30 day time frame in which to file an appeal as too short and asserted that it "does not afford individuals (such as whistleblowers and individual investors) sufficient time to find legal representation or to file a substantive appeal."[15] The commenter also noted that the likelihood of missing the 30 day deadline "is high."

In response to these concerns, the Office of FOIA Services staff referred to the above-referenced review of the FOIA appeals procedures at twenty-two federal agencies. It was noted that over half of those agencies have appeals time frames longer than 30 days. To permit FOIA requesters ample opportunity to fully address any complex issues related to their appeal, the Commission has determined to adopt a 90 day time frame for filing an appeal. The longer time frame should also obviate any concerns about delays resulting from mail screening. The 90 day time frame being adopted today is among the longest of those identified

[13] Independent financial agencies comparable to the SEC (CFTC and FTC) have 30 calendar day appeals time frames. The FDIC has a 30 business day appeals time frame.
[14] *See* OGIS letter.
[15] *See* Colapinto letter.

at other federal agencies. Accordingly, the Commission believes that an appeals time frame of 90 days is appropriate.

C. *Submission of FOIA Appeals by Email and Facsimile*

The Commission proposed to revise 17 CFR 200.80(d)(6)(ii) to allow appeals to be submitted by facsimile or email as well as through the mail. No commenter addressed this issue, and the Commission is adopting it as proposed.

D. Responses to FOIA Requests Indicating No Records Could Be Located

The Commission proposed to amend 17 CFR § 200.80(d)(5)(i) by adding a sentence to provide for responses to FOIA requests that indicate that no responsive records were located. [16] This proposed amendment would make clear that a possible response to a FOIA request is that no responsive records could be located. No commenter addressed this issue, and the new sentence would be adopted as proposed.

III. ECONOMIC ANALYSIS

The Commission is sensitive to the economic effects, including the costs and benefits, that result from its rules, and Section 23(a)(2) of the Exchange Act requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition.

As the Commission explained in the proposal, the rules are intended to help align the Commission's fees related to FOIA requests with its direct reasonable operating costs of providing FOIA services and to allow more efficient processing of requests. In the proposal, the Commission explained that although the Commission believed that the proposed rules were

[16] The draft amended rule text of 17 CFR §200.80(d)(5)(i) published in the proposed rule inadvertently omitted the penultimate sentence from existing paragraph (d)(5)(i). That language is included in amendatory text of this final rule.

unlikely to have a significant impact on the economy, the proposed rules would benefit the Commission and the public. In particular, compared to the baseline, which includes the current fee structure outlined above, the Commission believed that the proposed rules would permit the Commission to charge fees that more closely reflect the direct costs the Commission incurs to provide FOIA services. Additionally, as the Commission explained, the proposed rules would provide increased flexibility to FOIA requesters by expressly permitting appeals by email and facsimile and would also improve efficiency in the appeal process by establishing a time frame for FOIA appeals that, in light of potential alternatives, is consistent with the practice of other federal agencies.

The Commission also recognized in the proposal that the proposed rules may impose costs. Specifically, the Commission explained that the proposed rules may impose additional costs on individuals who wish to obtain access to Commission records and may impose a burden on requesters who would be required to appeal a decision within 30 days. The Commission noted, however, that those costs would be insignificant. Additionally, the Commission noted that the proposed rules would not burden competition and that the Commission believed that any potential burden on competition imposed by the proposed rules would be appropriate in furtherance of purposes of the Exchange Act.

The Commission requested comment on all aspects of the benefits and costs of the proposal, including any anticipated impacts on competition. No commenter addressed the economic analysis contained in the proposal, although, as discussed above, one commenter noted that the proposed rules would increase costs for FOIA requesters. After reviewing the comments, the Commission continues to believe that the rules will result in the economic effects described in the proposal and notes that the 90 day appeal time frame will likely impose less of a burden on requesters compared to the proposed 30 day time frame. In addition, the Commission continues to believe that the rules will have a minimal economic effect and that any potential burden on competition imposed by the amended rules would be appropriate in furtherance of purposes of the Exchange Act.

IV. REGULATORY FLEXIBILITY ACT CERTIFICATION

Pursuant to Section 605(b) of the Regulatory Flexibility Act,[17] the Commission certified that, when adopted, the amendments to 17 CFR 200.80 would not have a significant economic impact on a substantial number of small entities. This certification, including our basis for the certification, was included in the proposing release. The Commission solicited comments on the appropriateness of its certification, but received none. The Commission is adopting the final rules as proposed. Accordingly, there have been no changes to the proposal that would alter the basis upon which the certification was made.

V. OTHER ADMINISTRATIVE LAW MATTERS

These amendments do not contain any collection of information requirement as defined by the Paperwork Reduction Act of 1995, as amended.[18]

VI. STATUTORY AUTHORITY AND TEXT OF RULE AMENDMENTS

The amendments contained herein have been made under the authority set forth in 5 U.S.C. 552 and 15 U.S.C. 78d-1.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Freedom of information.

[17] 5 U.S.C. 605(b).

[18] 44 U.S.C. 3501-3520

Text of Amendments

For the reasons stated in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

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

Subpart D—Information and Requests

1. The authority citation for part 200, subpart D, is revised to read, in part, as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a-37, 80a-44(a), 80a-44(b), 80b-10(a), and 80b-11, unless otherwise noted.

* * * * *

2. Amend § 200.80 by:

a. Revising paragraph (d)(5)(i);

b. Revising paragraphs (d)(6)(i) and (d)(6)(ii);

c. Revising paragraph (e) introductory text; and

d. Removing the first sentence of paragraph (e)(1)

The revisions read as follows:

§ 200.80 Commission records and information.

* * * * *

(d) * * *

(5) *Initial determination; multi-track processing, and denials*--(i) *Time within which to respond.* When a request complies with the procedures in this section for requesting records under the Freedom of Information Act, a response shall be sent within 20 business days from the date the Office of FOIA Services receives the request, except as described in paragraphs

(d)(5)(ii) and (d)(5)(iii) of this section. If that Office has identified the requested records, the response shall state that the records are being withheld, in whole or in part, under a specific exemption or are being released. If that Office cannot locate any requested records, the response shall advise the requester accordingly.

* * * * *

(6) * * *

(i) *Time limits and content of appeal.* Appeals shall be clearly and prominently identified at the top of the first page with the legend "Freedom of Information Act Appeal" and shall provide the assigned request number. Copies of the request and the SEC's response, if any, should be included with the appeal. If an appeal is from an adverse decision, it must be received within ninety (90) calendar days of the date of the adverse decision. If only a portion of the decision is appealed, the requester must specify which part of the decision is being appealed. An appeal from an adverse decision should also identify the name of the deciding official, the date of the decision, and the precise subject matter of the appeal. An appeal is not perfected until the SEC receives the information identified in this paragraph (d)(6)(i).

(ii) *How to file and address a written appeal.* The appeal must be sent to both the General Counsel and the Office of FOIA Services at 100 F Street, NE, Washington, DC 20549. The SEC accepts facsimiles (faxes) and emails as written FOIA appeals. Information regarding where to fax or email a FOIA appeal is available on the SEC's FOIA home page on the Commission's website at http://www.sec.gov/foia.shtml. A legible return address must be included with the FOIA appeal. The requester may also include other contact information, such as a telephone number and/or an email address.

* * * * *

(e) *Fees for records services.* Information pertaining to search and review services, including locating, reviewing, and making records available, attestations and copying, appears in appendix E to this subpart D, 17 CFR 200.80e. A schedule of fees is located at the Commission's website at http://www.sec.gov/foia/feesche.htm.

* * * * *

3. Amend § 200.80e by:

   a. Adding introductory text; and

   b. Revising the paragraph that begins, "Search and review services:".

The addition and revision read as follows:

§ 200.80e Appendix E – Schedule of fees for records services.

The requester will be charged search, review, and duplication fees according to his or her fee category. In addition, the SEC will charge the requester for any special handling or services performed in processing the request and/or appeal. Duplication fees also are applicable to records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee or where the requester has met the requirements for a statutory fee waiver. Fees will be determined as follows:

Search and review services (review applies to commercial-use requesters only): (1) The Commission will establish and charge average rates for the groups of grades typically involved in search and review. Those groups will consist of employees at:

(i) Grades SK-8 or below;

(ii) Grades SK-9 to SK-13; and

(iii) Grades SK-14 or above.

(2) The average rates will be based on the hourly salary (i.e., basic salary plus locality payment), plus 16 percent for benefits, of employees who routinely perform those services. Fees will be charged in quarter-hour increments. The average hourly rates are listed on the Commission's website at http://www.sec.gov/foia/feesche.htm and will be updated as salaries change.

* * * * *

By the Commission.

Date: July 8, 2015

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75399 / July 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16680

In the Matter of Harvest Valley Ventures, Inc., and Introtech, 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 Harvest Valley Ventures, Inc. and Introtech, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Harvest Valley Ventures, Inc. (CIK No. 1101365) is a delinquent Wyoming corporation located in Draper, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Harvest Valley 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, 2004, which reported a net loss of $100 for the prior nine months.

2. Introtech, Inc. (CIK No. 1125020) is a dissolved Colorado corporation located in Colorado Springs, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Introtech is delinquent in its periodic filings

with the Commission, having not filed any periodic reports since it filed a Form 10-SB on September 29, 2000.

B. DELINQUENT PERIODIC FILINGS

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

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

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75400 / July 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16681

In the Matter of **Hinds, Inc., and Kenyon, 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 Hinds, Inc. and Kenyon, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Hinds, Inc. (CIK No. 1127162) is an inactive Wyoming corporation located in Casper, Wyoming with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Hinds 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, 2003.

2. Kenyon, Inc. (CIK No. 1119779) is a Wyoming corporation located in Casper, Wyoming with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Kenyon 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, 2002.

B. DELINQUENT PERIODIC FILINGS

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

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

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75401 / July 8, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3670 / July 8, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4138 / July 8, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31710 / July 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16328

In the Matter of

VERO CAPITAL MANAGEMENT, LLC, ROBERT GEIGER, GEORGE BARBARESI, ESQ, and STEVEN DOWNEY, CPA

Respondents.

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, SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO ALL RESPONDENTS, AND PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE AS TO STEVEN DOWNEY, AND INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND IMPOSING SANCTIONS PURSUANT TO SECTION 4C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE AS TO GEORGE BARBARESI

I.

On December 29, 2014, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings against VERO Capital

Management, LLC ("VERO Capital"), Robert Geiger ("Geiger"), George Barbaresi ("Barbaresi"), and Steven Downey ("Downey," and collectively, "Respondents") 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 against Downey pursuant to Rule 102(e)(1) of the Commission's Rules of Practice ("Rules of Practice"). In addition, the Commission deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Barbaresi pursuant to Section 4C[1] of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Rules of Practice.[2]

II.

In response to the institution of these proceedings, Respondents have submitted Offers of Settlement ("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 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, Section 9(b) of the Investment Company Act of 1940 as to all Respondents, and Pursuant to Rule 102(e) of the Commission's Rules of Practice as to Steven Downey, and Instituting Public Administrative Proceedings, Making Findings, and Imposing Sanctions Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice as to George Barbaresi ("Order"), as set forth below.

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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.

III.

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

A. SUMMARY

1. These proceedings arise out of Respondents' investment management activities on behalf of VERO Capital's advisory clients, the VERO Distressed ABS Opportunity Fund, B.V. ("Distressed Fund") and the VERO Distressed ABS Opportunity Master Fund, B.V. (the "Master Fund" and, collectively with the Distressed Fund, the "Funds").

2. Between late 2010 and 2011, Respondents caused the Funds to purchase three notes, with a total principal value of $7 million, from VERO Asset Management, LLC ("VERO Asset"), an affiliate of VERO Capital. Because the Funds were purchasing the notes from a VERO Capital affiliate, the transactions constituted principal transactions under Section 206(3) of the Advisers Act, which require written notice and consent of the client before the completion of the transaction. The client's consent was not obtained before the completion of each individual transaction.

3. Thereafter, from 2012 to 2013, Respondents improperly diverted approximately $2.8 million from the Funds for VERO Capital's wholly-owned subsidiary (the "VERO affiliate"), by causing the Funds to make a series of undocumented, undisclosed bridge loans to the VERO affiliate. At the same time Respondents were transferring the Funds' assets to the VERO affiliate, they were telling the Distressed Fund's investors and the Funds' director that they were winding down the Funds and actively working to liquidate their remaining investments for redemption. None of the Respondents disclosed the bridge loans to the Funds or any of their investors.

B. RESPONDENTS

4. **VERO Capital** is a Delaware limited liability company formed in 2003 with its principal place of business in New York, New York. It has been registered with the Commission as an investment adviser since 2008. VERO Capital is the investment manager to the Distressed Fund. Respondents Geiger, Downey, and Barbaresi are part owners of, and are associated with,[3] VERO Capital.. VERO Capital has several wholly-owned subsidiaries, which included the VERO affiliate at all times relevant to the activities detailed herein.

[3] A "person associated with" an investment adviser means "any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser . . . ." *See* Advisers Act § 202(a)(17).

5. **Geiger**, age 55, resides in Wainscott, New York. Geiger is a co-owner of VERO Capital, and through it, the VERO affiliate, and has served as VERO Capital's managing member since 2003. From at least 2010 through December 2013 (the "Relevant Period"), Geiger served on VERO Capital's Investment Committee. Geiger was the VERO affiliate's managing member at all times relevant to the activities detailed herein as well. Geiger has previously held Series 3, 7, and 63 licenses, but he is not currently registered with the Commission in any capacity.

6. **Barbaresi**, age 59, resides in Dayton, Ohio. Barbaresi is a co-owner of VERO Capital, and through it, the VERO affiliate, and has served as VERO Capital's general counsel since December 2003. During the Relevant Period, Barbaresi served on VERO Capital's Investment Committee. Barbaresi is the VERO affiliate's general counsel as well. Barbaresi is an attorney in good standing licensed to practice in New York, Connecticut, and the District of Columbia

7. **Downey**, age 57, resides in Prospect, Kentucky. Downey is a co-owner of VERO Capital, and through it, the VERO affiliate, and has served as VERO Capital's chief financial officer since August 2004. During the Relevant Period, Downey served on VERO Capital's Investment Committee. Downey is the VERO affiliate's chief financial officer as well. Downey has been a certified public accountant licensed to practice in Florida and Alabama, although his license is not currently active in any jurisdiction and he does not hold himself out as a CPA.

C. <u>OTHER RELEVANT ENTITIES</u>

8. **The VERO affiliate** is a Delaware limited liability company formed in 2008 with its principal place of business in New York, New York. During the Relevant Period, the VERO affiliate was a wholly-owned subsidiary of VERO Capital. The VERO affiliate's officers and its marketing materials describe the company as a risk analytics business.

9. The **Distressed Fund** is a private company with limited liability incorporated under the laws of the Netherlands in 2008. The Distressed Fund is 100% owned by Stichting VERO Distressed ABS Opportunity Fund, a foundation established under the laws of the Netherlands, and incorporated by TMF Management, B.V. ("TMF Management"), a Dutch corporate services provider. The Distressed Fund aimed to achieve returns by investing in the affiliated Master Fund, which made investments in various securities.

10. The **Master Fund** is a private company with limited liability incorporated under the laws of the Netherlands in 2007. The Master Fund is 100% owned by Stichting VERO Distressed ABS Opportunity Master Fund, a foundation established under the laws of the Netherlands, and incorporated by TMF Management. The Master Fund's primary stated investment objective was to maximize returns by investing in a diverse portfolio of mortgage-related structured finance securities, whole mortgage loans and other fixed-income instruments.

11. **VERO Asset** is a Delaware limited liability company formed in 2003 with its principal place of business in New York, New York. During the Relevant Period, VERO Asset was a wholly-owned subsidiary of VERO Capital that made certain loans, including one to Cayden Holdings, LLC ("Cayden"), a VERO Capital affiliate, that the Funds later purchased.

12. **VERO Realty Advisors, LLC ("VERO Realty")** is a Delaware limited liability company formed in 2012 with its principal place of business in New York, New York. During the Relevant Period, VERO Realty was a wholly-owned subsidiary of VERO Capital. Certain funds that VERO Capital diverted from the Funds to the VERO affiliate in 2013 were initially transferred to a bank account held in the name of VERO Realty.

13. **Cayden** is a Delaware limited liability company formed in 2007 with its principal place of business in Baltimore, Maryland. During the Relevant Period, Cayden was a wholly-owned subsidiary of VERO Asset. The Funds purchased a note from VERO Asset in November 2010 that evidenced a $3 million loan that VERO Asset had made to Cayden (the "Cayden Note"). VERO Capital ultimately diverted to the VERO affiliate a portion of the money that was due to the Funds to repay the $3 million loan.

14. **TMF Management** is a Dutch private company with limited liability headquartered in Amsterdam, The Netherlands. TMF Management served as director for the Distressed Fund and the Master Fund and provided management, corporate and administrative services to the Funds, with the exception of investment management services, which VERO Capital provided.

D. <u>FACTS</u>

<u>Background</u>

15. The Distressed Fund and the Master Fund are structured in a master-feeder relationship. The Distressed Fund is the feeder fund and aimed to generate returns by investing substantially all of its cash (raised from issuing notes to investors) in notes issued by the Master Fund. The Master Fund then used those proceeds to invest in mortgage-related finance securities and other distressed investments, as described below. Both the Distressed and Master Funds are Dutch companies each of whose shares are entirely owned by separate Dutch foundations, or "stichtings." The stichtings were incorporated by TMF Management, a Dutch corporate services provider, which serves as the director for both Funds. The stichtings are legal entities without shareholders whose object is to hold the shares of the Funds and have overall control over the Funds' management. However, the Funds, through TMF Management, delegated to VERO Capital the exclusive power and authority to manage the Funds' investments on a discretionary basis.

16. VERO Capital marketed the Distressed Fund to three foreign investors in 2008, raising approximately $75 million by selling them participating notes issued by the Fund, with the vast majority coming from two of the three investors. According to the Distressed Fund's private placement memorandum ("PPM"), its principal investment

objective was to achieve returns by investing through the Master Fund in a diverse portfolio of mortgage-related finance securities, whole mortgage loans and other fixed income instruments, including rated or unrated and performing or distressed securities issued by issuers of collateralized debt obligations, and special situation investments. The Distressed Fund could invest in a broad array of assets, but the Distressed Fund's PPM stated that "[i]t is intended that the portfolio will consist of approximately 80% U.S. RMBS Securities and there will be no . . . corporate credit risk." The Distressed Fund's two biggest investors understood that the Fund's primary purpose was to invest in mortgage-backed securities.

17. With respect to transactions involving affiliates of VERO Capital, the PPM stated that VERO Capital may purchase loans originated or syndicated by any affiliate of VERO Capital or otherwise engage in affiliated transactions on behalf of the Fund. However, to do so, VERO Capital was required to obtain the prior written consent of a committee comprised of VERO Capital's investment professionals (the "Investment Committee"). At all times relevant to this action, Geiger, Barbaresi, and Downey were members of the Investment Committee. No person independent of VERO Capital served on the Investment Committee.

Purchase of the Cayden Note

18. After their inception, the Funds invested primarily in residential and then commercial mortgage-backed securities ("RMBS" and "CMBS"). They undertook other investments as well. Specifically, in November 2010, the Investment Committee, on which Geiger, Downey, and Barbaresi sat, approved a transaction in which the Distressed Fund was to purchase the $3 million Cayden Note from VERO Asset.[4] Under the terms of the Cayden Note, VERO Asset loaned $3 million to another VERO Capital affiliate, Cayden. The Cayden Note paid 15% interest per annum due in monthly installments, with the entire principal due on December 1, 2013. The interest rate increased to 19% per annum in the event of a default. The Cayden Note also provided that its holder could accelerate the payment of the Note's principal in the event of a default.

19. This affiliated investment was documented by a written authorization by the Investment Committee; however, the investment was not disclosed prior to its completion to TMF Management or to any Distressed Fund investor; nor was consent for the investment obtained from any party outside VERO Capital.

20. The consent authorizing the purchase of the Cayden Note made clear that the purpose for the loan was for Cayden to make certain trades involving Government

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[4] In fact, the Master Fund purchased the Cayden Note according to the 2010 audited financial statements. The PPM disclosed that the Distressed Fund and the Master Fund would be treated interchangeably: "Unless specified otherwise, references herein to the Fund's investments and investment program include references to the Master Fund's investments and investment program, to the extent that the Fund invests through the Master Fund." Geiger, Downey and Barbaresi made little effort to distinguish among them.

National Mortgage Association ("GNMA") mortgage-backed securities. Cayden's business plan was to enter into agreements to fund Federal Housing Administration backed fixed-rate construction loan commitments. Draws funded under the loan commitments were guaranteed as to the principal by GNMA, and therefore once the loans were made, they were securitized and Cayden sold the GNMA securities into the aftermarket (the "GNMA trading strategy"). The GNMA trading strategy generated profits for Cayden through 2011 and 2012.

21. VERO Capital disclosed the Master Fund's purchase of the Cayden Note and Cayden's GNMA trading strategy in the notes to the Master Fund's year-end 2010 audited financial statements, which were sent to the Distressed Fund's investors in April 2011. Cayden made interest payments on the Cayden Note to the Master Fund until February 2013 at which point Cayden defaulted. Although Cayden's failure to pay interest when due permitted the Master Fund to accelerate the maturity of the Cayden Note, VERO Capital made no effort to collect on the Cayden Note on the Funds' behalf, as described below.

Purchase of the Envo and Tallas Notes

22. In December 2011, the Investment Committee approved the Distressed Fund's purchase of two additional promissory notes from VERO Asset.[5] Under the terms of the notes, VERO Asset loaned $2 million each to two unaffiliated issuers, Envo Properties, LLC ("Envo") and Tallas Properties, LLC ("Tallas"). The loans' purpose was for Envo and Tallas to make real-estate related investments. The notes (hereinafter the "Envo and Tallas Notes") paid 12% interest per annum. The Envo and Tallas Notes were guaranteed by an individual and were due to mature January 31, 2013.

23. On December 12, 2011, approximately one week after VERO Asset originated the Envo and Tallas Notes and the Master Fund purchased them, the Commission charged the guarantor and others with operating a Ponzi scheme. *See SEC v. Management Solutions, Inc.*, No. 2:11-cv-01165-BSJ (D. Utah). Simultaneously with the filing of its lawsuit, the Commission obtained a court order freezing the guarantor's assets and the assets of entities under his control. Like the purchase of the Cayden Note, the Investment Committee approved the purchase of the Envo and Tallas Notes, but the investments were not disclosed prior to their being completed to TMF Management or to any Distressed Fund investor; nor was consent for the investments obtained from any party outside VERO Capital.

24. In early 2012, Barbaresi and Downey took steps to recoup the principal on the Envo and Tallas Notes. As a result of those efforts, in July 2012, VERO Capital recouped approximately $2.1 million of the principal on the Envo and Tallas Notes. Of this amount, VERO Capital returned $1.5 million to the Master Fund in September 2012. As

[5] As was true with the purchase of the Cayden Note, the 2011 audited financial statements indicate that it was the Master Fund, not the Distressed Fund, that purchased the Envo and Tallas Notes.

described further below, VERO Capital diverted the remaining approximately $600,000 for the VERO affiliate, which drew down on it over time.

25. VERO Capital disclosed the purchase of the Envo and Tallas Notes in the notes to the Funds' audited financial statements for year-end 2011. In addition, in April 2012, VERO Capital sent a letter to the Distressed Fund's investors, enclosing the audited 2011 financial statements for the Funds, that described the situation with the Envo and Tallas Notes. In the letter, VERO Capital stated that it was placing the Envo and Tallas loans on "non-accrual status" and "after much deliberation" was adjusting the fair value of the notes to approximately $1.8 million for each note to "reflect a liquidity discount."

Respondents Communicate that the Funds Are Winding Down and Investors Will Be Redeemed

26. By the fall of 2011, VERO Capital began returning principal to the Distressed Fund's investors. In a June 2012 email, a representative of one of the investors sought information from Geiger about the timing of the wind down and return of investment: "My understanding was the [sic] VERO should have been redeemed in full by now. As it's not, do you have a liquidity schedule for the remaining part?" Geiger responded that VERO Capital had been returning principal "since last Fall" and that VERO Capital was "seeking to make three more distributions before the end of the year, returning the remainder by year end, with a potential tail in January" 2013. After the same investor representative asked for an update at the beginning of September 2012, Downey drafted an email response ultimately sent by Barbaresi stating that VERO Capital remained committed to making another distribution in October 2012. Barbaresi added: "As we continue to sell assets and raise cash, we will be able to obtain greater clarity around the liquidity in the market. We should know by early December if the third distribution will be in December or later as we continue to gain clarity and finish the wind up of the fund."

27. In 2013, the Distressed Fund's two major investors continued to ask about the status of the Fund's wind-down and the return of their principal. For example, in April 2013, a representative of one of these investors asked for another update on the Distressed Fund's wind-down, noting that "[b]ack in Jun/12 the fund was estimated to be fully distributed before end of 2012, with a potential tail into Jan/13." Barbaresi responded later in the month: "We have been actively liquidating the fund's assets and the remaining assets are very illiquid. . . . We hope to have the remaining assets sold by the second half of the year and will keep you updated on ongoing asset sales and distributions." Subsequently, in May, Barbaresi told another investor representative that "[w]e really can't accurately predict when the final liquidation of the fund will occur, as we discussed, we are looking at options to put the last of the illiquid assets into a structure that will not incur administrative fees."

28. In June 2013, Downey, in response to questions by TMF Management about when it could expect the Funds' 2012 audit reports, notified TMF Management that VERO Capital had begun to wind down the Fund, and that an audit would be conducted together with the wind-down audit. Prior to that time, none of the Respondents notified TMF Management of VERO Capital's intentions to liquidate the Funds, and the only notice

TMF Management received of the Funds' return of principal to investors was a line item in the 2011 audited financial statements that TMF Management received some time in or after April 2012.

The Undisclosed Loans from the Funds to Finance the VERO Affiliate

29. Beginning in at least 2008, while it was serving as investment manager to the Funds, VERO Capital was also developing the VERO affiliate as a risk management business or financial services technology company. The VERO affiliate's business plan was to provide large financial institutions with a platform to assist them with modeling the valuation of various pieces of their portfolios in different economic scenarios. VERO Capital anticipated that the demand for this type of service would increase following the financial crisis in 2008 and the passage of the Dodd-Frank Act, with its requirements that large financial institutions perform "stress tests" on their portfolios.

30. During all times relevant to this action, the VERO affiliate was a wholly-owned subsidiary of VERO Capital. Because they were co-owners of VERO Capital, Geiger, Barbaresi, and Downey were also co-owners of the VERO affiliate. In approximately 2010, Downey began treating the VERO affiliate as a separate entity for accounting purposes, booking revenues and expenses of the VERO affiliate separately from VERO Capital. Beginning in 2010, most VERO Capital employees became employees of the VERO affiliate.

31. Beginning in at least February 2012 and continuing through October 2013, when Commission examination staff commenced an examination of VERO Capital, Geiger, Barbaresi, and Downey, through VERO Capital, improperly diverted approximately $2.8 million in assets of the Funds for purposes of financing the VERO affiliate's operations. While informing the Distressed Fund's investors that the Funds were being wound down, Respondents at the same time transferred the money from the Funds through purported bridge loans to the VERO affiliate. These loans were never documented, nor were any of them disclosed to the Funds or their investors until after the Division of Enforcement ("Division") had commenced its investigation. In making the bridge loans to the VERO affiliate, Geiger, Barbaresi, and Downey did not follow the procedures for affiliated transactions set forth in the PPM. Nor were any of the bridge loans to the VERO affiliate reduced to writing, although they were recorded in the Master Fund's general ledger.

32. VERO Capital accomplished the transfers from the Funds to the VERO affiliate in multiple transactions. First, as the money invested through the Cayden Note in the GNMA trades was returned to Cayden as those trades were closed out throughout 2012, Geiger, Downey, and Barbaresi used at least $1.4 million to benefit the VERO affiliate, rather than returning it to the Funds. Downey arranged the transfer of the $1.4 million over time from accounts associated with Cayden to accounts associated with VERO Capital, VERO Asset, or the VERO affiliate, ultimately for the VERO affiliate's benefit. None of the Respondents prepared any documentation concerning the transfers to indicate whether they were loans or investments by Cayden in the VERO affiliate.

33. Second, in July 2012, VERO Capital secured the return of $2.1 million of the Envo and Tallas Notes' principal. While VERO Capital transferred $1.5 million of that amount back to the Funds, Geiger, Barbaresi, and Downey used the remaining $600,000 for the benefit of the VERO affiliate from December 2012 through February 2013. As VERO Capital and the VERO affiliate's CFO, Downey was primarily responsible for disbursing money on their behalf, and Geiger and Barbaresi were aware, or should have been aware, that Downey was using returned Envo and Tallas Note principal to benefit the VERO affiliate.

34. Finally, in August and September 2013, as the VERO affiliate's bank account was nearly depleted, and after VERO Capital had notified TMF Management that the Funds were being liquidated, Downey orchestrated two transfers, of $500,000 and $300,000, respectively, from the Master Fund's custodial bank account for the benefit of the VERO affiliate. Downey directed the August and September 2013 transfers from the Master Fund's account at U.S. Bank to VERO Realty, another VERO Capital affiliate.

35. Because U.S. Bank also served as the Funds' administrator and therefore maintained their books and records, Downey had to provide a reason to U.S. Bank for the two disbursements so that U.S. Bank could document what the money was being used for.

36. In an August 1, 2013 email to U.S. Bank, Downey, copying Barbaresi, advised the bank that VERO Capital (through its affiliate, VERO Realty) would invest the $500,000 that he requested in a property related to the Master Fund's Tallas Note in order to recoup additional principal on the Tallas Note. Downey and Barbaresi were aware, or should have been aware, that the $500,000 would not be used to invest in a property related to the Tallas Note, but would instead be transferred to pay VERO Capital's and the VERO affiliate's expenses.

37. The same day, U.S. Bank wired $500,000 to the VERO Realty account. Immediately thereafter, also on August 1, Downey transferred $80,000 of the $500,000 from the VERO Realty account to a VERO Capital account and used the money to pay for the VERO affiliate's expenses. On August 2, Downey made two transfers of $50,000 and $20,000 from the VERO Realty account to the VERO Capital account, and then subsequently transferred that money to a VERO affiliate account.

38. By September 12, 2013, Downey had transferred all of the $500,000 from the VERO Realty account for the benefit of the VERO affiliate. Geiger was aware, or should have been aware, that Downey and Barbaresi obtained the $500,000 from the Master Fund's account and used the money for the VERO affiliate.

39. Again, on September 26, 2013, Downey emailed U.S. Bank, this time copying Barbaresi and Geiger, requesting another transfer to VERO Realty for expenses related to the Tallas properties, again ostensibly for the purposes of recouping additional principal related to the Tallas Note. As part of his September 26, 2013 email, Downey forwarded the previous request for $500,000 that he made on August 1. Downey, Barbaresi, and Geiger were aware, or should have been aware, that the September 26, 2013

transfer from the Master Fund account would not be used for expenses related to the Tallas properties.

40. U.S. Bank wired $300,000 to the VERO Realty account on September 26, and Downey began drawing down the account the next day. By October 23, 2013, Downey had used the entirety of the $300,000 for the benefit of the VERO affiliate.

41. The $500,000 and $300,000 transferred from the Master Fund account on August 1, 2013 and September 26, 2013, respectively, were not approved or documented by the Fund's Investment Committee. Neither Downey, Barbaresi nor Geiger ever advised TMF Management, U.S. Bank, or Distressed Fund investors that the Master Fund's money had been used for the benefit of the VERO affiliate until after the commencement of the Division's investigation.

Respondents' Nondisclosure of the Transfers to the VERO Affiliate

42. The Respondents took no action to disclose the transfers from the Funds to the VERO affiliate. The Funds' bridge loans to the VERO affiliate were not timely disclosed to the Distressed Fund's investors or TMF Management. During the period when the Funds' assets were being used to finance the VERO affiliate, Downey, Geiger and Barbaresi each prepared and/or reviewed periodic (monthly, then quarterly) newsletters to the Distressed Fund's investors in which the nature and amount of the Fund's investments were purportedly described to them. None of those newsletters disclosed the existence of the transfers to the VERO affiliate. None of the loans to the VERO affiliate was properly documented in any loan agreements. Downey only directed that they be recorded as entries in VERO Capital's general ledger. At no time did anyone prepare any promissory note or other document evidencing the VERO affiliate's debt to the Funds as a result of the approximately $2.8 million in ostensible loans that the Funds provided.

43. Cayden first defaulted on interest payments due to the Funds under the Cayden Note in February 2013. Cayden defaulted on the interest payments even though Cayden's original investment strategy, the GNMA trading strategy, had been profitable. When Cayden stopped paying interest, under the terms of the Cayden Note, the Funds could have called the loan and accelerated the due date for the return of the principal (which was December 1, 2013). No one associated with VERO Capital took any action to call the loan on the Funds' behalf.

44. In addition, Downey, who was responsible for valuation of certain of the Funds' assets, did not mark down the value of the Cayden Note on either Fund's balance sheet after Cayden defaulted on its interest payments on the Note. This stood in sharp contrast to his decision to mark down the Envo and Tallas Notes in April 2012. Nor did Downey or anyone else at VERO Capital inform U.S. Bank, the Funds' administrator, that Cayden had defaulted on the Cayden Note until December 2013. As a result of Respondents' failure to mark down the value of the Cayden Note, the Funds' assets under management were overstated and their losses understated in quarterly investor statements issued in March 2013 and later.

Geiger, Barbaresi, and Downey Benefit from the Transfers to the VERO Affiliate

45. Geiger, Barbaresi, and Downey benefited from the transfers from the Funds. For example, from August to October 2013, when the $800,000 from the Master Fund account was the primary source of money for VERO Capital, Downey paid himself more than $125,000 in purported salary and expenses, purportedly earned as a result of work he had performed for the VERO affiliate. Downey also directed $48,000 to Geiger to pay bills on his behalf, including business expenses due from the VERO affiliate, and wired another $40,000 to Barbaresi, all also representing purported compensation or reimbursement due from the VERO affiliate.

46. In addition, at the time the VERO affiliate was a wholly-owned subsidiary of VERO Capital, which was co-owned by Geiger, Barbaresi, and Downey, among others. The utilization of cash from the Funds to finance the VERO affiliate's ongoing development and operations in 2012 and 2013 thus inured to the benefit of Geiger, Barbaresi, and Downey, as they stood to gain from any profits that the VERO affiliate ultimately generated.

VERO Capital Failed to Comply with the Custody Rule in 2012 and 2013

47. As investment adviser to the Funds, VERO Capital held custody of Fund assets because it was authorized or permitted to withdraw money from the Master Fund's custodial account. Because VERO Capital had custody of client assets, Advisers Act Rule 206(4)-2 required VERO Capital to, among other things, provide notice to investors in the Funds upon opening the account with U.S. Bank on their behalf, establish a reasonable belief upon due inquiry that U.S. Bank was delivering account statements to investors in the Fund at least quarterly, and undergo an annual surprise examination by an independent public accountant. Alternatively, VERO Capital could have had the Funds audited annually by an independent public accountant that was registered with and subject to regular inspection by the Public Company Accounting Oversight Board and distribute audited financial statements prepared in accordance with Generally Accepted Accounting Principles to the investors in the Funds within 120 days of the Funds fiscal year end. VERO Capital did neither in 2012 and 2013.

E. VIOLATIONS

48. As a result of the conduct described above, VERO Capital, Geiger, Barbaresi, and Downey willfully[6] violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, which prohibit conduct by an investment adviser that operates as a fraud.

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[6] 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)).

49. As a result of the conduct described above, VERO Capital willfully violated Section 206(3) of the Advisers Act, which prohibits an investment adviser from, directly or indirectly, "acting as principal for his own account, knowingly to sell any security or to purchase any security from a client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

50. As a result of the conduct described above, VERO Capital willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-2 promulgated thereunder, which requires that an investment adviser maintain each client's funds in bank accounts containing only those client funds, notify its clients about the place and manner in which their funds are maintained, and have client funds and securities verified by an independent public accountant at least once a year without prior notice to the investment adviser.

51. As a result of the conduct described above, Geiger, Barbaresi, and Downey willfully aided and abetted and caused VERO Capital's violations of Sections 206(2), 206(3), and 206(4) of the Advisers Act and Rules 206(4)-2 and 206(4)-8 promulgated thereunder.

F. UNDERTAKINGS

52. Respondent VERO Capital has undertaken to cease investment advisory operations and deregister as an investment adviser within 180 days of entry of this Order. The 180 day limit shall not apply to VERO Capital's role as a named plaintiff in the lawsuits captioned *VERO Distressed ABS Opportunity Fund, B.V. et al. v. BC Warner Investments, L.C. et al.*, Civ. No. 149915059 (3rd Judicial Dist., Salt Lake Cty, Utah) and *VERO Distressed ABS Opportunity Fund, B.V. et al. v. Jacobson et al.*, (3rd Judicial Dist., Salt Lake Cty, Utah (expected)) (collectively, the "Fund Lawsuits").

53. Respondent VERO Capital has undertaken to certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and VERO Capital agrees to provide such evidence. The certification and supporting material shall be submitted to Thomas P. Smith, Jr., Assistant Regional Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty days from the date of the completion of the undertakings.

54. In determining whether to accept VERO Capital's Offer, the Commission has considered these undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Offers of Respondents VERO Capital, Geiger, Barbaresi, and Downey.

Accordingly, pursuant to Section 4C of the Exchange Act, Sections 203(e), 203(f), and 203(k) of the Advisers Act, Section 9(b) of the Investment Company Act, and Rule 102(e)(1) of the Rules of Practice, it is hereby ORDERED that:

A. Respondents VERO Capital, Geiger, Barbaresi and Downey shall cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(3), and 206(4) of the Advisers Act and Rules 206(4)-2 and 206(4)-8 thereunder.

B. Respondents Geiger, Barbaresi, and Downey be, and hereby are:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; provided however, that for a period of up to 180 days from the entry of this Order, Respondents Geiger, Barbaresi, and Downey may, solely for the purposes of completing the wind down of the Funds, making final payments and distributions to investors in those Funds, and preserving value for those investors in the interim, (1) participate in advisory activities and (2) continue to be associated with VERO Capital while VERO Capital acts as an investment adviser. The 180 day limit shall not apply to Respondents' supervision of the Fund Lawsuits.; 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;

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

D. Respondent VERO Capital is censured.

E. Respondent Downey is denied the privilege of appearing or practicing before the Commission as an accountant.

F. After three years from the date of this Order, Respondent Downey may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

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

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

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

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

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

   d. Respondent acknowledges his/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.

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

H. Respondent Barbaresi is denied the privilege of appearing or practicing before the Commission as an attorney for three years from the date of the Order.

I. After three years from the date of the Order, Respondent Barbaresi 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.

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

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

   a. that Respondent has complied with the Order;

   b. that Respondent:

      i. 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

      ii. 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;

   c. 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

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

i. 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;

ii. 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;

iii. 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

iv. 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.

J. If Respondent Barbaresi provides the documentation required in Paragraph I, 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.

K. If Respondent Barbaresi is not able to truthfully attest to the statements required in Subparagraphs I(2)(b)(ii) or I(2)(d), 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.

L. Respondents VERO Capital, Geiger, Barbaresi, and Downey, jointly and severally, shall pay disgorgement of $2,879,623, and prejudgment interest of $189,083.35, for a total of $3,068,706.35, to the Securities and Exchange Commission. Payment shall be made in the following installments: $1,534,353.18 within 180 days of the entry of the Order; and $1,534,353.17 within 360 days of the entry of the Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

1. Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

2. 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 VERO Capital, Geiger, Barbaresi, or Downey 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 Amelia A. Cottrell, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

M. Respondents VERO Capital, Geiger, Barbaresi, and Downey shall each pay a civil money penalty in the amount of $300,000 to the Securities and Exchange Commission. Payment shall be made in the following installments: each shall make a payment of $150,000 within 180 days of the entry of the Order; and each shall make a payment of $150,000 within 360 days of the entry of the Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

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

2. 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
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   HQ Bldg., Room 181, AMZ-341
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   Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying VERO Capital, Geiger, Barbaresi, or Downey 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 Amelia A. Cottrell, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

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 Geiger, Barbaresi, and Downey, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents Geiger, Barbaresi, and Downey 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 Geiger, Barbaresi, and Downey 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75417 / July 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16682

In the Matter of **Patrick Lehnert,** **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 Patrick Lehnert ("Lehnert" or "Respondent").

II.

In anticipation of the institution of these proceedings, Lehnert 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, Lehnert 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 Lehnert's Offer, the Commission finds that:

A. Summary

1. These proceedings involve insider trading in the securities of Harman International Industries, Incorporated ("Harman") in advance of a positive earnings announcement. Before the open of the market on October 30, 2014, Harman announced better-than-expected revenues and earnings for its first quarter ended September 30, 2014. The closing price of Harman common stock increased 7.5% on this news.

2. Beginning in late September and continuing through the end of October 2014, Patrick Lehnert, a Harman finance officer located in Germany, purchased the economic equivalent of Harman common stock through contracts-for-difference ("CFDs") in an overseas brokerage account. Lehnert's profit on those securities transactions was approximately $31,506.

B. Relevant Entity And Respondent

3. Harman International Industries, Incorporated is a publicly-traded Delaware corporation headquartered in Stamford, Connecticut. Harman is a worldwide leader in the development, manufacture and marketing of high quality, high-fidelity audio products, lighting solutions and electronic systems. The company's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange.

4. Patrick Lehnert, age 43, was a Senior Director of Finance & Controlling Europe at Harman until December 23, 2014, when he was terminated. Harman did not have to pre-clear Lehnert's trades as was required for certain employees trading in Harman securities. Lehnert lives in Karlsruhe, Germany.

C. Lehnert's Awareness Of Financial Information

5. Harman's first quarter of fiscal year 2015 ended September 30, 2014. As highlighted in its October 30, 2014 press release, Harman's quarterly net sales increased by 22% to $1.4 billion and its operational earnings-per-share increased by 38% to $1.31. Revenues for the Infotainment division were up 17% to $748 million.

6. Lehnert's duties and responsibilities included controlling, financial reporting, and accounting for the European part of Harman's Infotainment division. Lehnert was responsible for monthly closing processes, managerial reporting of monthly and quarterly financial performance and financial performance measurement and variance analysis.

7. By virtue of his job responsibilities, at a minimum, Lehnert was aware of nonpublic information concerning the entire Infotainment division. The Infotainment division was material to Harman as a whole, accounting for more than 50% of Harman's total revenues for the first quarter ended September 30, 2014.

8. Lehnert reported to the company's Vice President Controlling Infotainment. Both individuals worked at Harman's offices located in Karlsbad, Germany, and interacted on a daily basis. On October 13, 2014, Lehnert's supervisor sent him an email with the subject line, "Infotainment Monthly Report September FY15." The attachment to that email included quarterly financial results for the Infotainment division including the top-line revenue of $748 million for the division.

D. Lehnert's CFD Trading And Related Hedges

9. Beginning in late September 2014, Lehnert began to purchase the economic equivalent of Harman common stock through CFDs. Lehnert continued to purchase CFDs through October 29, 2014, the day before Harman's first quarter earnings announcement, while he was aware of the nonpublic financial performance of the Infotainment Division, as described in Paragraph 7.

10. Equity CFDs are agreements between two parties to exchange the difference in value of an underlying stock between the time the contract is opened and the time it is closed. If the share price increases, the seller pays the difference to the buyer. If the share price declines, the buyer must pay the seller. Equity CFDs mirror the movement and pricing of the underlying stock on a dollar-for-dollar basis, so any fluctuations in the public market price of the underlying security is reflected in a gain or loss of the CFD position.

11. Lehnert purchased CFDs through an account at a German branch office of a London-based CFD firm. The London firm hedged each of Lehnert's trades, either partially or fully, immediately after Lehnert opened the position. The London firm typically hedged these trades through swaps with a European-based affiliate of a large international financial institution. That financial institution then hedged its positions under the swaps by purchasing Harman common stock through its broker-dealer in the United States.

12. Before the open of the market on October 30, 2014, Harman announced better-than-expected revenues and earnings for its first quarter ended September 30, 2014. The closing price of Harman common stock increased 7.5% on this news. Lehnert closed out his open CFD positions shortly thereafter for profit of approximately $31,506.

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Lehnert cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Lehnert shall, within thirty (30) days of the entry of this Order, pay disgorgement of $31,506, which represents profits gained as a result of the conduct described herein, and prejudgment interest of $470, plus a civil money penalty of $15,753, to the Securities and

Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

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

(2) Lehnert 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) Lehnert 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 Lehnert 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 Reid A. Muoio, Esq., Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, 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 Lehnert, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Lehnert 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
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. 75418 / July 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16683

In the Matter of

JUSTIN G. DICKSON,

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 Justin G. Dickson ("Dickson" or "Respondent").

II.

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

III.

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

1. Dickson, age 39, is a resident of Midvale, Utah. Dickson was an independent contractor for AVF, Inc., and the vice president and chief executive officer of AV Funding, LLC. Dickson has never held any securities licenses and has never been associated with a registered broker-dealer.

2. On July 6, 2015, a final judgment was entered by consent against Dickson, permanently enjoining him from future violations of Section 5 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. Christopher A. Seeley and Justin G. Dickson, Civil Action Number 2:11-cv-00907-CW-BCW, in the United States District Court for the District of Utah.

3. On September 28, 2011, the Commission filed its complaint against Dickson alleging violations of the federal securities laws related to Dickson's conduct with two entities, AVF, Inc. ("AVF") and AV Funding, LLC ("AV Funding"). In 2014, the Court dismissed the claim under Section 17(a) of the Securities Act as to both AVF and AV Funding, and the claim under Section 15(a)(1) of the Exchange Act as to AVF. The remaining claims in the Commission's complaint alleged that Dickson offered and sold securities of AV Funding in violation of Section 15(a)(1) of the Exchange Act and, in connection with the offer and sale of such securities, Dickson aided and abetted material misrepresentations and omissions to investors in violation of Section 10(b) of the Exchange Act. The complaint also alleged that Dickson offered and sold the securities of AVF and AV Funding in unregistered transactions in violation of Section 5 of the Securities 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 Dickson's Offer.

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

Pursuant to Section 15(b)(6) of the Exchange Act Respondent Dickson 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

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9864 / July 10, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75420 / July 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16684

In the Matter of **Gerard Boudreault** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Gerard Boudreault (the "Respondent" or "Boudreault").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, 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

This is an insider trading case in which Gerard Boudreault traded on the basis of material nonpublic information ahead of a June 20, 2013 public announcement by Idenix Pharmaceuticals, Inc. ("Idenix") that the U.S. Food and Drug Administration ("FDA") had placed a hold on clinical trials for IDX 20963, a Hepatitis C treatment drug that Idenix was developing. Boudreault served as a consultant to Idenix for the clinical trials for IDX 20963 and knew when he sold his shares that the FDA did not view IDX 20963 favorably. Idenix's stock price dropped more than 30% on the announcement, and Boudreault sold virtually all of his Idenix holdings before the announcement to avoid losses of approximately $18,400.

RESPONDENT

Gerard Boudreault, age 52, is a North Weymouth, Massachusetts resident. Boudreault is the President and owner of Drug Development Resources ("DDR"), a Cambridge, Massachusetts-based company he founded in 2001, which provides drug development and commercialization consulting services to biopharmaceutical companies.

OTHER RELEVANT ENTITY

Idenix, a Delaware corporation, is headquartered in Cambridge, Massachusetts. At all relevant times, Idenix's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and was traded on the NASDAQ Global Market. Idenix was acquired in a 2014 tender offer by Merck and is now a wholly-owned subsidiary of Merck.

FACTS

1. Boudreault's relationship with Idenix began in August 2011. At that time, DDR entered into a Services Agreement with Idenix in which DDR agreed to provide Idenix with consultancy services related to drug development and commercialization. The Services Agreement, which Boudreault signed as the company's President, expressly prohibited DDR's employees from using Idenix confidential information except in connection with services provided to Idenix. Thus, Boudreault owed a duty of confidentiality to DDR and Idenix.

2. As DDR's principal contact with Idenix, Boudreault was chiefly responsible for managing clinical trial materials and ensuring that study drugs were timely available in appropriate quantities at clinical trial sites. To carry out his duties and responsibilities, Boudreault had an office at Idenix's headquarters.

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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.

3. In 2013, DDR – and in turn, Boudreault – were retained to provide services to Idenix on a developmental drug to treat Hepatitis C known as IDX 20963. On May 20, 2013, Idenix filed with the FDA an Investigational New Drug Application seeking agency approval for IDX 20963. Boudreault was aware of the application filing and that the FDA had until June 20, 2013 (the "application deadline") to complete its initial review of the application.

4. While Idenix was waiting for the FDA to complete its application review, Boudreault worked with various Idenix personnel to prepare the materials for IDX 20963's planned clinical trials. Assuming FDA approval, the clinical trials were scheduled to begin on June 24, 2013.

5. On June 13, 2013, the FDA contacted certain Idenix personnel and informed them that, while the Agency's review of the application was ongoing, it wanted to have a teleconference with Idenix on June 19, 2013 to discuss its review of IDX 20963. Boudreault knew that this teleconference was scheduled for June 19.

6. Boudreault understood the FDA's request for a teleconference before the application deadline indicated that the FDA would likely place a hold on, or at least delay, clinical trials for IDX 20963.

7. Moreover, on June 17, 2013, Boudreault received a series of emails from Idenix employees in which they indicated that the clinical trial materials for IDX 20963 were released and ready to be shipped, but that no shipments could occur until the results of the June 19 FDA call were known. For example, on June 17, 2013, an Idenix employee emailed Boudreault "Drug [20963] is available for POC[2] but should we wait until the FDA call on Wednesday [June 19] . . . agree?" Boudreault replied, "that is our plan."

8. On June 19, 2013, various Idenix personnel participated in the FDA call concerning IDX 20963. On that call, the FDA informed Idenix personnel that they were placing a hold on clinical trials for IDX 20963. While Boudreault did not participate in the call, he never received an instruction from any Idenix personnel to ship the clinical trial materials and, in turn, proceed with the clinical trials.

9. On June 20, 2013, at approximately 10:25 a.m. EST, Boudreault accessed his personal brokerage account through a DDR laptop computer while at Idenix's headquarters. At that time, he liquidated all of his Idenix holdings (7,580 shares) in his personal brokerage account. Boudreault's sale of his entire Idenix position was the single largest trade he had placed in his personal brokerage account since at least June 2009.

10. A few minutes later, Boudreault accessed an IRA account in his name, again from the same DDR laptop computer while at Idenix's headquarters. At that time, Boudreault sold 5,000 Idenix shares, which represented over 40% of his total Idenix holdings in that account.

11. On June 20, 2013, after the market closed, Idenix announced publicly that the FDA had placed a hold on clinical trials for IDX 20963 pending additional pre-clinical safety

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2 The term "POC" stands for Port of Call, which is a type of shipment method.

information regarding the drug. Idenix's stock price subsequently dropped approximately 30% to $3.68 per share. By selling his shares, Boudreault avoided losses of approximately $18,400.

VIOLATIONS

12. As a result of the conduct described above, Boudreault knowingly or recklessly sold his Idenix shares on the basis of material, nonpublic information, and in so doing, breached a duty of trust and confidence that he owed to DDR and Idenix. Accordingly, Boudreault violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent shall, within ten days of the entry of this Order, pay disgorgement of $18,405.00, which represents losses avoided as a result of the conduct described herein and prejudgment interest of $846.04 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). Respondent shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of $18,405.00 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

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

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

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

C. Payments by check or money order must be accompanied by a cover letter identifying Boudreault 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 Antonia Chion, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-5720.

D. 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 Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75445 / July 14, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16686

In the Matter of OZ Management, LP Respondent.	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

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 OZ Management, LP ("OZ Management" or "Respondent").

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 Paragraphs 5 through 26 below, acknowledges that its conduct violated and caused violations of the federal securities laws, admits the Commission's jurisdiction over it and the subject matter of these proceedings, and consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

INTRODUCTION

1. These proceedings arise from OZ Management, a registered investment adviser, providing inaccurate trade data to four of its prime brokers. The inaccurate data became part of the brokers' required books and records and blue sheet submissions[2] and concerned thousands of sales and millions of shares. These records and data submissions from broker-dealers are a core component of investigations by the Commission and self-regulatory organizations regarding securities trading. Trading records that are infected with inaccurate data pose substantial risks to the integrity of the investigative process. The problem with OZ Management's inaccurate trade data continued undetected for nearly six years until discovered by Commission staff during an investigation.

2. Between January 2008 and December 2013, OZ Management sometimes provided inaccurate daily trade files to four prime brokers, causing those brokers to record inaccurate data concerning whether an OZ Management sale of shares was a long sale or a short sale. The agreements between the prime brokers and OZ Management, and the prime brokers' technical specifications for the trade files, required that OZ Management provide data indicating whether sales transactions were long or short. However, OZ Management did not inform the brokers that it characterized sales not on a net basis, but rather based on whether it was long or short with respect to securities held in accounts with those prime brokers. OZ Management did this in an effort to avoid operational inefficiencies, but did not consider the possible effects of its characterizations on the prime brokers' books and records, including blue sheets. The four prime brokers accepted these trade files as correct representations of the sales OZ Management had executed in the market and used OZ Management's trade files to create required records and generate blue sheets for requests made by the Commission and the Financial Industry Regulatory Authority ("FINRA"). As a result, during the nearly six-year time period, a total of approximately 552 million shares were listed inaccurately in prime brokers' books and records, and sales totaling approximately 14.4 million shares were reported inaccurately in response to Commission blue sheet requests. Also as a result, FINRA made several referrals to the

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

[2] As described below, blue sheets are electronic forms generated by market makers, brokers, and clearing firms in response to requests by the Commission and securities industry self-regulatory organizations. They contain detailed information relating to trading activity including, among other things, whether the transactions in question were purchases, long sales, or short sales.

Commission concerning possible violations of Rule 105 of Regulation M based on the incorrect data that designated certain long sales as short sales.

3. The records required by the Commission's rules pursuant to Section 17(a) of the Exchange Act are core transaction records of brokers and dealers and "a keystone of the surveillance of brokers and dealers by the Commission's staff and by the securities industry's self-regulatory bodies."[3] The failure of brokers and dealers to make and keep accurate records and provide true copies in response to Commission requests can compromise investigations and examinations and undermine the Commission's mission to protect investors. OZ Management caused the prime brokers to make and keep inaccurate ledgers, and to furnish faulty blue sheets to the Commission, thereby causing the prime brokers to violate Section 17(a) of the Exchange Act and Rules 17a-3(a)(3) and 17a-25 thereunder.

4. Separately, in one instance, OZ Management engaged in short sales during the restricted period prior to the pricing of a secondary offering, and then purchased shares in that offering, thereby violating Rule 105 of Regulation M of the Exchange Act.

FACTS

A. Respondent

5. **OZ Management LP ("OZ Management")**, is an investment adviser headquartered in New York, New York. OZ Management is indirectly owned by Och-Ziff Capital Management Group LLC ("Och-Ziff"), a Delaware limited liability company whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. Och-Ziff is one of the largest alternative asset managers in the world, with approximately $47.3 billion in assets under management as of April 1, 2015. OZ Management, a Delaware limited partnership, has been registered with the Commission as an investment adviser since 1999 and serves as the manager for numerous Och-Ziff funds.

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[3] In the Matter of Edward J. Mawod & Co., Exchange Act Rel. No. 13512, 1977 SEC LEXIS 1811, at *16 (May 6, 1977), aff'd, 591 F.2d 588 (10th Cir. 1979); see also, In the Matter of the Application of Ko Secs., Inc., et al., Exchange Act Rel. No. 48550, 2003 SEC LEXIS 3174 (Sept. 26, 2003).

B. <u>OZ Management Caused Four Brokers to Maintain and Provide to Commission Staff Inaccurate Records</u>

<u>OZ Management's Creation of Daily Trade Files</u>

6. OZ Management traders placed orders for the funds that it advised through hundreds of executing brokers. Orders were captured in OZ Management's order management system, EZE Castle ("EZE"). OZ Management's traders marked sell orders as "long" or "short" based on the relevant fund's global net position in the security. The executing brokers placed the orders in the market based on OZ Management's order instructions, which contained accurate trade type designations.

7. OZ Management exported the trading data in EZE on a daily basis to the firm's in-house accounting software platform, the Financial Controls and Information System, ("FCIS"), a custom-built system. After the close of trading each day, FCIS generated an electronic trade file report ("trade file"), and transmitted it to the prime brokers where the funds maintained accounts and where the trades would settle ("fund prime brokers" or "the prime brokers").

8. The trade file was designed to facilitate settlement by providing the prime brokers with specific information about the trades OZ Management had placed through its numerous executing brokers. Among other information, pursuant to technical specifications provided to OZ Management by the prime brokers, OZ Management's trade files identified the security, executing broker, trade date, settlement date, price, quantity, and the trade type, *i.e.*, whether the trade was a long sale, a short sale or a purchase.

<u>OZ Management Introduced the Possibility of Misidentifying Trade Types in the Trade Files</u>

9. When OZ Management launched FCIS on January 1, 2008, it implemented a functionality that enabled FCIS to produce the trade files to prime brokers in two different versions, or "views." FCIS also utilized a "strategy filter," which further impacted certain trade files. As a result of these configurations, in a number of circumstances, OZ Management provided fund prime brokers with trade files that inaccurately listed the trade type (long or short) of sales.

<u>The "Fund View"</u>

10. OZ Management sent to some of its prime brokers a version of the trade file that displayed sales as long or short based on the relevant fund's position in the security firm-wide (the "fund view"). The trade file in the "fund view" correctly reflected how OZ Management had marked the sale (long or short) when it sent the sale to the market through its executing brokers.

The "Prime Broker View"

11. OZ Management sent a different version of the trade file to the four prime brokers. Unlike the "fund view," the version sent to these prime brokers identified a sale as long or short based on the relevant fund's position in the stock *at the prime broker where the trade was sent for settlement* and not based on whether the sale in question had actually been marked long or short when OZ Management sent the sale to the market through its executing brokers (the "prime broker view"). Because this logic was focused on listing the trade in the trade file in a manner consistent with the fund's position in the security *at the prime broker*, it sometimes switched the identification of the trade type from the way it was identified when OZ Management sent the sale to the market through its executing brokers.

12. In particular, when the relevant fund had a long position in a security firm-wide and had marked the sale long when it sent the sale to the market through its executing brokers, but the fund's account at the particular prime broker in question did not hold sufficient shares to settle the trade, OZ Management's "prime broker view" trade file identified the long sale as a short sale.

13. OZ Management developed the "prime broker view" to avoid the need for OZ Management and its prime brokers to manually reconcile on a trade-by-trade basis sales that were executed as long based on the fund's global net position, but where the fund did not hold sufficient shares to settle that trade at the prime broker where settlement took place. OZ Management did not consider the possible effects of the "prime broker view" on the accuracy of the prime brokers' required books and records, or inform the prime brokers that the trade files they received from OZ Management did not represent how OZ Management marked sales when OZ Management sent the trades to the market.

The "Strategy Filter"

14. OZ Management assigns strategy codes to trades for internal purposes to track the performance of its trading strategies.[4] The use of the strategy codes as one of the data filters (the "strategy filter"), when generating the "prime broker view," also altered the way the trade type was identified in the trade files in certain instances.

15. For example, when the relevant fund had a long position in a security firm-wide and also at the prime broker, and engaged in a long sale, but the particular *strategy* in that fund at the prime broker had no position in the security, OZ Management's "strategy filter" switched the long sale to a short sale in the trade file. The "strategy filter" operated in this fashion even

[4] OZ Management utilizes multiple trading strategies, and a strategy may be used by more than one fund.

though the fund that traded held sufficient shares to settle the trade at that prime broker (and firm-wide).

16. OZ Management did not anticipate that the "strategy filter" would have this consequence, and was not aware that the "strategy filter" was changing the identification of some long sales to short sales (and vice-versa) until October 2013 when Commission staff identified discrepancies in identification of sales as long or short during the course of the Commission's investigation.

17. The use of the "prime broker view" and the "strategy filter" affected the four prime brokers' books and records and blue sheet submissions, but did not affect the settlement of OZ Management's trades.

The Impact of OZ Management's Inaccurate Trade Files Was Significant

18. When the trade type information in the trade files was wrong, the errors were introduced into the brokers' books and records, and also remained latent in their data systems, infecting the brokers' blue sheets produced to the Commission and FINRA. The inaccurate information in the trade files generated in the "prime broker view" did not impair the settlement process because OZ Management arranged for shares to be delivered to prime brokers before settlement when its funds did not hold sufficient shares at those prime brokers to settle trades.

Impact on the Prime Brokers' Ledgers

19. Between January 2008, and December 2013, "prime broker view" trade files that OZ Management sent to the four prime brokers misidentified thousands of sales, totaling approximately 552 million shares, and these inaccuracies were included in the prime brokers' books and records.

Impact on Blue Sheets Submitted by the Prime Brokers

20. Blue sheets, so named because of the traditional blue paper on which they were once printed, play a critical role in the Commission's Enforcement program. Brokers, clearing firms, and market makers now provide electronic, standardized responses to blue sheet requests from the Commission and self-regulatory organizations. The information in blue sheets includes, among other things, account holders' names and addresses, trade dates, settlement dates, the stock symbol, number of shares, purchase or sale price, and whether the transaction was a buy or sell, and whether it was marked long or short. The Commission staff uses and has used blue sheets: (1) to assist in the examination for and investigation of possible securities law violations, principally involving insider trading or market manipulation; and (2) to conduct market

reconstructions, primarily following significant market volatility.[5] Securities industry self-regulatory organizations, including FINRA, also use blue sheets to conduct surveillance for insider trading and other securities law violations, including possible violations of Rule 105 of Regulation M.

21. Between July 2009, and October 2013, the prime brokers who received "prime broker view" trade files from OZ Management generated blue sheet responses for Commission requests that reported an inaccurate trade type for thousands of sales.

Discovery of the Violations

22. In 2013, as part of a Commission investigation, SEC staff discovered that OZ Management's internal trade blotters identified certain trades differently than what had been reported in blue sheets. Commission staff further identified that the trade type for OZ Management trades had been inaccurately recorded in ledgers maintained by a prime broker for OZ Management funds. Ultimately, SEC staff determined that a total of four prime brokers had inaccurate books and records and made inaccurate blue sheet submissions as a result of the trade files OZ Management provided to the prime brokers.

23. After the discovery, in late 2013, OZ Management stopped providing trade files with the "prime broker view."

24. OZ Management also has provided corrected *historical* information to the affected prime brokers. The prime brokers also are working with the Commission to resubmit corrected blue sheets to the Commission and address the inaccurate information in the systems they use to maintain records required by the Commission's rules.

C. OZ Management Engaged in Prohibited Transactions in Connection with a Secondary Offering

25. On March 1, 2011, after the market close, EOG Resources, Inc. ("EOG") announced the pricing of a public secondary offering of 13,570,000 shares of common stock ("the EOG offering"), which priced at $105.50 per share. On March 2, 2011, OZ Management purchased 150,000 shares of EOG common stock in the EOG offering at $105.50 per share. Prior to the pricing of the EOG offering, however, OZ Management had engaged in short sales of 5,618 shares of EOG at prices ranging from $111.50 to $114.08 per share. These short sales occurred during the restricted period under Rule 105.[6] Under Rule 105, because OZ

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[5] See Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers, 66 Fed. Reg. 35836, 35386 (July 9, 2001) (final rule release).

[6] Rule 105 defines the restricted period as 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

Management had executed short sales during the restricted period, OZ Management was prohibited from purchasing securities in the secondary offering. OZ Management did not recognize that its purchases were prohibited because a compliance associate miscalculated the restricted period under Rule 105.

26. The difference between OZ Management's proceeds received from its restricted period short sales of 5,618 shares of EOG and the price it paid for shares received in the offering was $38,752. OZ Management also improperly obtained a benefit of $175,628 by purchasing the remaining 144,382 shares at a discount from EOG's market price even though it was prohibited from participating in the offering. Thus, OZ Management's participation in the EOG offering resulted in wrongful gains of $214,380.

VIOLATIONS

A. Books and Records: Section 17(a) of the Exchange Act and Rules 17a-3(a)(3) and 17a-25

27. Under Section 21C of the Exchange Act, a person is a "cause" of another's primary violation if the person knew or should have known that his act or omission would contribute to the primary violation. Negligence is sufficient to establish causing liability under Section 21C when a person is alleged to have caused a primary violation that does not require scienter. See In re KPMG Peat Marwick LLP, Exchange Act Rel. No. 43862, 2001 WL 47245, at *19 (Jan. 19, 2001), aff'd, KPMG, LLP v. SEC, 289 F.3d 109, 120 (D.C. Cir. 2002).

28. Section 17(a) of the Exchange Act requires, among other things, that brokers or dealers make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the securities laws. The information contained in required books and records must be accurate, regardless of whether the information entered into those records is itself mandated by the Commission's rules. In the Matter of Merrill Lynch, et al., Exchange Act Rel. No. 33367, 1993 SEC LEXIS 3516, at *20 (Dec. 22, 1993). OZ Management should have known that its conduct, described below, would cause four prime brokers to have inaccurate books and records, which violated Section 17(a) of the Exchange Act and rules promulgated by the Commission thereunder.

29. Rule 17a-3(a)(3) requires brokers or dealers to make and keep certain ledger accounts that, among other things, itemize separately all purchases and sales of securities. As described above, prime brokers for OZ Management funds used OZ Management's trade files to

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filing of a registration statement or notification on Form 1-A or Form 1-E and ending with the pricing. 17 C.F.R. § 242.105(a)(1) and (a)(2).

make the ledger account records required under Rule 17a-3(a)(3). OZ Management failed to inform four prime brokers that it sometimes did not provide the trade type accurately, despite its agreements with its prime brokers and the specifications for the trade files, which required OZ Management to identify sales transactions as long or short. This resulted in the prime brokers' ledger accounts inaccurately identifying sales of securities as either long sales or short sales. Because its trade files contained inaccurate information, OZ Management should have known that it would cause the four prime brokers to have inaccurate books and records, which was a violation of Rule 17a-3(a)(3).

30. Rule 17a-25 requires brokers or dealers, upon request, to electronically submit to the Commission securities transaction information that specifies, among other things, "whether each transaction was a purchase, sale or short sale." This transaction data has become known as "blue sheet" data.

31. As described above, four prime brokers for OZ Management funds used incorrect information that they received from OZ Management to create reports in response to Commission blue sheet requests. OZ Management did not inform four prime brokers that it sometimes provided the trade type inaccurately. Blue sheets pertaining to thousands of sales by OZ Management therefore were recorded with an inaccurate trade type, and were provided to the Commission in response to its requests. Because the trade files contained inaccurate information, OZ Management should have known that it would cause the four prime brokers to create inaccurate blue sheet reports in response to Commission requests, which was a violation of Rule 17a-25.

B. Rule 105 of Regulation M

32. 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).

33. 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.

34. As described above, OZ Management purchased shares in the EOG secondary offering after OZ Management had sold short EOG securities during the restricted period. As a result, OZ Management violated Rule 105 of Regulation M.

OZ Management's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, OZ Management shall cease and desist from causing any violations and any future violations of Section 17(a) of the Exchange Act and Rules 17a-3(a)(3) and 17a-25 promulgated thereunder, and from committing or causing any violations or future violations of Rule 105 of Regulation M of the Exchange Act.

B. OZ Management shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $4,250,000 ($4.25 million) 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 of the civil monetary penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. OZ Management also shall, within ten (10) days of the entry of this Order, pay disgorgement of $214,380, which represents profits gained as a result of the conduct described herein, and prejudgment interest of $29,047 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 of disgorgement plus prejudgment interest 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 OZ Management 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 Daniel M. Hawke, Chief, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, One Penn Center, 1617 JFK Boulevard, Suite 520, Philadelphia, PA 19103.

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. 4139 / July 14, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16687

In the Matter of TOBY D. HUNTER, 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 Toby D. Hunter ("Hunter" 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, 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. Hunter was the chief investment officer and partial owner of Prestige Capital Advisors, LLC ("Prestige"), an investment adviser previously registered with the Commission until its registration was revoked by the Commission on November 4, 2013. Hunter, 39 years old, is a resident of Fort Mill, South Carolina.

2. On December 12, 2013, Hunter pled guilty to one count of racketeering conspiracy in violation of Title 18 United States Code, Section 1962(d) before the United States District Court for the Western District of North Carolina, in United States v. Toby Hunter, Crim. No. 3:12-CR-00239-GCM-DCK-6.

3. The counts of the criminal indictment to which Hunter pled guilty alleged, inter alia, that in connection with Prestige, Hunter participated in a racketeering conspiracy with the predicate act of, among other things, securities fraud. The criminal indictment alleged that, as part of the conspiracy, Hunter and others made material misrepresentations concerning, among other things, Prestige's past performance and the use of investor funds.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Hunter 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 Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75450 / July 14, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4141 / July 14, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16688

In the Matter of BURGESS NATHANIEL HALLUMS, 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 Burgess Nathaniel Hallums ("Hallums" 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.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 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2003 through October 2011, Hallums was a registered representative with Fortune Securities Inc., a Commission-registered broker-dealer firm. Hallums also owned RMC Capital Management, Inc., which from July 1991 through November 2013, was a California-registered investment adviser. RMC Capital Management's registration with the California Secretary of State is currently suspended by both the Secretary of State and the Franchise Tax Board. Hallums, 56, is presently incarcerated at the California Institution for Men in Chino, CA. Prior to his incarceration, Hallums resided in Ramona, CA.

2. On November 18, 2013, the California Superior Court entered a Final Judgment against Defendant Burgess Nathaniel Hallums in an action brought against him by the California Department of Corporations entitled California v. RMC Capital Management, Inc.; Burgess Nathaniel Hallums; et al., Case No.: 37-2011-00103198-CU-MC-CTL (Cal. Super. Ct., County of San Diego, Nov. 18, 2013). The California Superior Court Order enjoined Hallums from engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative, including but not limited to, operating a Ponzi scheme, misusing clients funds, employing fraudulent practices and engaging in transactions that operate as a fraud to the detriment of clients, barring him from future employment, management or control of any broker-dealer, investment adviser, or commodity adviser, and ordering him to pay restitution of $10.4 million and $875,000 in civil penalties.

3. The Department of Corporations' complaint alleged that, between 2000 and 2010, Hallums operated a Ponzi scheme in which he raised over $10 million from nearly 60 investors. The complaint also alleged that Hallums overstated the value of privately held securities held by his clients, inflated his advisory fees, and sent false statements to his clients.

4. On November 18, 2014, Hallums pled guilty to, and was convicted of, making a false statement in connection with the sale of a security, and grand theft of personal property. On January 15, 2015, Hallums was sentenced to five years and eight months imprisonment, ordered to serve four years parole or post-release community supervision, and ordered to pay a $10 million fine and more than $1 million in restitution. California v. Burgess Nathaniel Hallums, CT No. CD259775, DA No. ADU741 (Cal. Super. Ct., County of San Diego, Central Division, Nov. 18, 2014).

5. The counts of the criminal information to which Hallums pled guilty alleged, inter alia, that Hallums made a false statement in connection with the sale of a security and committed grand theft of personal property. Hallums admitted that he unlawfully offered to sell, and sold, a security to an investor by means of communications which included untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light

of the circumstances under which they were made, not misleading. The criminal information further alleged that Respondent unlawfully took and stole money and personal property of another investor in excess of $950; took, damaged and destroyed property, with the intent to cause such taking, damage and destruction, with said loss exceeding $200,000; and, finally, committed two or more related felonies, a material element of which was fraud and embezzlement, which involved a pattern of related felony conduct involving an investor loss of more than $500,000.

IV.

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

Pursuant to Section 15(b)(6) of the Exchange Act Respondent Hallums 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75452 / July 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16690

In the Matter of **NNN 2003 Value Fund, LLC,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against NNN 2003 Value Fund, LLC ("NNN 2003 Value" or "Respondent").

II.

In anticipation of the institution of these proceedings, NNN 2003 Value 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, NNN 2003 Value consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. NNN 2003 Value (CIK No. 1260429) is a Delaware corporation located in Santa Ana, California with a class of securities registered with the Commission under Exchange Act Section 12.

2. NNN 2003 Value has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended September 30, 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 or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

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

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of NNN 2003 Value's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

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. 75451 / July 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16689

In the Matter of **NNN 2002 Value Fund, LLC,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against NNN 2002 Value Fund, LLC ("NNN 2002 Value" or "Respondent").

II.

In anticipation of the institution of these proceedings, NNN 2002 Value 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, NNN 2002 Value consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. NNN 2002 Value (CIK No. 1178132) is a Virginia limited liability company located in Santa Ana, California with a class of securities registered with the Commission under Exchange Act Section 12.

2. NNN 2002 Value has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended June 30, 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 or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

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

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of NNN 2002 Value's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

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. 75462 / July 15, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4142 / July 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16691

In the Matter of

JAMES R. HOLDMAN,

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 James R. Holdman ("Holdman" 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.1 through 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 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:

A. RESPONDENT

1. Respondent, 59 years old, a former resident of Baton Rouge, Louisiana, is currently in custody at a Federal Bureau of Prisons facility in Oakdale, Louisiana. At the time of the relevant conduct, Respondent was associated with, Greenwing Securities, Inc. ("Greenwing"), a registered investment adviser licensed in Louisiana and Mississippi. Also at the time of the relevant conduct, Respondent was associated with NWT Financial Group, LLC ("NWT"), a registered broker-dealer firm.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On July 7, 2014, Holdman pled guilty in the United States District Court for the Middle District of Louisiana to two counts of mail fraud, in violation of Title 18, United States Code Section 1341. On February 13, 2015, the Court sentenced Holdman to five years imprisonment and an order of restitution to victim investors of approximately $7.9 million. No fine was imposed. The judgment of conviction was entered that same day.

3. According to the plea agreement, Holdman offered potential investors the opportunity to invest in three Louisiana-based funds. Holdman solicited and received millions of dollars in investment funds from investors. Holdman provided falsified monthly statements to investors detailing the balance of their accounts and monthly and year to date return on their investments. From approximately February 2008 until October 2008, Holdman used these falsified statements to conceal losses that his investments were incurring by representing inflated amounts of "ending equity," "monthly net percent gain/loss" and "year to date net percent gain/loss."

4. By falsifying these account statements, Holdman was able to conceal his funds' investment losses and defraud investors into keeping their remaining money with Greenwing, thereby allowing Holdman to continue to raise additional funds from investors and receive additional fees for his own personal benefit. In concealing the true performance of the funds, Holdman was able to continue to operate the funds. He lost investors' money throughout the year, until nearly all of their investment money was lost.

IV.

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75474 / July 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16523

In the Matter of HUGO URREA, 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") previously instituted proceedings in this matter on April 30, 2015. The Commission now deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Hugo Urrea ("Urrea" or "Respondent").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and over the subject matter of the proceedings and admits the findings in Section III below. Respondent further consents to the entry of the Order, as set forth below.

III.

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

1. Respondent, 57 years old, is a resident of Metairie, Louisiana. He is currently being supervised by the probation and parole department of East Jefferson, Louisiana. At the time of the relevant conduct, Respondent was engaged in activities as an unregistered broker-dealer.

2. On September 17, 2012, Urrea pleaded guilty to eighteen felony counts in the 22d Judicial District Court, St. Tammany Parish, Louisiana, including unlawful securities practices, theft, theft of assets of an aged person, and money laundering, in violation of Louisiana Revised Statutes 51:703(A), 51:712, 51:723(A), 14:67(A), 14:67(B)(1), 14:67.21(C)(1), and 14:230(B)(4) and (E)(4).

3. The counts of the criminal indictments to which Urrea pleaded guilty alleged, among other things, that, from August 2008 through April 2011, Urrea held himself out as a "registered securities dealer" and misappropriated over $200,000 from nine individuals, including the elderly, by means of fraudulent conduct, practice, or representation, and with intent to permanently deprive funds. Urrea's theft was in connection with the purchase or sale of securities.

4. On September 17, 2012, Urrea was sentenced to five years imprisonment and five years of probation. Urrea was also ordered to make restitution to all victims in the sum of $247,550, and was prohibited from representing individuals in trading commodities and stocks.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Urrea 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 Commision.

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. 75465 / July 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16692

In the Matter of Capital Connection, Inc., China Biotechnology, Inc., China Sports & Entertainment, Ltd., Christie Fun, Inc., Cosway Industries, Inc., and Oriole, 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 Capital Connection, Inc., China Biotechnology, Inc., China Sports & Entertainment, Ltd., Christie Fun, Inc., Cosway Industries, Inc., and Oriole, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Capital Connection, Inc. (CIK No. 1161829) is a void Delaware corporation located in Largo, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Capital Connection, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10 on February 1, 2002.

2. China Biotechnology, Inc. (CIK No. 1375908) is a dissolved Florida

corporation located in Tampa, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Biotechnology, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended July 31, 2007, which reported a net loss of $19,981 from the company's August 30, 2007 inception to July 31, 2007.

3. China Sports & Entertainment, Ltd. (CIK No. 1097885) is a revoked Nevada corporation located in Naples, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Sports & Entertainment, Ltd. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2005, which reported a net loss of $17,062 from the company's June 8, 1999 inception to March 31, 2005.

4. Christie Fun, Inc. (CIK No. 1300902) is a void Delaware corporation located in Naples, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Christie Fun, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of $21,683 from the company's August 20, 1997 inception to September 30, 2005.

5. Cosway Industries, Inc. (CIK No. 1386925) is a forfeited Delaware corporation located in Mary Esther, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Cosway Industries, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2008, which reported a net loss of $56,208 from the company's January 1, 2007 inception to March 31, 2008.

6. Oriole, Inc. (CIK No. 1098080) is a revoked Nevada corporation located in Naples, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Oriole, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of $21,836 from the company's June 7, 1999 inception to September 30, 2005.

B. DELINQUENT PERIODIC FILINGS

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

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

is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

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

By the Commission.

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. 75466 / July 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16693

In the Matter of **CDMemories.com, Inc.,** **Cedar Grove Marketing, Inc.,** **Centro Services, Inc.,** **Codatek Corp., and** **Dipper 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 CDMemories.com, Inc., Cedar Grove Marketing, Inc., Centro Services, Inc., Codatek Corp., and Dipper Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. CDMemories.com, Inc. (CIK No. 1106780) is a revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CDMemories.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on June 13, 2000.

2. Cedar Grove Marketing, Inc. (CIK No. 1101359) is a dissolved Wyoming corporation located in Draper, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Cedar Grove Marketing, Inc. 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, 2004, which reported a net loss of $3,806 from the company's October 20, 1999 inception to June 30, 2004.

3. Centro Services, Inc. (CIK No. 1177250) is a revoked Nevada corporation located in Carson City, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Centro Services, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2004, which reported a net loss of $674 for the prior three months.

4. Codatek Corp. (CIK No. 1080750) is a revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Codatek Corp. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of $10,600 for the prior nine months.

5. Dipper Inc. (CIK No. 1160423) is a dissolved Colorado corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Dipper Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended July 31, 2002, which reported a net loss of $21,827 from the company's April 8, 1998 inception to July 31, 2002.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

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. 75477 / July 17, 2015

WHISTLEBLOWER AWARD PROCEEDING

File No. 2015-5

In the Matter of the Claim for Award

in connection with

Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

On March 9 and March 25, 2015, the Claims Review Staff ("CRS") issued Preliminary Determinations related to Notices of Covered Action Redacted (the "Covered Actions") and Redacted related actions.[1] The Preliminary Determinations 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 Actions and related actions 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 Rules 21F-3(a) & (b) thereunder, 17 C.F.R. § 240.21F-3(a) & (b).[2]

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1 The related actions are: Redacted

2 The CRS also recommended that an award application from a second claimant in connection with Covered Action Redacted should be denied because the second claimant did not

Further, the CRS recommended that such award be set in the amount of Redacted of the monetary sanctions collected or to be collected in the Covered Actions and related actions, which will equal payment of more than $3,000,000. In arriving at this recommendation, the CRS 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.[3]

On March 25, 2015, Claimant provided written notice to the Commission of Claimant's decision not to contest the Preliminary Determinations 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 Determinations 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 Determinations, it is hereby ORDERED that Claimant shall receive Redacted of the monetary sanctions collected and to be collected in the Covered Actions and related actions.

By the Commission.

Brent J. Fields
Secretary

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provide information that led to the successful enforcement of that action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. The second claimant thereafter failed to submit a timely response contesting the Preliminary Determination. Accordingly, pursuant to Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f), the Preliminary Determination to deny the second claimant's award application became the Final Order of the Commission as to that second claimant.

3 Among these factors, due consideration was given to Claimant's unreasonable delay in reporting the illegal conduct to the Commission, although we have not applied this factor as severely here as we otherwise might have done had the delay occurred entirely after the whistleblower award program was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Commissioner Gallagher
Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75483 / July 17, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16694

In the Matter of

CHIH HSUAN "KIKI" LIN,

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 Chih Hsuan "Kiki" Lin ("Respondent").

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 her conduct violated the federal securities laws, admits the Commission's jurisdiction over her 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. Respondent was born in 1965 in Taiwan and emigrated to the United States in approximately 1999. Respondent resides in Las Vegas, Nevada and, from 2011 to the present, has done business in both Las Vegas and Los Angeles, California. Respondent has never been registered with the Securities and Exchange Commission (the "SEC") as a broker or dealer or been associated with a broker or dealer registered with the SEC.

2. On July 10, 2015, a judgment was entered by consent against Lin, permanently enjoining her from future violations of Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. CKB168 Holdings Ltd., et al, Civil Action Number 13-CV-5584, in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged that, Lin solicited investments in an entity that was falsely portrayed as a profitable multi-level marketing company that sells web-based children's educational courses. The complaint alleged that, in fact, the company was a fraudulent pyramid scheme. The complaint also alleged that Lin sold unregistered securities and acted as an unregistered broker-dealer.

IV.

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

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

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75484 / July 17, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4143 / July 17, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16695

In the Matter of

CHAD E. WIEGAND,

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 Chad E. Wiegand ("Wiegand" 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.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 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. Wiegand was a registered representative associated with broker-dealers registered with the Commission from at least 1990 through March 19, 2013, and was a registered representative associated with National Planning Corporation, a registered broker-dealer and investment adviser, from December 2008 through March 19, 2013. Wiegand, 42 years old, resides in Lakeside, California.

2. On June 23, 2015, a judgment was entered by consent against Wiegand, 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. Michael J. Fefferman, et al., Civil Action No. 3:15-cv-01276-MMA-DHB, in the United States District Court for the Southern District of California.

3. The Commission's complaint alleged, among other things, that on four separate occasions between March 2009 and April 2012, Wiegand engaged in insider trading. In particular, on each of these occasions, Wiegand was tipped material, nonpublic information about Ardea Biosciences, Inc. ("Ardea") which he knew, recklessly disregarded, or should have known was in violation of a fiduciary duty, or obligation arising from a similar relationship of trust and confidence, to keep the information confidential. Wiegand tipped this material, nonpublic information to one individual, who then traded and tipped others. In addition, the Complaint alleged that Wiegand traded Ardea securities on the basis of the material, nonpublic information in accounts of his customers at National Planning Corporation in advance of three of the public disclosures. The Complaint also alleged that Wiegand earned commissions from his trading in customer accounts and received a share of tippee profits.

4. On June 9, 2015, Wiegand pled guilty to one count of conspiracy to commit securities fraud in violation of Title 18 United States Code, Section 371, before the United States District Court for the Southern District of California, in United States v. Chad Wiegand and Akis Eracleous, Crim. Information No. 3:15-cr-01462-DMS.

5. The counts of the criminal information to which Wiegand pled guilty alleged, inter alia, that Wiegand conspired to commit securities fraud. In connection with that plea, Wiegand admitted that from at least March 2009 through April 2012, he obtained material, nonpublic information about Ardea, used that information to purchase Ardea securities in his customers' brokerage accounts, and tipped the material, nonpublic information to a co-conspirator.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Wiegand'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 Wiegand 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 Wiegand 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 Wiegand 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. 75496 / July 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16697

In the Matter of **ILN Amherst Corp.,** **ILN Brentwood Corp.,** **ILN Celeste Corp.,** **ILN Century Corp., and** **Interstate Data USA, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents ILN Amherst Corp., ILN Brentwood Corp., ILN Celeste Corp., ILN Century Corp., and Interstate Data USA, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. ILN Amherst Corp. (CIK No. 1142802) is a Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ILN Amherst is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of $1,350 from the company's May 3, 2001 inception to September 30, 2001.

2. ILN Brentwood Corp. (CIK No. 1142376) is a Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to

Exchange Act Section 12(g). ILN Brentwood is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001.

3. ILN Celeste Corp. (CIK No. 1142379) is a Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ILN Celeste 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 October 2, 2001.

4. ILN Century Corp. (CIK No. 1142378) is a Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ILN Century is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001.

5. Interstate Data USA, Inc. (CIK No. 1143705) is a void Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Interstate Data USA is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over $2 million for the prior nine months.

B. DELINQUENT PERIODIC FILINGS

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

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

8. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/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. 75495 / July 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16696

In the Matter of **Greene Power, Inc.,** **Intacta Technologies, Inc.,** **and** **Lane Co. #3, 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 Greene Power, Inc., Intacta Technologies, Inc., and Lane Co. #3, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Greene Power, Inc. (CIK No. 1470237) is a revoked Nevada corporation located in Matthews, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Greene Power is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10 registration statement on August 13, 2009.

2. Intacta Technologies, Inc. (CIK No. 1106737) is a permanently revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Intacta is delinquent in its periodic filings with the Commission, having not filed any

periodic reports since it filed a Form 10-Q for the period ended June 30, 2002, which reported a net loss of $845,900 for the prior six months. As of July 16, 2015, the company's securities (symbol "ITAC") were traded on the over-the-counter markets.

3. Lane Co. #3 (CIK No. 1347007) is a void Delaware corporation located in Atlanta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lane Co. #3 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2009, which reported a net loss of $47,305 from the company's May 4, 2005 inception to September 30, 2008.

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 Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75500 / July 21, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4144 / July 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16698

In the Matter of **AKIS C. ERACLEOUS,** **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 Akis C. Eracleous ("Eracleous" 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.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 and Section 203(f) 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. Eracleous was a registered representative associated with broker-dealers registered with the Commission from at least 1993 through March 19, 2013, and was a registered representative associated with National Planning Corporation, a registered broker-dealer and investment adviser, from December 2008 through March 19, 2013. Eracleous, 48 years old, is a resident of San Diego, California.

2. On June 23, 2015, a judgment was entered by consent against Eracleous, 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. Michael J. Fefferman, et al., Civil Action No. 3:15-cv-01276-MMA-DHB, in the United States District Court for the Southern District of California.

3. The Commission's complaint alleged, among other things, that on four separate occasions between March 2009 and April 2012, Eracleous engaged in insider trading. In particular, on each of these occasions, Eracleous purchased Ardea Biosciences, Inc. ("Ardea") securities, and tipped others, based on tips he received of material, nonpublic information regarding which he knew, recklessly disregarded, or should have known was in violation of a fiduciary duty, or obligation arising from a similar relationship of trust and confidence, to keep the information confidential. The Complaint further alleged that Eracleous shared in the profits of his tippees, who traded in the securities of Ardea.

4. On June 9, 2015, Eracleous pled guilty to one count of conspiracy to commit securities fraud in violation of Title 18 United States Code, Section 371, before the United States District Court for the Southern District of California, in United States v. Chad Wiegand and Akis Eracleous, Crim. Information No. 3:15-cr-01462-DMS.

5. The counts of the criminal information to which Eracleous pled guilty alleged, inter alia, that Eracleous conspired to commit securities fraud. In connection with that plea, Eracleous admitted that from at least March 2009 through April 2012, he obtained material, nonpublic information about Ardea, tipped the material, nonpublic information to co-conspirators, and received a portion of the profits realized from trading in Ardea securities by his co-conspirators.

IV.

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9868 / July 23, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75510 / July 23, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31725 / July 23, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4145 / July 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16699

In the Matter of SCOTT A. EISLER, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, 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"), Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Scott A. Eisler ("Eisler" or "Respondent").

II.

In anticipation of the institution of these proceedings, Eisler has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b) of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, 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:

A. RESPONDENT

1. **Scott A. Eisler**, age 50, resides in Parkland, Florida. From 2007 to 2011, Eisler was a registered representative and investment adviser representative, holding the position of Financial Advisor ("FA"), at Oppenheimer & Co. Inc.'s ("Oppenheimer") Boca Raton Branch Office. He is currently a registered representative and investment adviser representative, holding the position of FA at another dually-registered broker-dealer and investment adviser. Eisler holds Series 7 and 63 licenses.

B. OTHER RELEVANT ENTITY

2. **Oppenheimer & Co. Inc.**, a New York corporation, is a broker-dealer and an investment adviser registered with the Commission and headquartered in New York, New York. Oppenheimer is a subsidiary of Oppenheimer Holdings, Inc., a publicly traded company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act. On January 27, 2015, Oppenheimer was the subject of a Commission enforcement action, in which it consented to the institution of an order admitting to the facts set forth in the Order and that it violated the federal securities laws, and consenting to the issuance of an order finding that it willfully violated Securities Act Sections 5(a) and 5(c) and Exchange Act Section 17(a) and Rules 17a-3(a)(2), 17a-3(a)(9) and 17a-8 thereunder, willfully aided and abetted and caused violations of Exchange Act Section 15(a), and, pursuant to Exchange Act Section 15(b)(4)(E), failed reasonably to supervise with a view to preventing and detecting the violations of Section 5 by Oppenheimer personnel. *Oppenheimer & Co. Inc.,* Sec. Act Rel. No. 33-9711, 2015 WL 33111 (January 27, 2015).

C. SUMMARY

3. Section 5 of the Securities Act generally requires registration of securities offerings, or an available exemption from registration, including for resales of securities acquired in private transactions. Brokers frequently rely on an exemption under Section 4(a)(4) of the Act, known as the brokers' transaction exemption. For this exemption to be available, brokers are required, before selling securities on their customers' behalf, to engage in a reasonable inquiry into the facts surrounding the customers' proposed sales to determine if the customers

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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.

were engaging in an unlawful distribution of securities. The amount of inquiry a broker must conduct as part of this reasonable inquiry varies with the facts and circumstances of each transaction. When brokers are presented with red flags indicating that a customer could be potentially engaging in an unlawful distribution of securities, brokers are required to conduct a searching inquiry to claim the brokers' transaction exemption. As part of a searching inquiry, brokers have a responsibility to know the requirements necessary to establish an exemption from the registration requirements of the Securities Act and, for each resale transaction, they need to be reasonably certain that an exemption is available.

4. In the present case, from October 6, 2009 through December 10, 2010 (the "relevant period"), an Oppenheimer customer (the "Customer") repeatedly deposited into its Oppenheimer account large quantities of newly-issued penny stocks that it had recently acquired from little known, non-reporting companies through private transactions. Shortly after the Customer deposited these securities, Eisler, at the direction of his Customer, sold the shares to the public ("resales"), without registration statements being on file or in effect, and then quickly wired the proceeds out of its account. In total, Eisler sold over 2.5 *billion* shares of newly issued penny stocks for the Customer.

5. The Customer's trading activity raised numerous red flags indicative of illegal unregistered distributions, which Eisler knew about while selling shares at the direction of the customer. Eisler failed to make the reasonable inquiry necessary to ensure that the proposed resales of the Customer's securities were exempt from the registration requirement of Section 5, and therefore cannot claim to have relied on the brokers' transaction exemption to that registration requirement.

D. FACTS

Eisler Executed His Customer's Illegal Unregistered Sales of Billions of Shares Through the Customer's Oppenheimer Account

6. In October 2009, the Customer opened an account at Oppenheimer with Eisler and shortly thereafter electronically deposited millions of recently-issued shares of Quasar Aerospace, Inc. ("QASP"), a thinly-traded penny stock that the Customer had recently acquired.

7. Between October 6, 2009 and June 10, 2010, the Customer acquired and electronically deposited 575 million recently-issued shares of QASP, and Eisler sold all of these securities at his Customer's direction over the course of approximately 634 sales transactions, typically within days of the shares being deposited at Oppenheimer, and no later than 45 days after deposit.

8. Between March 23, 2010 and June 24, 2010, the Customer acquired and deposited physical certificates for 12.6 million recently-issued shares of My Social Income, Inc. ("MSOA"), another thinly-traded penny stock. Eisler sold all of these securities at his Customer's direction in 57 sales transactions, all of which took place within 21 days of deposit.

9. Between June 15, 2010 and July 27, 2010, the Customer acquired and deposited physical certificates for 540 million recently-issued shares of Sebastian River Holdings, Inc.

("SBRH"), another thinly-traded penny stock, and Eisler sold all of these securities at his Customer's direction in 48 sales transactions, all of which took place within 14 days of deposit.

10. Between June 29, 2010 and July 28, 2010, the Customer acquired and deposited physical certificates for 885 million recently-issued shares of Encounter Technologies, Inc. ("ENTI"), another thinly-traded penny stock, and Eisler sold all of these securities at his Customer's direction in 27 sales transactions, all of which took place within three days of deposit.

11. Between July 13, 2010 and July 16, 2010, the Customer acquired and deposited physical certificates for 270 million recently-issued shares of Strategic Rare Earth Metals, Inc. ("SREH"), another thinly-traded penny stock, and Eisler sold all of these securities for the Customer at his Customer's direction in five sales transactions, all of which took place within three days of deposit.

12. Between November 18, 2010, and December 10, 2010, the Customer acquired and deposited physical certificates for 250 million recently-issued shares of Shot Spirit Corporation ("SSPT"), another thinly-traded penny stock, and Eisler sold all of these securities at his Customer's direction in five sales transactions, all of which took place within 22 days of deposit.

13. In total, between October 6, 2009, and December 10, 2010, the Customer deposited over 2.5 billion shares of recently-issued shares of QASP, ENTI, MSOA, SREH, SBRH, and SSPT (collectively, "the Customer's Securities"), which Eisler sold at his Customer's direction in approximately 776 unregistered resale transactions.

14. In facilitating and effecting the offers and sales of the Customer's Securities, Eisler used email and made telephone calls from his office in Florida to Oppenheimer personnel in New York.

15. All of the Customer's Securities were quoted on the Pink Sheets (now known as OTC Link) and sold into interstate commerce by Eisler and Oppenheimer at the Customer's direction.

16. The unregistered resales of the Customer's Securities generated approximately $12,000,000 in proceeds.

17. The Customer paid Oppenheimer approximately $588,400 in commissions for the unregistered resales of the Customer's Securities. The remaining proceeds were credited to the Customer's account.

18. Oppenheimer wired the proceeds of the unregistered resales of the Customer's Securities, net of commissions, out of the Customer's account shortly after the sales transactions.

19. The Customer's pattern and practice of trading over the relevant period strongly indicated that it was engaging in the unlawful unregistered distribution of securities. The Customer acquired shares in QASP, MSOA, SBRH, and SSPT through wrap-around debt-purchase agreements. Specifically, the Customer purchased, with promissory notes, purportedly

pre-existing debt that was owed to affiliates of each of these issuers using wrap-around agreements that modified the affiliates' pre-existing debt to include new debt-to-equity conversion rights. Shortly after the wrap-around agreements were executed, the Customer began to exercise the debt-to-equity conversion provision to have the companies issue new shares to the Customer. The Customer then deposited the newly-issued shares at Oppenheimer and ordered Eisler to quickly sell them, repeating the process in which the shares were issued by the company, deposited by the Customer, and sold by Eisler at his Customer's direction.

20. The Customer used stock purchase agreements to acquire shares in ENTI and SREH from unrelated third parties that were owed money by ENTI and SREH. Those third parties converted their pre-existing debt with ENTI and SREH into newly-issued equity securities just before selling the shares to the Customer. The Customer deposited all of these securities into its Oppenheimer account, and Eisler sold them at his Customer's direction shortly after they were deposited.

21. None of the securities that the Customer deposited at Oppenheimer bore any legends indicating the securities were restricted, even though they had been recently acquired directly or indirectly from the issuer, or an affiliate of the issuer, in private transactions.

22. For all of the securities that the Customer deposited at Oppenheimer, no registration statement was filed or in effect for: (1) the issuance of shares upon conversion of the debt; (2) the third-party creditors' sales of the shares to the Customer; or (3) the Customer's subsequent resales of the shares into the public market through Oppenheimer.

23. The Customer represented to Oppenheimer that its resales qualified for the Securities Act Rule 144 safe harbor and the Securities Act Section 4(a)(1) exemption from registration.

24. Neither the Customer's acquisition of the Customer's Securities, nor its resale of these securities through Oppenheimer, qualified for an exemption from the registration requirements of Section 5.

25. In particular, the resale of the Customer's Securities did not satisfy Securities Act Rule 144's one-year holding period requirement for three reasons. *First*, a debt owed by an issuer (i.e., a mere obligation to pay a sum of money) in the absence of a conversion provision allowing the debt's conversion into the issuer's securities does not qualify as a "security" within the meaning of Rule 144(d)(3)(ii). None of the debts the Customer converted to acquire the shares had a conversion provision until just prior to or at the time of the Customer's acquisition of the shares, and Rule 144 does not permit the Customer to include in its holding period the period of time that the debt was owed before the conversion feature was added. *Second*, even if the debts at issue had been securities from the date they were incurred, the original debt holders were affiliates of QASP, MSOA, SBRH, and SSPT and, therefore, the Customer may not include the affiliate's holding period in its holding period. 17 C.F.R. §§ 230.144(a)(3) and 230.144(d)(1)(ii). *Third*, if a promissory note is used to pay for the purchase of securities, the Rule's holding period does not commence until the note has been discharged by payment in full prior to the sale of the securities. 17 C.F.R. § 230.144(d)(2). Here, the Customer used promissory notes to purchase the debt from affiliates that was converted into shares of QASP,

MSOA, SBRH, and SSPT, and only paid for the shares at or around the time of the conversions, at which point the holding period could commence.

Eisler Was Aware of Substantial Red Flags Associated with His Customer's Trading Activity, Yet Eisler Failed to Conduct a Reasonable Inquiry Before Engaging in Unregistered Resales of his Customer's Securities

26. Sections 5(a) and 5(c) of the Securities Act prohibit the offer and sale of securities through interstate commerce or the mails, unless a registration statement is filed with the Commission and is in effect, or the offer and sale are subject to an exemption. 15 U.S.C. § 77e(a) and (c).

27. Section 4(a)(4) of the Securities Act exempts from the registration requirements of Section 5 "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." 15 U.S.C. § 77d(a)(4). Section 4(a)(4) of the Securities Act is unavailable, for example, when a broker "knows or has reasonable grounds to believe that the selling customer's part of the transaction is not exempt from Section 5 of the Securities Act." *John A. Carley*, Exch. Act Rel. No. 34-57246, 2008 WL 268598, *8 (Jan. 31, 2008) (Commission Opinion). To rely on this exemption, the broker must, among other things, engage in a "reasonable inquiry" into the facts surrounding the proposed unregistered sale, and after such inquiry, he must not be "aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is part of a distribution of the securities of the issuer." 15 U.S.C. § 77d(a)(4); 17 CFR § 230.144(g)(4). Section 2(a)(11) of the Securities Act defines an underwriter as "any person who has purchased from an issuer, with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." 15 U.S.C. § 77b(a)(11).

28. The Commission long ago explained that whether a broker has conducted a "reasonable inquiry" depends on the facts and circumstances surrounding the transaction:

> A dealer who is offered a modest amount of a widely traded security by a responsible customer, whose lack of relationship to the issuer is well known to him, may ordinarily proceed with considerable confidence. On the other hand, when a dealer is offered a substantial block of a little-known security, either by persons who appear reluctant to disclose exactly where the securities came from, or where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.

Distribution by Broker-Dealers of Unregistered Securities, Sec. Act Rel. No. 4445 (Feb. 2, 1962) (Commission interpretative release).

29. On January 13, 2009, the Financial Industry Regulatory Authority ("FINRA") issued Notice to Members 09-05 in which FINRA reminded firms of their obligations to determine whether sales comply with the registration requirements of the federal securities laws.

30. FINRA's Notice to Members 09-05 listed examples of "red flags" that broker-dealers should be on the alert for in order to identify possible illegal unregistered distributions, including: (1) a customer opens a new account and delivers physical certificates representing a large block of thinly traded or low priced securities; (2) a customer has a pattern of depositing physical share certificates, immediately selling the shares, and then withdrawing the proceeds from the account; (3) a customer deposits share certificates that have been recently issued or represent a large percentage of the float of the security; and (4) the lack of a restrictive legend on deposited shares seems inconsistent with the date the customer acquired the securities or the nature of the transactions in which the securities were acquired.

31. The red flags in FINRA's Notice to Members 09-05 had been previously identified by the Commission as red flags that are indicative of illegal unregistered distributions.

32. Eisler received and read FINRA's Notice to Members 09-05 and kept a copy of it on his desk during the time the Customer was depositing and selling the securities at issue.

33. In October 2009, Oppenheimer's Compliance Department issued a Compliance Alert that referenced FINRA Notice to Members 09-05 ("Compliance Alert"). The Compliance Alert addressed concerns about illegal unregistered distributions, and advised employees to be on alert for the red flags listed in FINRA's Notice to Members 09-05.

34. Eisler received Oppenheimer's Compliance Alert in October 2009 and specifically discussed with his Branch Office Manager that trading activity by Eisler's customers appeared to exhibit eight of the red flags identified in the Compliance Alert.

35. From the time that the Customer began trading penny stocks through its Oppenheimer account in October 2009, Eisler knew that the Customer's business model was to acquire and immediately liquidate large blocks of shares.

36. Eisler was presented with the following recurring red flags in the Customer's trading activity: (1) the Customer acquired substantial amounts of newly issued penny stocks; (2) directly from little known, non-reporting issuers; (3) through private, unregistered transactions; (4) then immediately resold those shares; (5) wired out the sales proceeds; and (6) repeated the process over and over again.

37. Taken together, the red flags in the Customer's trading put Eisler and Oppenheimer on notice that the Customer may have been engaged in unlawful distributions.

38. Given the red flags associated with the Customer's deposited securities and resale transactions, Eisler was required to engage in a searching inquiry to properly rely on the Section 4(a)(4) brokers' transaction exemption.

39. As part of a searching inquiry, Eisler had a responsibility to be aware of the requirements necessary to establish an exemption from the registration requirements of the

Securities Act, and for each resale transaction he needed to be reasonably certain that such an exemption was available. *World Trade Financial Corp., et al.*, Exch. Act Rel. No. 66114 (Jan. 6, 2012) (Commission Opinion), *petition denied*, 739 F.3d 1243 (9th Cir. 2014); *Stone Summers & Co., et al.*, 45 S.E.C. 105, 108 (1972) (Commission opinion).

40. Eisler took inadequate steps to identify the specific exemptions from registration on which the Customer was claiming, relying on assertions from the Customer or third parties, and he did not become aware of any other exemptions potentially available.

41. When a broker is faced with recurring red flags suggesting that a customer is engaging in unregistered distributions of securities, he cannot satisfy his reasonable inquiry obligations by relying on the mere representations of his customer, the issuer, or counsel for the same, without reasonably investigating the potential for opposing facts. *See World Trade Financial Corp. v. SEC*, 739 F.3d 1243, 1249 (9th Cir. 2014) (rejecting the argument that under the circumstances the duty of reasonable inquiry was met by reliance on third parties in conformity with industry practice and stating "brokers rely on third–parties at their own peril, and will not avoid liability through that reliance when the duty of reasonable inquiry rests with the brokers"); *Wonsover v. SEC*, 205 F.3d 408, 415-16 (D.C. Cir. 2000) (rejecting broker's argument that under the circumstances he justifiably relied on the clearance of sales by his firm's restricted stock department, the transfer agent, and counsel); *see also*, *Distribution by Broker-Dealers of Unregistered Securities*, Sec. Act Rel. No. 4445 ("It is not sufficient for [a dealer] merely to accept self-serving statements of his sellers and their counsel without reasonably exploring the possibility of contrary facts." (internal quotation omitted)).

42. Because Eisler did not undertake a searching inquiry to be reasonably certain that the exemptions being claimed by the Customer were available, in light of other facts of which he was aware, Eisler cannot claim the brokers' transaction exemption under Section 4(a)(4) with respect to his facilitation of the Customer's resales of securities that were not registered under the Securities Act. As a consequence, he is liable for willfully violating Section 5.

E. VIOLATIONS

43. Based on the conduct alleged above, Eisler willfully violated Sections 5(a) and (c) of the Securities Act by selling the Customer's Securities in illegal unregistered distributions.

F. UNDERTAKINGS

Respondent undertakes to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice in connection with any hearing or trial against any other individual or entity relating to the facts at issue in this matter, and to cooperate with the Commission at any such hearing or trial upon reasonable notice.

IV.

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

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

1. Eisler cease-and-desist from committing or causing any violations and any future violations of Section 5 of the Securities Act.

2. Eisler be, and hereby is:

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

   b. 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 company or affiliated person of such investment adviser, depositor, or principal underwriter; and

   c. 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 one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

3. 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.

4. Eisler shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the Securities and Exchange Commission for transfer to the general fund of 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. 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 Scott A. Eisler 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, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5010.

5. Eisler shall comply with the undertaking in Section III.F 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, 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

SECURITIES EXCHANGE ACT OF 1934
Release No. 75512 / July 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16701

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

I.

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

II.

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

III.

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

A. RESPONDENT

1. Robert Okin, age 59, resides in Armonk, New York. From June 2009 to December 2014, Okin was Executive Vice President of Oppenheimer & Co. Inc. ("Oppenheimer" or the "Firm"), serving as the Head of the Private Client Division, Oppenheimer's retail brokerage division, which included National Sales. Okin was the subject of a prior Commission enforcement action in which, without admitting or denying the Commission's findings, he consented to the issuance of an order finding that he failed reasonably to supervise within the meaning of Exchange Act Section 15(b)(4)(E) and imposing a one-year supervisory suspension and ordering him to pay a $150,000 civil penalty. *See In the Matter of Michael Sassano, Dogan Baruh, Robert Okin and R. Scott Abry,* Securities Exchange Act Rel. No. 34-57879 (May 28, 2008). Okin's supervisory suspension was effective from June 9, 2008 through June 8, 2009. Okin holds Series 7, 8, and 63 licenses.

B. RELEVANT ENTITY

2. Oppenheimer, a New York corporation, is a broker-dealer and an investment adviser registered with the Commission and headquartered in New York, New York. Oppenheimer is a subsidiary of Oppenheimer Holdings, Inc., a publicly traded company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act.

C. SUMMARY

3. Section 5 of the Securities Act of 1933 ("Securities Act") prohibits any person, directly or indirectly, from offering or selling securities unless a registration statement is on file or in effect or the offer or sale falls within an available exemption from registration. Section 4(a)(4) of the Securities Act provides an exemption for "brokers' transactions, executed upon customers' orders but not the solicitation of such orders." Before selling securities in reliance on Section 4(a)(4), a broker must conduct a reasonable inquiry into the facts surrounding a proposed unregistered sale and, after such inquiry, not "know[] or ha[ve] reasonable ground[s] to believe that his customer is an underwriter," *In re Ronald S. Bloomfield*, Exchange Act Rel. No. 71632, 2014 WL 768828, *7 (Feb. 27, 2014) (Commission opinion), "or that the transaction is part of a distribution of securities of the issuer." 17 C.F.R. § 203.144(g) (defining broker's transactions for purposes of the Rule 144 safe harbor for persons deemed not to be engaged in a distribution).

4. Between October 2009 and December 2010, Okin failed reasonably to supervise a

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

Branch Office Manager ("BOM") under his direct supervision with a view towards preventing and detecting his violations of Section 5 of the Securities Act in connection with the unregistered offer and sale by a customer of the Firm (the "Customer") of the securities of five different issuers. The five issuers were Encounter Technologies, Inc. ("ENTI"), My Social Income, Inc. ("MSOA"), Strategic Rare Earth Metals, Inc. ("SREH"), Sebastian River Holdings, Inc. ("SBRH"), and Shot Spirit Corporation ("SSPT"). No registration statement was filed with the Commission with respect to any of the offers or sales, and no exemption from registration applied. The BOM willfully violated Section 5 by requesting and granting exceptions to the Customer, pursuant to a delegation of authority from another member of senior management, from Firm policies designed to curtail sales of sub-penny and penny stocks[2] and by signing paperwork that allowed the Customer to deposit the certificates. The BOM engaged in these activities despite being aware of red flags that the Customer was engaging in unregistered offers and sales potentially in violation of Section 5, in response to which the BOM failed to conduct a searching inquiry into the propriety of the sales.

5. Beginning in July 2010, in response to trading in penny stocks, among other things, Oppenheimer formulated policies designed to limit customers' transactions in penny stocks and address capital costs of clearing the stocks. Although these policies purportedly sought to address potential unregistered distributions, among other regulatory risks, no feature of the policies reflected consideration of Section 5 requirements, except for the limited consideration of affiliate status. As a result, Oppenheimer did not establish policies and procedures that addressed compliance with Section 5, including how to conduct a reasonable inquiry to determine whether a customer's transactions were subject to an exemption from the registration requirements of Section 5, except in relation to compliance with certain requirements of Rule 144.

6. Okin failed reasonably to supervise with respect to the BOM's violations of Section 5. First, the BOM, or the financial advisor ("FA") under the BOM's supervision at the relevant branch ("Branch"), asked Okin and other members of Oppenheimer's senior management team for exceptions to the Firm policies limiting sales of sub-penny and penny stocks on behalf of the Customer. Information about the proposed transactions provided to Okin in connection with these requests suggested that the transactions might violate Section 5. These requests, in conjunction with knowledge of the Customer's trading activity, constituted red flags that the BOM had possibly violated Section 5. Okin failed to follow up with the BOM to determine whether the proposed offers and sales complied with Section 5 or whether the BOM had performed a reasonable inquiry into the offers and sales to determine that they were exempt from registration. If Okin had followed up appropriately, it is likely that he would have prevented and detected the BOM's Section 5 violations. Second, Okin, working with other senior managers, participated in developing and implementing policies (1) to limit the number of

[2] The securities qualified as "penny stocks" because they did not meet any of the exceptions from the definition of a "penny stock," as defined by Section 3(a)(51) of the Exchange Act and Rule 3a51-1 thereunder.

penny stock transactions executed at the Firm, and (2) with respect to one customer, for Oppenheimer's Corporate and Executive Services ("CES") department, which Okin supervised, to limit or truncate its required review of certificates that did not have a restricted legend and were accompanied by legal opinion letters stating that the requirements of Rule 144 had been met. When the new Firm policy related to penny stocks prevented the Customer from being able to trade in penny stocks, the BOM sought an exemption from an account-based condition of the policy for the Customer. Okin and another member of senior management who, unlike Okin, had operational responsibility at the Firm but no supervisory responsibility for the BOM (hereinafter, the "Senior Executive") granted the exemption, and the Customer's deposits and sales were subject to the truncated review. Accordingly, the BOM facilitated the Customer's deposit and sale of the securities in one of the five issuers in violation of Section 5.

The Customer's Offers and Sales Violated Section 5

7. From October 6, 2009 through December 10, 2010 (the "relevant period"), the Customer repeatedly deposited large blocks of penny stocks obtained either directly or indirectly from the issuer or an affiliate of the issuer, which Oppenheimer then offered and sold to the public without any registration statements being filed or in effect. The Customer claimed the resales were exempt from registration under Section 4(a)(1) because they complied with Rule 144's safe harbor.

8. In fact, the Customer's resales of the penny stocks did not qualify for any exemption from registration. The Customer's resales failed to comply with Rule 144's safe harbor because the transaction did not meet Rule 144's requirements. In particular, the offers and sales of the securities of the five issuers did not comply with Rule 144(d)'s one-year holding period requirement for non-reporting issuers. In most instances, the Customer had deposited and liquidated each tranche of the five issuers' penny stocks shortly after acquiring them. In any event, the Customer had liquidated all tranches of each issuer's securities in less than four months.

The BOM Failed to Conduct a Reasonable Inquiry into the Customer's Offers and Sales and Violated Section 5

9. To facilitate the Customer's offer and sale of the securities, the BOM: (1) authorized the deposit of the certificates, without which Oppenheimer would not have accepted the securities for deposit and sale; (2) asked senior management, including Okin, for exceptions on behalf of the Customer to Firm policies directed at curtailing the deposit and sale of sub-penny stocks; (3) when delegated the authority by the Senior Executive to do so, granted exceptions to the Customer to enable it to sell sub-penny stocks; and (4) successfully advocated to Okin and senior management that the Customer receive an exemption to certain Oppenheimer policies restricting sales of penny stock for customers with no business other than penny stocks. Without the BOM requesting and granting these exceptions, the Customer would not have been able to sell the penny stocks through its Oppenheimer account.

10. The proposed sales of the penny stocks were accompanied by a number of red

flags that the transactions could violate Section 5, including the pattern of activity in the Customer's account, information about how the Customer obtained the shares in relation to when the shares were deposited in the account, and the timing of the Customer's sales. In the face of these red flags, the BOM failed to perform the reasonable inquiry required for him to claim an exemption from Section 5 under Section 4(a)(4) of the Securities Act for "brokers' transactions."

11. On January 13, 2009, the Financial Industry Regulatory Authority ("FINRA") issued Notice to Members 09-05 in which FINRA reminded firms of their obligations to determine whether sales comply with the registration requirements of the federal securities laws. FINRA listed illustrative examples of red flags that broker-dealers should be on the alert for in identifying illegal unregistered distributions. The red flags were consistent with red flags previously identified by the Commission as indicative of the possibility of an illegal unregistered distribution. *See Distribution by Broker-Dealers of Unregistered Securities,* Securities Act Rel. No. 33-4445 (Feb. 2, 1962) (Commission interpretative release).

12. Ten months later, in October 2009, Oppenheimer's compliance department issued internal guidance to the Firm referencing FINRA Notice 09-05 and identifying red flags indicative of illegal unregistered distributions. The red flags included the following: (i) a customer opens a new account and delivers physical certificates representing a large block of thinly traded or low priced securities; (ii) a customer has a pattern of depositing physical share certificates, immediately selling the shares, and then withdrawing the proceeds from the account; (iii) a customer deposits share certificates that have been recently issued or represent a large percentage of the float of the security; and (iv) the lack of a restrictive legend on deposited shares seems inconsistent with the date the customer acquired the securities or the nature of the transactions in which the securities were acquired.

13. The BOM received the alert, and was aware that the Customer's account activity exhibited a pattern of red flags that the FINRA notice indicated could reflect illegal unregistered distributions. For instance, the BOM knew that the Customer opened the account in October 2009 and, in the relevant period, deposited 1.95 billion shares of penny stocks, mostly in the form of physical certificates, many of which the Customer obtained pursuant to conversion provisions put in place coincident with or shortly before each share issuance. The BOM also knew that the Customer had a pattern of depositing and, shortly after, liquidating the shares and withdrawing the proceeds from each sale. The BOM understood that the Customer's business model was to acquire and immediately liquidate large blocks of shares for the purpose of raising capital to finance penny stock issuers. The per-share price of each liquidated share of the five issuers was generally sub-penny and never exceeded $0.24. The BOM was aware that the certificates deposited did not have restricted legends even though the Customer had only recently acquired them in a private transaction with the issuer or third parties who themselves had recently acquired them from the issuer. In addition, the BOM knew or should have known the cumulative number of shares owned and sold over relatively short periods of time constituted a significant percentage of the issued and outstanding shares for each issuer. Essentially all of the Customer's activity consisted of penny stocks.

14. The BOM, however, did not properly follow up on those red flags or analyze available information in order to rely on the Section 4(a)(4) exemption. Given that the pattern of recurring red flags known to the BOM suggested that the Customer was engaged in illegal unregistered distributions of securities, to rely on Section 4(a)(4) the BOM should have engaged in a searching inquiry into the facts and circumstances of the transactions. Had the BOM done so, he likely would have determined that the facts did not support the Customer's representations that the transactions complied with the Rule 144 safe harbor, and that the Customer was, in fact, engaged in the illegal unregistered distribution of securities.

15. Moreover, the BOM failed to follow Firm procedures directed at complying with Rule 144. Okin supervised Oppenheimer's CES department which had responsibility for reviewing share deposits for compliance with Rule 144 of the Securities Act. Before September 2010, Oppenheimer's written policy required that all shares subject to Rule 144 be reviewed for compliance with Rule 144 and subsequently approved by CES for deposit. This policy applied to all restricted securities, which were defined as "securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering." Such securities included both certificates with a restricted legend where a customer was seeking to have the legend removed based on compliance with Rule 144, and unlegended certificates accompanied by a legal opinion letter representing that a sale would comply with Rule 144. Personnel at the Branch determined which certificates should be elevated to CES for review. In determining whether physical certificates presented for deposit were "restricted," however, it was the practice of Branch personnel to determine whether the certificate bore a restricted legend. The Branch routed to CES only those certificates bearing such a legend. Contrary to Firm policy, neither the BOM nor other Branch personnel routed to CES certificates that bore no "restricted" legend but which were accompanied by legal opinion letters representing that the shares were unrestricted, due to satisfaction of the Rule 144(d) holding period.

16. Because the transactions were illegal unregistered distributions and the BOM could not rely on the Section 4(a)(4) exemption and no other exemption was available, the BOM violated Section 5.

Okin Failed Reasonably to Supervise the BOM's Section 5 Violations

17. Okin became aware of red flags of Section 5 violations by the BOM in conjunction with the facts about the Customer's account activity but did not reasonably follow up to determine whether the BOM was facilitating transactions that were part of a potentially illegal unregistered distribution or whether the BOM was conducting an inquiry necessary to rely on the Section 4(a)(4) exemption.

18. On June 24, 2009, in order to address capital concerns and operational risk, members of senior management, after discussion with Okin, disseminated a policy prohibiting the sale of shares with a per-share price below a penny.

19. Following the implementation of the policy, a number of the FA's customers

wanted to sell securities priced at below a penny per share. On behalf of the FA, the BOM directed requests to Okin and the Senior Executive for exemptions from the Firm's policy prohibiting the sale of sub-penny shares in order for the customer's sales to be executed. The Senior Executive, or Okin when the Senior Executive was not available, granted certain of these requests. In evaluating these requests, Okin became aware of red flags related to the Customer's account and trading activity, in particular the fact that the Customer was trading in large blocks of penny stocks in thinly-traded issuers.

20. In July 2010, Okin, the Senior Executive, and members of the Firm's legal and compliance departments, formulated and implemented a written policy designed to limit the number of penny stock transactions executed at the Firm, including by limiting the number and type of customers authorized to engage in such transactions. This policy established certain transaction- and account-based conditions that had to be satisfied to allow transactions in penny stocks. An amendment to the policy in October 2010 directed requests for exceptions from the policy to Okin and National Sales.

21. By its terms, the policy barred the Customer from trading in penny stocks because the Customer did not satisfy the account-based condition that it maintain a minimum non-penny stock equity balance in its account. Beginning in August 2010, the BOM requested that Okin and the Senior Executive grant an exemption to the Customer from this condition to permit it to continue executing sales of penny stocks in order—according to the BOM—to allow the FA time to transition his business from penny stocks to other products.

22. In the course of reviewing the BOM's requests for an exemption to the policy on behalf of the Customer, Okin and the Senior Executive reviewed a spreadsheet that identified all trades in the Customer's account, sorted by the per-share price of each transaction. This spreadsheet revealed that the Customer had a pattern of depositing and liquidating large blocks of penny stocks at mostly sub-penny prices, and that this pattern of activity occurred regularly in a given security over relatively short periods of time.

23. At no time did Okin follow up on these red flags to seek to ensure that the BOM had been conducting a reasonable inquiry into the facts surrounding these transactions and that the BOM was not violating Section 5.

24. Rather, despite having reviewed information that revealed the extent of the Customer's transactions in penny stocks, Okin agreed to the BOM's request to except the Customer from the minimum non-penny stock equity balance condition in Oppenheimer's July 2010 policy. Thereafter, the Customer proceeded to sell shares of SSPT in illegal unregistered distributions.

25. If Okin had reasonably followed up on these red flags, he likely would have prevented and detected the BOM's violations of Section 5.

26. Before September 2010, as discussed above, Oppenheimer's written policy required that all shares subject to Rule 144 be reviewed and approved by CES for deposit.

Contrary to Firm policy, neither the BOM nor other Branch personnel routed to CES certificates that bore no "restricted" legend but which were accompanied by legal opinion letters representing that the shares were unrestricted. Okin had responsibility for the implementation of this procedure for his areas of supervision.

27. Beginning around September 2010, Okin worked with the Senior Executive, the compliance department, and the BOM to adopt a procedure pursuant to which CES would conduct a limited review for one customer's deposits of certificates without a restricted legend that were accompanied by legal opinion letters representing that the shares were unrestricted. Okin directed CES to conduct this limited review of that customer.

28. From August through October 2010, the BOM made repeated requests to Okin and the Senior Executive that they exempt the Customer from the minimum non-penny stock equity balance condition of the July 2010 policy. The BOM ultimately proposed that the exemption be granted with the Customer's shares deposits being subject to the CES limited review described in paragraph 27. Okin, despite his awareness of information indicating red flags addressed above, and the Senior Executive granted the request. The BOM thereafter facilitated the Customer's deposit and sale of securities in the last of the five issuers, SSPT, pursuant to the limited review. In November 2010, the Customer deposited physical certificate shares of SSPT with no "restricted" legend, but accompanied by a legal opinion letter. Personnel from CES reviewed the deposit of SSPT shares under the limited review but did not detect that the transactions failed to meet the requirements of Rule 144. The BOM then allowed the Customer to sell the SSPT shares in illegal unregistered transactions.

29. The limited review was unreasonable and failed to prevent and detect the BOM's violations of Section 5. If Okin had not granted the exemption to the July 2010 policy, and not allowed the limited CES review of the Customer's deposit and sales, it is likely the BOM's violations of Section 5 would have been prevented or detected.

D. VIOLATIONS

30. Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act provide that the Commission may sanction a supervisor for failing reasonably to supervise, with a view to preventing violations of the federal securities laws, another person subject to his supervision who commits such a violation.

31. As a result of the conduct described above, Okin failed reasonably to supervise the BOM, within the meaning of Sections 15(b)(4) and 15(b)(6) of the Exchange Act, with a view to preventing the BOM's violations of Section 5 of the Securities Act.

IV.

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

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

1. Okin be, and hereby is, barred from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization with the right to apply for reentry after one (1) year 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 arbitration award related to the conduct that served as the basis for the Commission order; (b) 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 (c) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order;

2. Okin shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $125,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury subject to Exchange Act Section 21F(g)(3). If timely payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

   (1) Respondent may 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 (for transfer to the general fund of United States Treasury in accordance with Exchange Act Section 21F(g)(3)) 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 Okin 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, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5010.

3. 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 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

SECURITIES EXCHANGE ACT OF 1934
Release No. 75519 / July 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15654

In the Matter of G-TRADE SERVICES LLC, CONVERGEX GLOBAL MARKETS LIMITED, and CONVERGEX EXECUTION SOLUTIONS LLC Respondents.	ORDER APPROVING A PLAN OF DISTRIBUTION

I.

On December 18, 2013, the Commission issued an 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 ("Order") against G-Trade Services LLC ("G-Trade"), ConvergEx Global Markets Limited ("CGM"), and ConvergEx Execution Solutions LLC ("CES")[1] (collectively, "Respondents"). The Order required Respondents to pay a total of $107,424,429 in disgorgement, prejudgment interest, and civil money penalties into an escrow account and created a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended. Payment was made into the escrow account as required by the Order on December 17, 2013. In three related proceedings, the Commission or Court ordered that the disgorgement and prejudgment interest paid in those

[1] Exchange Act Release No. 71128 (Dec. 18, 2013), available at http://www.sec.gov/litigation/admin/2013/34-71128.pdf.

proceedings, totaling $2,011,889, be combined with the funds paid in this matter for distribution to harmed customers.[2] All payments have been made and placed into the escrow account, which as of April 30, 2015, totals $109,440,085.58.

In the Order, the Commission found that, from 2006 through 2011, Respondents engaged in a fraudulent scheme to conceal their practice of unnecessarily routing certain global trading and transition management customer orders to an offshore affiliate in order to charge undisclosed mark-ups and mark-downs in addition to disclosed commissions on those orders. Respondents held themselves out to the public as a unified conflict-free agency broker that charged explicit commissions for equity order execution. In addition to explicit commissions, Respondents routinely took undisclosed "trading profits" ("TP") from these customers by routing their orders to an offshore affiliate, which executed orders on a riskless basis and opportunistically added a mark-up or mark-down to the price of the security. Often the offshore affiliate consulted with the client-facing brokers to assess whether and how much TP to take, in order to minimize the risk of detection by the customer. TP often greatly exceeded the disclosed commissions, which resulted in many customers paying more than double the amount that they thought they were paying to execute orders. The practice of executing orders through the offshore affiliate and taking TP was not adequately disclosed to customers and was inconsistent with Respondents' purported conflict-free agency model. In addition, through this practice, Respondents failed to seek best execution.

Respondents believed that they would lose business if customers became aware of this practice. As a result, Respondents engaged in a scheme to intentionally or recklessly conceal their taking TP from customers. The foundation of the scheme was Respondents' multiple-

[2] *See In the Matter of Jonathan Samuel Daspin*, Administrative Proceeding File No. 3-15652 (Exchange Act Rel. No. 71126 (Dec. 18, 2013)), available at http://www.sec.gov/litigation/admin/2013/34-71126.pdf; *In the Matter of Thomas Lekargeren*, Administrative Proceeding File No. 3-15653 (Exchange Act Rel. No. 71127 (Dec. 18, 2013)), available at http://www.sec.gov/litigation/admin/2013/34-71127.pdf; and *Securities and Exchange Commission v. Craig S. Lax*, Civil Action No. 23:15-cv-014079-WHW-CLW (D.N.J.) available at http://www.sec.gov/news/pressrelease/2015-27.html.

broker corporate structure, which was necessary to add an additional layer of execution charges while maintaining the appearance of technical compliance with regulatory requirements. Respondents also engaged in specific acts to hide TP from customers, including opportunistically taking TP only when they believed that the risk of detection by the customer was low, using technological tools to conceal their identity in otherwise transparent markets, intentionally delaying the implementation of real-time trade reporting and utilizing proprietary software applications to quickly fabricate false execution prices. In addition, Respondents made false and misleading statements to customers who inquired about Respondents' overall compensation, including providing certain customers with falsified trading data to cover up the fact that the offshore affiliate had taken TP on their orders.

Although the scheme involved the taking of TP from customers in connection with orders in securities traded in U.S. markets ("U.S. securities"), as well as with securities traded in non-U.S. markets ("non-U.S. securities"), Respondents' misconduct related to interpositioning and best execution was particularly egregious with respect to U.S. securities. The Order found that CGM often took TP on orders received within the U.S. to buy or sell U.S. securities, but that instead of routing those orders for execution directly to CES, which was the U.S. trading arm of ConvergEx Group, LLC and a member of U.S. exchanges, Respondents unnecessarily routed those orders to CGM in Bermuda in order to take TP. The Order also found that CGM did not provide any additional necessary services in Bermuda when handling orders in U.S. securities and merely routed them back to brokers in the U.S. for execution, thus improperly interpositioning CGM between the customer and the relevant market.

On May 9, 2014, pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans ("Rules"), 17 C.F.R. § 201.1103, the Commission issued a Notice of

Proposed Plan of Distribution and Opportunity for Comment (the "Notice")[3] for the distribution of monies placed into the Fair Fund. The Notice provided all interested parties thirty (30) days to submit comments on the Proposed Plan of Distribution (the "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. Five comments were submitted, four within the thirty (30) day comment period and one after.

After considering comments, Commission staff, working with the distribution plan administrator appointed by the Commission,[4] prepared a distribution plan, which contains modifications from the Proposed Plan that address the comments received (the "Plan").

After careful consideration, the Commission has concluded to approve the Plan.

II.

A. Public Comments on the Proposed Plan

1. The Neuberger Berman LLC Letter

Joshua Blackman submitted a comment letter, dated May 22, 2014, on behalf of Neuberger Berman LLC ("Neuberger"). Neuberger requested (1) that distribution payments arising from orders placed by investment advisers to wrap fee programs[5] ("Wrap Advisers") be sent directly to the sponsors of the wrap fee programs who cleared the trades and have a

[3] Exchange Act Rel. No. 72146 (May 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-72146.pdf.

[4] On December 18, 2014, pursuant to Rule 1105(a), 17 C.F.R. § 201.1105(a), the Commission issued an order appointing The Garden City Group, Inc. ("GCG") as the fund administrator and ordering that GCG obtain a bond in accordance with Rule 1105(c), 17 C.F.R. § 201.1105(c), in the amount of $108,653,021. This order is available at http://www.sec.gov/litigation/admin/2014/34-73865.pdf.

[5] *Wrap fee program* means an advisory program under which a specified fee or fees not based directly upon transactions in a client's account is charged for investment advisory services (which may include portfolio management or advice concerning the selection of other investment advisers) and the execution of client transactions. 17 C.F.R. § 275.204-3(h)(5).

direct contractual relationship with the affected clients ("Wrap Sponsors"), instead of the Wrap Advisers who submitted the orders to Respondents, and (2) that American Depositary Receipts ("ADRs") be treated as "U.S. securities" under the Plan. Neuberger enumerated several reasons why Wrap Sponsors are better positioned than Wrap Advisers to allocate and distribute payments to underlying wrap clients ("Wrap Clients").[6] Neuberger's comment requesting that distribution payments to be sent directly to Wrap Sponsors rather than Wrap Advisers was also echoed in substance by another commenter (Federated, *infra* at p. 11, §4, ¶ 1).

In support of its first comment, Neuberger's letter explained that, in a typical wrap fee program, a Wrap Client opens an account with a Wrap Sponsor, which typically hires or appoints one or more Wrap Advisers to handle specific trading strategies for the Wrap Client. Neuberger stated that Wrap Advisers typically do not communicate with Wrap Clients, do not have custody of their assets and do not allocate trades among Wrap Clients, which is ordinarily the responsibility of Wrap Sponsors. Thus, according to Neuberger, if a distribution payment were to be sent to a Wrap Adviser like Neuberger (as the Respondents' Direct Customer), then that Wrap Adviser would need to forward the payment to the appropriate Wrap Sponsor with custody of the underlying Wrap Client accounts and knowledge of the appropriate allocation among those accounts.

The Commission has considered Neuberger's first comment, along with other similar comments, and agrees that some modification to the Proposed Plan is appropriate. To address the concerns raised we have added an outreach process to the Plan, designed both to ensure

[6] The reasons cited by Neuberger for directing payments to Wrap Sponsors are that they: (a) have a contractual relationship with the Wrap Clients; (b) have the most information about the Wrap Clients; (c) made the allocations for the affected trades and therefore can determine the amounts owed to each Wrap Client; and (d) as custodian, will ultimately need to receive the payment in order to deposit the amount in the Wrap Client's account or send the payment to the affected client. Mr. Blackman further noted that if distribution payments were sent to a Wrap Adviser such as Neuberger, the Wrap Adviser would need to forward the payment to the appropriate Wrap Sponsors, as it lacks sufficient information about allocations to underlying Wrap Clients and also does not have custody of Wrap Client's accounts.

the accuracy of the distribution process as well as to provide an opportunity for Direct Customers, such as Neuberger, to request that their distribution payment be sent to their underlying clients. More specifically, as described in Section 10 of the Plan, the Fund Administrator will send correspondence to all known Direct Customers of record to advise them of the distribution payments that they are eligible to receive and to request that they respond with an indication of where to send the payments. Direct Customers may elect to receive their payment directly, or they may request that the Fund Administrator make payment to their underlying clients. Direct Customers electing to have distribution payments sent to their underlying clients will be asked to provide contact information and other necessary information to the Fund Administrator, who will then contact the underlying clients to verify payment instructions and obtain any other necessary information.

With regard to Neuberger's request that securities transactions in ADRs be treated as securities transactions involving U.S. securities, the Commission agrees but notes that that is how the Plan, as proposed, will operate. Distribution payments arising from orders relating to ADRs are to be treated consistently with orders in other securities. According to Neuberger, "although the underlying securities of an ADR are foreign, the ADR itself is a negotiable instrument that is traded and settled in U.S. markets." While the Commission agrees with this characterization of ADRs generally, the Respondents executed some orders for ADRs by trading in the underlying non-U.S. securities and taking TP on those transactions while, in other instances, Respondents traded the ADR and took TP on that transaction. In administering the Plan, orders for an ADR transaction will be treated consistently with all other orders for securities transactions – that is, they will be treated as transactions involving U.S. securities unless the Respondents traded non-U.S. securities in filling the order, in which case they will be treated as transactions involving non-U.S. securities. Thus, the Plan's treatment of ADRs is consistent with the underlying securities violations and the taking of TP.

The Plan treats an ADR order, like an order in any other security, in the manner in which the order was executed, and no change is necessary.

2. **The EII Capital Management, Inc. Letter**

Richard D. Marshall submitted a comment letter, dated June 2, 2014, on behalf of EII Capital Management, Inc. ("EII"), requesting (1) that the Proposed Plan be amended to eliminate the distinction in the treatment of harm suffered by customers in connection with trades in U.S. and non-U.S. securities, and (2) that the Proposed Plan be "clarified" to ensure that investment advisers do not bear any costs associated with the distribution, including expenses incurred by investment advisers to apportion and distribute payments received in the distribution to their underlying customers.

In its first request, EII asserted that the proposed treatment of U.S. and non-U.S. securities is inconsistent with the Order, unfair and lacking basis. EII, in particular, cited that the conduct in the order involved trading in both U.S. and non-U.S. securities and argued that there is "no basis to treat injuries from trading in non-U.S. securities differently (and less advantageously) from injuries from trading in U.S. securities." EII's comment challenging the proposed treatment of U.S. and non-U.S. securities was reiterated in substance by a later comment letter (Towers Watson, *infra* at p. 13, §5, ¶ 1).

The Commission's objective is to distribute the Fair Fund in a fair and reasonable manner, taking into account relevant facts and circumstances.[7] The settlement agreed to by Respondents and the Commission included as disgorgement an amount equivalent to the total amount of TP taken on U.S. securities. This settlement—and the remedies obtained by the Commission—result from arms' length negotiations and reflect the Commission's

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[7] *See Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006) ("So long as the district court is satisfied that 'in the aggregate, the plan is equitable and reasonable,' the SEC may engage in the 'kind of line-drawing [that] inevitably leaves out some potential claimants'"), citing *SEC v. Wang*, 944 F.2d 80, 88 (2d Cir. 1991).

discretionary judgment about the use of its limited resources, the risks of litigation (including risks of litigation concerning TP from non-U.S. securities), and the Commission's ability to obtain funds for distribution quickly.

Because the disgorgement amount in the Fair Fund equals the amount of gain from TP taken on U.S. securities, the majority of the money in the Fair Fund corresponds to ill-gotten gains related to the trading of U.S. securities. Given the limited funds available in the Fair Fund, which are insufficient to make all injured investors 100% whole, the Commission must choose a method of distribution, and the Commission concludes that it is reasonable to first seek to distribute all of those funds back to those customers harmed by TP in U.S. securities before seeking to distribute funds to customers harmed by trading in non-U.S. securities. Accordingly, the Commission is adopting a plan that distributes all of the funds recovered from Respondents by distributing 100% of the TP taken on U.S. securities back to the customers from whom this money was taken, and then, distributing pro rata the remainder of the funds in order to return a portion of the TP taken on non-U.S. securities.[8]

Moreover, this approach is consistent with the Order, which highlighted multiple instances of misconduct unique to U.S. securities.[9] For example, Respondents' misconduct related to interpositioning and best execution, arising from unnecessarily routing customer orders to Respondent's Bermuda affiliate, was especially egregious with regard to U.S. securities. This is particularly true in light of Respondents' ability to execute those orders at its U.S.-based broker-dealer. The Order also highlighted deficiencies in the company's

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[8] The Commission anticipates that approximately $80.1 million will be paid to refund TP taken on U.S. securities with the residual amount of the Fair Fund, approximately $29.3 million, to be distributed pro rata to refund TP taken on non-U.S. securities.

[9] In Paragraph 8 of the Order, the Commission found that the CGM Division and GTM received orders for U.S. securities in their New York offices, and "instead of routing these orders to CES, which was ConvergEx's U.S. trading arm and a member of U.S. exchanges, they unnecessarily routed these orders to CGM in Bermuda in order to take TP." Moreover, Paragraph 10 of the Order describes two transactions for a university and a charitable organization, involving trades in only U.S. securities that GTM routed to CGM in Bermuda, resulting in the taking of an amount of TP equal to several times the disclosed commissions.

disclosures that were particularly problematic with regard to U.S. securities. For these reasons, the Commission concludes that it is fair and reasonable to retain the proposed distribution methodology relating to the treatment of U.S. and non-U.S. securities without any modification.

Regarding EII's request that the Commission modify the Proposed Plan to require Respondents to reimburse investment adviser intermediaries for costs incurred in connection with the distribution, so as to be consistent with the Order, the Commission disagrees that the Order requires Respondents to reimburse their customers for their administrative costs related to the distribution. The language of the Order cited by EII, that Respondents pay all "fees and expenses of administering the Plan," is standard language used regularly in Commission orders. When the Commission appoints a third party administrator for a Fair Fund, this language is used to indicate that the Respondent will pay the administrator's costs and expenses and, conversely, that the distribution fund will not be used to pay any fees and expenses of a respondent. Here, where the Respondents have set up an escrow account for the fund, this language is intended to prohibit the Respondents from using the Fair Fund to reimburse themselves. Furthermore, the addition of the outreach provisions in Section 10 of the Plan (described *supra* at pp. 5-6, §1, ¶ 3), under which customers may elect for the Fund Administrator to make distribution payments directly to underlying clients, addresses EII's concerns to a certain extent. Accordingly, the Commission declines to require further modifications to the Plan based on EII's comments.

3. <u>The City of Philadelphia Letter</u>

Joseph A. Ingrisano submitted a comment letter, dated June 6, 2014, on behalf of the City of Philadelphia and its related agencies and funds (collectively, "City"), which included the following requests: (1) that the Proposed Plan be reissued for comment with the addition of (a) the overall relevant or proportional amounts of TP on U.S. and non-U.S. securities, and

(b) an explanation of the disparate treatment of U.S. securities and non-U.S. securities; (2) that, in the alternative, the Proposed Plan be modified to distribute the Fair Fund on a pro rata basis with equivalent treatment of U.S. and non-U.S. securities; (3) that, prior to distributing the Fair Fund to any intermediary customer (such as a broker), the Commission implement a notice and claims process through which known indirect, underlying customers would be notified that their broker (as a customer of the Respondents) will be receiving a TP refund and provided an opportunity to request that instead such indirect customers' pro rata share of the payment be made to them directly; and (4) that any residual amount remaining in the Fair Fund after the distribution be distributed pro rata to customers in proportion to each customer's uncompensated TP, rather than transferring such amount to the U.S. Treasury, as provided in the Proposed Plan.

First, with regard to City's request for additional quantitative information concerning TP, the Commission's staff estimates that approximately $80.1 million (or 73%) of the Fair Fund will be paid in connection with TP taken on U.S. securities, with the residual amount, approximately $29.3 million (or 27%) of the Fair Fund, to be paid pro rata toward TP taken on non-U.S. securities. Total TP on U.S. and non-U.S. securities taken by Respondents during the relevant period of the investigation was approximately $81.3 million and $185.7 million, respectively. Thus, the distribution payments to be made in this distribution, will result in approximately 100% customer recovery on U.S. TP and approximately 16% recovery on non-U.S. TP, not including amounts refunded in connection with other settlements. In light of the fact that the Proposed Plan disclosed in Section 2 that the distribution was anticipated to "cover substantially less than half of the TP taken on those [non-U.S. securities] orders," together with the fact that letters addressing the U.S./non-U.S. securities methodology were submitted by three commenters, the Commission concludes that reissuing the Plan for comment is not warranted.

Second, regarding equivalent treatment of U.S. and non-U.S. TP, the Commission has provided additional detail regarding its rationale for adopting the Plan's distribution methodology (*see* response to EII's comment, *supra* at pp. 7-9, §2, ¶¶ 3-5). Moreover, in light of the prior notice and comment period, the Commission concludes that an additional notice and comment period is neither necessary nor required by the Rules. Under Rule 1104, 17 C.F.R. § 201.1104, "[i]n the discretion of the Commission, a proposed plan that is *substantially* modified prior to adoption may be republished for an additional comment period. . . ." (emphasis added). In determining whether a plan is substantially modified, the Commission considers, among other things, whether modifications revise the distribution plan's methodology, in particular whether such modifications could have a negative effect on the proposed eligible recipients, and whether the modifications affect the group of persons eligible to participate in a plan. In this case, there is no "substantial" modification because the Plan retains the proposed distribution methodology as to U.S. and non-U.S. TP and both the distribution payment amounts and the ultimate recipients remain unaffected. As a result, the Commission exercises its discretion to not republish the Plan for additional comment.

Third, the City requested that the Plan be modified to create a notice and claims process for known underlying customers, which would notify them of forthcoming TP refunds and provide an opportunity for them to claim directly their pro rata portion from Respondents. According to the Commission staff and Respondents, implementing such a process would not be practicable given that the Respondents lack access to the requisite trading records for all ultimate customers and such customers also lack knowledge of which transactions involved the taking of TP. Moreover, in light of the outreach process incorporated in Section 10 of the Plan, the Commission has added significant steps to help ensure that distribution payments reach harmed customers. Accordingly, the Commission declines to further modify the Plan based on this comment.

Fourth, City requests that "any" residual amount in the Fair Fund be distributed in a final pro rata distribution, rather than transferring such balance to the U.S. Treasury. The Plan is structured to distribute essentially all funds to known harmed customers, thus, according to the Commission staff, any residual amount remaining in the Fair Fund after the distribution is expected to be de minimis. It is the practice of the Commission to send de minimis residual amounts to the U.S. Treasury after Fair Fund distributions are completed because the administrative cost and burden of conducting a follow-on distribution typically outweighs paying additional de minimis amounts to eligible recipients. In response to this comment, the Commission has added language, now in Section 16 of the Plan, that provides: in the event there is a residual of undistributed Fair Fund funds that in the Commission staff's view would warrant consideration of an additional disbursement from the Fair Fund, the Commission may exercise its discretion to enter an order for an additional distribution to harmed customers who, after an initial disbursement of the Fair Fund, and in accordance with the methodology set forth in Section 9, remain eligible to receive additional funds.

4. The Federated Investors, Inc. Letter

Stephen A. Keen submitted a comment letter, dated June 9, 2014, on behalf of Federated Investors, Inc. ("Federated"). Federated requested a modification to the distribution methodology of the Proposed Plan for customers that placed orders as investment adviser intermediaries (*e.g.*, Wrap Advisers). Specifically, Federated requested that the Respondents be ordered to engage an independent fund administrator to engage in an outreach process to underlying intermediaries (*e.g.*, Wrap Sponsors), through which those lower level intermediaries would be presented options as to how, and the manner in which, they wish to participate in the Fair Fund distribution on behalf of their underlying customers. Federated also stated that the Proposed Plan would unfairly impose a burden on Federated outside the scope of its obligations as a Wrap Advisor and cause it to violate the custody requirements of the Investment Advisers Act of 1940.

The Commission has considered Federated's comments, together with the similar and related concerns raised by the EII, Neuberger and the City. In response, as described above, the Commission has incorporated in the Plan an outreach process in Section 10, to be administered by a third-party fund administrator in Section 3, to facilitate the identification of appropriate recipients for distribution payments. The Commission concludes that the Plan addresses the concerns raised by Federated and other commenters on this issue, provides the flexibility necessary to address and resolve the wide variety of potential issues that may arise with different customers, and is fair and reasonable.

5. **The Towers Watson (Pty) Ltd. Letter**

Anthony Lester, of Towers Watson (Pty) Ltd., submitted a comment letter, dated August 8, 2014, on behalf of his client, "Client 5" (described in paragraph 57 of the Deferred Prosecution Agreement, dated December 12, 2013, between the Department of Justice and ConvergEx Group, LLC). Mr. Lester wrote that it was "fundamentally unfair" for the Commission to treat U.S. and non-U.S. equities differently, as proposed, particularly where his client relied on the fact that Respondent was an affiliate of a large U.S. firm regulated by the Commission. Mr. Lester also noted Client 5's agreement with the arguments regarding the same issue raised by comment letters from the City of Philadelphia and EII.

The Commission has considered the comments of Towers Watson (Pty) Ltd., which essentially reiterate the comments of EII with regard to the treatment of U.S. and non-U.S. securities in the distribution. For the same reasons explained above (*supra* at pp.7-9, §2, ¶¶ 3-5) in response to EII's comment regarding the treatment of U.S. and non-U.S. securities in the distribution, the Commission in its discretion declines to modify the Proposed Plan's distribution methodology.

B. Modification and Approval of the Plan

For the reasons stated above, the Commission finds that the Proposed Plan should be modified in response to some of the comments submitted, with the changes that are incorporated into the Plan submitted herewith.

III.

Accordingly, IT IS HEREBY ORDERED that, pursuant to Rule 1104, 17 C.F.R. § 201.1104, the Plan for this matter is approved, and it shall be posted simultaneously with this Order on the Commission's website at www.sec.gov.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

Commissioner Gallagher
Not participating
Commissioner Piwowar
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75521 / July 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16703

In the Matter of **GARY B. WOLFF, Esq.** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Gary B. Wolff, Esq. ("Respondent" or "Wolff") pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") [1] and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[2]

II.

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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 . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct ....

2 Rule 102(e)(1)(ii) provides, in relevant part, that:

> The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

1. Wolff, age 72, is licensed to practice law in the State of New York. He obtained his New York law license in March 1969. Wolff's law practice included appearing and practicing before the Commission as an attorney.

2. On October 21, 2010, Wolff was suspended from the practice of law by the Supreme Court of New York, Appellate Division First Judicial Department, for failing to register with the New York State Office of Court Administration in compliance with New York Judiciary Law §468-a.

3. On at least seven occasions between August 17, 2011 and November 30, 2011, Wolff filed purported legal opinions, registration statements, amended registration statements, and other documents with the Commission on behalf of Client A and Client B. In addition, on July 13, 2012, Wolff contacted Commission staff on behalf of Client C to request an extension of Client C's time to respond to a comment letter from Commission staff, and sent a letter confirming that conversation on July 16, 2012.

4. In a comment letter dated November 1, 2011, Commission staff questioned the validity of Wolff's purported legal opinions given that his license to practice law in New York was suspended. In a letter to Commission staff dated November 30, 2011, Wolff admitted that his New York law license was suspended but nonetheless asserted that "I am of the opinion that I may provide a valid legal opinion in connection with [my client's] offering."

5. As a result of the conduct described in paragraphs 3 and 4, Wolff violated the Supreme Court of New York's order suspending him from the practice of law.

6. On August 29, 2012, the Commission issued an Order pursuant to Rule 102(e)(2) suspending Wolff from appearing or practicing before the Commission as an attorney based on New York's suspension of his law license.

7. On December 28, 2012 and January 4, 2013, Wolff contacted Commission staff via telephone on behalf of Client D to request an extension of Client D's time to respond to a comment letter from Commission staff. At the time of these contacts,

Wolff's law license in New York had not been reinstated, nor had he been reinstated to appear or practice before the Commission as an attorney.

8. On March 12, 2013, Wolff's license to practice law was reinstated by the Supreme Court of New York.

9. On April 11, 2013, Wolff submitted an application pursuant to Rule 102(e)(5)(ii) for reinstatement to appear and practice before the Commission.

10. On April 25, 2013, Wolff contacted Commission staff on behalf of Client D to request an extension of Client D's time to respond to a comment letter from Commission staff. Wolff had not been reinstated to appear or practice before the Commission as an attorney at the time of this contact.

11. On May 17, 2013, Client E advised Commission staff that all questions regarding its filings should be directed to Wolff as its counsel. On May 24, 2013, Wolff contacted Commission staff on behalf of Client E in regard to Client E's preparation of a response to a comment letter from Commission staff. Wolff had not been reinstated to appear or practice before the Commission as an attorney at the time of these contacts.

III.

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

A. Through the conduct described in paragraphs 3 and 4, Wolff violated Rule 102(e)(1)(i) of the Commission's Rules of Practice, which prohibits a person who does not possess the requisite qualifications to represent others from appearing and practicing before the Commission as an attorney.

B. Through the conduct described in paragraphs 7, 10, and 11, Wolff violated the Commission's Order suspending him from appearing or practicing before the Commission as an attorney.

C. Through the conduct described in paragraphs 3, 4, 7, 10 and 11, Wolff engaged in "unethical or improper professional conduct" pursuant to Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

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

A. Wolff is denied the privilege of appearing or practicing before the Commission as an attorney for two years from the date of the Order.

B. After two 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 must be sent to the attention of the Commission's Office of the General Counsel.

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

D. 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;

  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.

E. If Respondent provides the documentation required in Paragraphs C and D, 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.

F. If Respondent is not able to truthfully attest to the statements required in Subparagraphs D(2)(b) or D(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.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4146 / July 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16702

In the Matter of **DION MONEY MANAGEMENT, LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted, pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against Dion Money Management, LLC ("DMM" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over Respondent 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 Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

SUMMARY

1. This matter involves a registered investment adviser's failure to disclose to clients the terms of certain compensation arrangements whereby the adviser received payments from third parties that were calculated based on client assets invested in particular mutual funds. In filings with the Commission, the adviser disclosed the existence of the arrangements and the possibility that the arrangements could pose conflicts of interest for the adviser in the provision of investment advice to clients. However, the adviser did not describe the interplay between the different arrangements, either in its filings or otherwise to clients. The adviser thus understated the maximum payment rate under the multiple arrangements, and did not disclose the possibility of receiving payments from multiple parties based on the same client assets. By failing to disclose its conflicts of interest completely and accurately, the adviser violated Section 206(2) of the Advisers Act. The adviser also violated Section 207 of the Advisers Act by virtue of certain omissions of material facts from its Commission filings concerning the compensation arrangements.

RESPONDENT

2. **Dion Money Management, LLC** ("DMM" or "Respondent") is a Delaware limited liability company with its principal place of business in North Adams, Massachusetts. Since September 1, 2007, DMM has been registered with the Commission as an investment adviser (File No. 801-68444). In October 2012, DMM's founder and longtime principal retired. In January 2014, DMM changed its name to Atlas Private Wealth Management, LLC.

FACTS

Firm Background

3. Between approximately 2010 and 2013, DMM reported total client assets under management ranging from $500-$600 million, all in separately managed discretionary accounts. Historically, most of DMM's clients were retail and high net worth individuals, family businesses, or corporations.

4. Although it evolved over time, DMM's fundamental investment strategy was to recommend portfolios of mutual funds with different risk or other profiles to its clients. DMM's approach was to research and recommend mutual funds across several fund families offering a range of fund options.

5. DMM constructed more than a dozen model portfolios of mutual funds for client accounts, including balanced, growth, and income model portfolios. DMM routinely reviewed the composition of its model portfolios. Although DMM recommended its model portfolios to

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

clients based on their risk profiles and investment goals, clients could and often did elect to depart from the exact holdings in the model portfolios, and, in such instances, DMM would recommend and construct portfolios based on individualized client needs and preferences.

6. DMM's clients could select any custodian for their assets. DMM recommended two custodians, both of which were Commission-registered broker-dealers. A majority of DMM's clients chose one of these broker-dealers ("Broker A") as the custodian for their assets.

Service Agreements

7. In May 2002, DMM entered into an agreement with the adviser and administrator ("Adviser B") to a certain family of mutual funds ("Fund Family B"). Pursuant to this agreement, DMM received a quarterly payment from Adviser B based on a percentage of DMM client assets invested in certain enumerated mutual funds within Fund Family B in exchange for DMM providing recordkeeping and administration services for clients holding such investments. The agreement with Adviser B subsequently was amended several times to add or remove various mutual funds from the enumerated list and to adjust the rate of compensation. By 2005, DMM received a payment of 0.20% (or 20 basis points) of applicable client assets up to $75 million, 0.25% (or 25 basis points) for assets of $75-175 million, and 0.30% (or 30 basis points) for assets over $175 million. The agreement with Adviser B was terminated in 2014.

8. In January 2006, DMM entered into an agreement with the distributor ("Distributor C") for a certain family of mutual funds ("Fund Family C") advised by Distributor C's affiliate ("Adviser C"). Pursuant to this agreement, DMM received a quarterly payment from Distributor C based on a percentage of DMM client assets invested in certain enumerated mutual funds within Fund Family C in exchange for DMM providing account maintenance services for clients holding such investments. The agreement with Distributor C subsequently was amended several times to add or remove various funds from the enumerated list. The maximum rate of compensation to DMM under the agreement with Distributor C was 0.30% (or 30 basis points) of applicable client assets. The agreement with Distributor C remains in effect.

9. In July 2007, DMM entered into a Custodial Support Services Agreement ("CSSA") with Broker A. Pursuant to the terms of the CSSA, in exchange for DMM performing certain account recordkeeping services, Broker A would compensate DMM on a quarterly basis in an amount based on a percentage of DMM client assets held in custody with Broker A that were invested in mutual funds available on Broker A's no-transaction-fee ("NTF") platform, other than the proprietary family of funds ("Fund Family A") advised by Broker A's affiliate ("Adviser A"); pursuant to the express terms of the CSSA between DMM and Broker A, DMM was not compensated for client investments in mutual funds within Fund Family A. Broker A's NTF platform carried a large selection of mutual funds across various fund families, including mutual funds within Fund Family B and Fund Family C. The rate of compensation to DMM under the CSSA with Broker A initially was 0.01% (or 1 basis point) of applicable client assets, and then, pursuant to subsequent amendments to the CSSA, rose to 0.085% (or 8.5 basis points) in 2008 and 0.095% (or 9.5 basis points) in 2011. The CSSA with Broker A remains in effect.

Disclosure of Service Agreements

10. In its Form ADV filed with the Commission, DMM made certain disclosures referring to the agreements with Broker A, Adviser B, and Distributor C (collectively, "Service Agreements"), as required by the terms thereof. However, DMM did not disclose to clients certain material terms of the Service Agreements, either in its Form ADV or otherwise.

11. DMM included the following representative provisions referring to the Service Agreements in its Form ADV, Part 2A, filed in each of 2011, 2012, and 2013:

> Dion Money Management, LLC has entered into Service Agreements with some mutual funds in which clients are invested. Per these Agreements, Dion Money Management, LLC is paid a fee for providing shareholder services, such as maintaining shareholder accounts and providing personal services to clients that are shareholders of such mutual funds. Such compensation may be up to 0.30% per year of the mutual fund's average daily net asset value of shares held by clients. . . .
>
> The fees Dion Money Management, LLC currently receives are calculated quarterly and range up to .30% of the average daily net asset value of the respective shares held of a particular mutual fund by Dion Money Management, LLC clients.
>
> Dion Money Management, LLC is currently receiving fees from the following mutual fund companies:
>
> - [Adviser A][2] . . .
> - [Fund Family B]
> - [Fund Family C] . . . .
>
> As a result of these fees, Dion Money Management, LLC has an incentive to invest client assets in the mutual funds for which Dion Money Management, LLC receives this additional compensation. However, Dion Money Management, LLC shall maintain its fiduciary duty by only recommending mutual funds that it deems appropriate and suitable for clients. . . .

[2] In a separate paragraph of its Form ADV, Part 2A, filed in 2012 (but not before then or again until 2015), DMM referenced the 0.095% rate of payment from Broker A but did not indicate whether or how this payment was related to the payments under the other Service Agreements. Beginning in its Form ADV, Part 2A, filed in 2014, DMM stated that it received compensation based on non-Fund Family A mutual funds available on Broker A's NTF platform.

12. DMM's statement that the maximum rate of compensation that DMM could receive under the Service Agreements was "up to 0.30%" (or 30 basis points) of applicable client assets was not complete. DMM did not disclose that, in certain instances, DMM could – and did – receive payments at a rate greater than 0.30% based on the same client assets. DMM also did not disclose that, in certain instances, DMM could – and did – receive payments based on the same client assets from Broker A (pursuant to the CSSA) as well as either Adviser B or Distributor C (pursuant to DMM's agreements with those entities).

13. For example, for a client investment in a mutual fund within Fund Family C that was available on Broker A's NTF platform and held in custody at Broker A, DMM would receive a 30 basis point payment from Distributor C and an additional payment of up to 9.5 basis points (depending on the time period) from Broker A, for a total payment based on the same asset of up to 39.5 basis points.

14. DMM did not disclose to clients, in its Form ADV or otherwise, either the possibility of payments from multiple sources based on the same client assets, or the aggregate possible rate of such payments, both of which were material pieces of information.

15. Moreover, to different degrees over different time periods, DMM incorporated mutual funds from within Fund Family B and Fund Family C, including mutual funds as to which DMM received payments under the Service Agreements, in the model portfolios it recommended to clients.

16. Through 2011 and 2012, approximately 50-55% of DMM's total client assets were invested in mutual funds within Fund Family B and Fund Family C combined – and the vast majority of that in mutual funds of Fund Family C, which alone comprised approximately 40-45% of DMM's total client assets during this period. The combined percentages steadily and significantly declined to below 25% in 2013 and below 15% in 2014.

17. In light of the fact that Fund Family B and Fund Family C were among the mutual fund families that DMM recommended to its clients, and given the concentration of DMM client assets in mutual funds within Fund Family B and Fund Family C prior to 2013, DMM was at least negligent in failing to make complete and accurate disclosures to clients about the compensation terms of the Service Agreements and the potential conflicts of interest arising from the Service Agreements.

Statements in Form ADV

18. Respondent was required to file and did file Form ADV annual amendments with the Commission.

19. In its Form ADV, Part 2A, filed in 2011 and 2013, Respondent omitted material information about certain compensation terms under the Service Agreements.

20. Specifically, DMM's Form ADV, Part 2A, filed in 2011 and 2013 did not disclose the rate of compensation under the CSSA with Broker A.

VIOLATIONS

21. Based on the conduct described above, Respondent willfully violated[3] Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud upon any client or prospective client.

22. Based on the conduct described above, Respondent willfully violated Section 207 of the Advisers Act, which makes it unlawful for any person to make any untrue statement of a material fact or omit any material fact in any report filed with the Commission.

UNDERTAKINGS

Respondent has undertaken the following:

23. Additional Disclosures in Form ADV. Respondent shall amend certain provisions of its current Form ADV, Part 2A, to make additional disclosures not unacceptable to the Commission staff concerning the Service Agreements or other matters alleged in this Order.

24. Notice to Advisory Clients. Within thirty (30) days of the entry of this Order, Respondent shall provide a copy of this Order to its advisory clients as of the date of the entry of this Order by mail, electronic mail, or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.

25. Certification of Compliance. Respondent shall certify, in writing, its compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Robert B. Baker, Assistant Regional Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110, with a copy to the Office of Chief Counsel of the Division of Enforcement, 100 F Street, NE, Washington, DC 20549, no later than sixty (60) days from the completion of the undertakings.

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

IV.

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

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 207 of the Advisers Act.

B. Respondent shall be and hereby is censured.

C. Respondent shall, within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of $50,000 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 Respondent by name as the Respondent in these proceedings, and the file number of these proceedings; and a copy of the cover letter and check or money order must be sent to Robert B. Baker, Assistant Regional Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110.

D. 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, Respondent agrees that in any

Related Investor Action, Respondent shall not argue that Respondent is entitled to, nor shall Respondent benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that Respondent 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, "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Respondent shall comply with the undertakings enumerated in Section III of the Order.

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

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 75531 / July 27, 2015

Admin. Proc. File No. 3-15964

In the Matter of the Application of

DAVID KRISTIAN EVANSEN

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Former associated person of former member firm failed to timely respond to association's requests for information and failed to appear and provide testimony for on-the-record interviews with association staff. *Held*, association's findings of violation and sanction imposed are *sustained.*

APPEARANCES:

David Kristian Evansen, *pro se*.

Alan Lawhead and *Gary Dernelle*, for FINRA.

Appeal filed: July 3, 2014
Last brief received: October 15, 2014

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David Kristian Evansen, formerly associated with Newbridge Securities Corporation, a FINRA member firm ("Newbridge"), appeals a decision by FINRA's National Adjudicatory Council ("NAC") barring him from associating with any FINRA member firm. The NAC found that Evansen violated FINRA Rule 8210 and Rule 2010 by failing to timely respond to requests for information and failing to appear and provide testimony for a FINRA investigation of allegations that Evansen engaged in misconduct in Newbridge customer accounts. The NAC found that Evansen defaulted by failing to respond to the complaint and that he demonstrated a "long-playing pattern of indifference to his responsibilities" to cooperate with FINRA investigations and proceedings.

Evansen primarily contends on appeal that FINRA lacked jurisdiction; that FINRA did not provide him proper notice of the requests for information, the requests for on-the-record interviews, or the disciplinary proceedings; and that FINRA engaged in various procedural violations reflecting its improper motives for pursuing this case, including a desire to retaliate for whistleblowing activities. Following our independent review, we reject Evansen's contentions and find that the record establishes his violations. We conclude that a bar is consistent with the FINRA Sanction Guidelines and is neither excessive nor oppressive. Accordingly, we sustain FINRA's action.

I. Background

A. FINRA sent Evansen two requests for information in connection with its investigation of his alleged wrongdoing in customer accounts.

Evansen was registered with FINRA from 1987 until 2010 through several FINRA member firms, including as a registered representative of Newbridge from October 20, 2003 to May 6, 2009.[1] In 2010, Newbridge made filings with FINRA describing customer complaints and arbitration claims alleging that Evansen, in his capacity as a Newbridge registered representative, had recommended unsuitable transactions, engaged in unauthorized trading, traded excessively or churned accounts, and fraudulently misrepresented and omitted material facts.

In November and December 2010, FINRA sought information from Evansen under Rule 8210. In each of its two requests, FINRA notified Evansen that it was "conducting inquiries with respect to Form U5 Filings and Complaint Disclosures made by" Newbridge. The letters directed Evansen to respond to the allegations and questions regarding the customer accounts and set response deadlines of November 22, 2010 and December 17, 2010, respectively. FINRA

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1 Evansen was associated with Jesup & Lamont Securities Corp. ("Jesup"), a former FINRA member firm, from May 1, 2009 to July 14, 2010. Jesup filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on July 14, 2010, stating that it terminated Evansen's association because it ceased operations as a broker-dealer. Evansen is not currently associated with a FINRA member.

sent both requests to Evansen's Boca Raton, Florida address listed in the Central Registration Depository ("Florida CRD address").[2] Evansen did not meet either deadline.

B. FINRA initiated an expedited disciplinary proceeding and suspended Evansen for failing to respond to its requests for information.

On March 7, 2011, FINRA initiated an expedited proceeding against Evansen pursuant to FINRA Rule 9552 based on his failure to provide information requested pursuant to Rule 8210.[3] FINRA notified Evansen that he would be suspended from associating with any member firm unless he complied fully with its two information requests by March 31, 2011. It also advised Evansen of his right to request a hearing that would stay the effective date of his suspension.

On March 31, 2011, FINRA suspended Evansen after he did not provide the requested information or contact FINRA to request a hearing. FINRA sent Evansen a notice of this suspension explaining that he could request termination of the suspension on the ground of his full compliance with the information requests. But it warned that he would be automatically barred from association with any FINRA member firm in any capacity on June 10, 2011 if he failed to request termination of the suspension based on full compliance.[4] FINRA sent the March 7 and March 31, 2011 notices to Evansen's Florida CRD address.[5]

On June 6, 2011, four days before the automatic June 10 effective date of the bar, Evansen requested termination of his suspension, claiming that he was "never noticed." He sent this letter from his Florida CRD address, but stated that he had been in Atlantic City, New Jersey for six months and "only recently" returned to Florida. His letter did not respond to the information requests and did not indicate that any responses would be forthcoming. On June 8, 2011, FINRA responded in a letter reiterating that the suspension would not be terminated "[u]ntil and unless [Evansen] . . . produce[d] the requested information and documents." This letter further stated that the FINRA correspondence and Rule 8210 requests were properly served at Evansen's Florida CRD address because Evansen "did not update [his] information in CRD . . . nor did [he] otherwise notify FINRA staff of a more current address," and pointed out that Evansen's June 6 letter had been sent from his Florida CRD address.

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2 Each Rule 8210 request in this case was sent by first-class and certified mail.

3 FINRA Rule 9552(a) states that if a person subject to FINRA jurisdiction fails to provide any information or testimony requested by FINRA staff, the association may provide a written notice "specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in [a] suspension."

4 FINRA Rule 9552(f) permits a suspended individual to file a written request for termination of the suspension on the ground of full compliance with the notice of suspension. Rule 9552(h) provides that a suspended person who fails to request termination of the suspension within three months of the original notice of suspension will be barred automatically.

5 FINRA sent these notices by overnight delivery and first-class mail pursuant to FINRA Rule 9552(b).

Two days later, Evansen received confirmation that FINRA had automatically barred him under Rule 9552(h) for his failure to comply with the suspension notice and respond to its requests. On or about that same day, Evansen sent a response to the information requests by fax and overnight delivery, asserting that he "had no other information or documentation that . . . would aid in [FINRA]'s inquiry," and again requesting termination of the suspension. Evansen sent this letter from his Florida CRD address and did not provide an updated address.

On June 14, 2011, FINRA terminated Evansen's suspension and vacated the automatic bar by notice to Evansen but informed him that FINRA reserved the right to ask him further questions, request additional information, and pursue disciplinary action against him, "including but not limited to" disciplinary action under Rule 8210 for his late response.[6] FINRA sent this notice to Evansen's Florida CRD address.

C. After vacating the automatic bar, FINRA sent three requests for Evansen's on-the-record testimony in connection with its ongoing investigation.

In spring 2012, as part of its continuing investigation, FINRA attempted to schedule interviews with Evansen under Rule 8210. FINRA staff sent Evansen two letters in April 2012 requesting his appearance for on-the-record interviews ("OTR") on April 25, 2012 and May 9, 2012, respectively. FINRA sent these requests to Evansen's Florida CRD address.[7] Evansen did not appear, attempt to reschedule, or otherwise respond to FINRA.

On May 10, 2012, the day after the second OTR was scheduled to occur, FINRA staff checked the CRD records and discovered that they listed a New Lisbon, Wisconsin address ("Wisconsin CRD address") for Evansen as of that date. FINRA sent a third letter to this Wisconsin CRD address that same day, requesting Evansen's appearance for an OTR on May 21, 2012.[8] Evansen again failed to appear, attempt to reschedule, or otherwise respond. Each of the three OTR notices warned Evansen that he was "obligated to appear as requested and to answer [its] questions fully, accurately, and truthfully" and that "failure . . . to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry."[9]

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6 The parties dispute exactly when FINRA sent the bar notice and when Evansen responded. Evansen submitted a fax transmittal report indicating that he faxed his response on June 10, but FINRA states that it was not received until June 13. Evansen also contends that FINRA staff prematurely sent the bar letter before June 10. These factual disputes became moot once FINRA vacated the bar and terminated the suspension.

7 The record includes CRD printouts indicating that the Florida address was his CRD address as of the April 13, 2012 and April 25, 2012 dates of those letters. The record also includes copies of the envelopes indicating that the letters were returned to FINRA from the Florida CRD address as undeliverable on May 14, 2012 and June 11, 2012.

8 The certified mailing receipt for the third OTR notice was signed and returned by Evansen's father on May 17, 2012.

9 The record includes a FINRA staff affidavit indicating that on May 9, 2012, FINRA staff verified that the CRD as of that date indicated that Evansen's residential address was the Florida

(continued...)

D. FINRA initiated a disciplinary proceeding and issued a default decision when Evansen failed to respond to the complaint.

FINRA's Department of Enforcement ("Enforcement") initiated a disciplinary proceeding on June 12, 2012. The two-cause complaint alleged that Evansen violated Rules 8210 and 2010[10] by (i) providing late responses to FINRA's two information requests; and (ii) failing to appear and provide investigative testimony scheduled by FINRA on three occasions. The complaint specified a July 10, 2012 deadline for answering the disciplinary charges. On July 12, 2012, Enforcement sent Evansen a second notice, in accordance with FINRA Rule 9215(f), noting Evansen's failure to respond to the complaint, specifying a new July 30, 2012 deadline for an answer, and informing him that failure to answer by that date could be deemed an admission of the complaint's allegations and result in a default decision against him under FINRA Rule 9269 "without further notice." Enforcement filed a motion for default decision on August 7, 2012. Evansen did not respond to the complaint, the FINRA notices, or the motion for default, which were each sent to his Wisconsin CRD address.[11]

On August 24, 2012, the Hearing Officer issued a default decision.[12] The decision considered the two counts of the complaint separately and concluded that Evansen's failure to provide testimony warranted a bar from association with any FINRA member firm.[13]

(...continued)
address. Evansen disputes the accuracy of the affidavit and asserts that it does not prove that the first two OTR notices went to the correct address. But as we explain more fully below, we do not rely on the affidavit to find that each OTR notice was mailed to the CRD address then on record. *See infra* note 42 and Section II.C.7.

10 A violation of FINRA rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *8 n.29 (July 2, 2013).

11 The June 12 complaint and the July 12 notice were each sent to Evansen by first-class and certified mail. The certified mailings were delivered on June 18, 2012 and July 17, 2012, respectively, and the receipts for the certified mailings were signed by Evansen's father. The August 7 motion for default was sent by first-class mail. *See* Rule 9134(a)(2) (permitting service of papers other than a complaint by first-class mail).

12 On August 24, 2012, the Hearing Officer issued a notice of default decision that incorrectly identified the date of the decision as August 20, 2012. On September 7, 2012, the Hearing Officer issued an amended notice of default decision to correct this error. In addition, the September 7 amended notice specified October 2, 2012 as the deadline for Evansen's appeal, recognizing that the incorrect date in the original notice could suggest an earlier deadline for filing an appeal than required under FINRA Rule 9311. Evansen timely appealed on October 1.

On appeal, Evansen points to a September 24, 2012 letter from FINRA's Department of Registration and Disclosure erroneously stating that his period for appeal ended on September 21, 2012, and claims that this error was evidence of wrongdoing. We find this claim moot because the NAC accepted his appeal as timely filed. *See infra* discussion at Section II.C.7.

E. The NAC affirmed the default decision and barred Evansen from association with any FINRA member firm.

On October 1, 2012, Evansen timely appealed to the National Adjudicatory Council (the "NAC"). On November 16, 2012, the NAC ordered Enforcement to supplement the record pursuant to FINRA Rule 9346(f).[14] On June 3, 2014, the NAC sustained the default, and, based on its review of the supplemented record,[15] barred Evansen from association with any member firm as a unitary sanction for the violations of Rules 8210 and 2010. The NAC found that Evansen's failure to provide testimony was complete and that his late response to the information requests was tantamount to a failure to respond. The NAC concluded that Evansen demonstrated a "long-playing pattern of indifference" to his FINRA responsibilities and that a bar was an appropriate sanction for his "entire course of misconduct." This appeal followed.

(...continued)

13 The Hearing Officer found that the late response to the FINRA information requests warranted a $25,000 fine and two-year suspension from association, but declined to impose these sanctions in light of the bar for the failure to appear for the OTRs.

14 The NAC ordered that the supplement include evidence supporting the motion for default decision, a FINRA staff declaration in support of the motion for default decision, and evidence related to the Rule 9552 expedited proceedings. In its decision, the NAC explained that it ordered this supplement to ensure that the "record contain sufficient independent evidence to support FINRA's findings and enable the Commission to discharge its statutory review functions" under Exchange Act Section 19.

15 Evansen sought leave to supplement the record with a Jesup pay stub and Form W-2, which, he claims, show that the NAC did not have jurisdiction in this case. The NAC denied Evansen's motion to adduce under FINRA Rule 9346(b). The NAC found that Evansen failed to "demonstrate why the evidence is material to the proceeding" because, as discussed below, it found that "the date upon which Evansen's association with Jesup was terminated is irrelevant" to FINRA's jurisdiction in this case. NAC Decision at 13 n.26.

In addition to the Jesup pay stubs and Form W-2, the NAC stated that Evansen submitted "a large volume of [other] documents that were not part of the record below" as attachments to his papers without seeking leave to adduce them under FINRA rules. The NAC explained that "where necessary to give full consideration to Evansen's arguments, [it] considered the substance of the documents" but found them "irrelevant to liability and sanctions in this matter." NAC Decision at 4 n.10.

II. Analysis

We base our findings on an independent review of the record and apply a preponderance of the evidence standard for self-regulatory organization disciplinary actions.[16] Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violated the securities laws or SRO rules, and whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[17]

A. Evansen's failures to timely respond to information requests and to appear for testimony violated Rules 8210 and 2010.

The essential facts concerning Evansen's conduct are undisputed. FINRA sought information and testimony from Evansen pursuant to its authority under Rule 8210. Evansen did not provide any information until more than six months after FINRA requested it, and only on the automatic effective date of the bar. FINRA sought Evansen's testimony on three separate occasions, but Evansen failed to appear and never sought to reschedule. We therefore sustain FINRA's finding that Evansen failed to timely respond to the information requests and to appear for testimony at three OTRs.

We also sustain FINRA's finding that Evansen's conduct violated Rules 8210 and 2010. Under Rule 8210, FINRA has the authority to require any person subject to its jurisdiction to provide information in writing and to "testify at a location specified by FINRA staff, under oath or affirmation . . . with respect to any" FINRA investigation. Evansen had an unequivocal obligation to cooperate fully and promptly with FINRA's information and OTR requests.[18] Although Evansen contends that his responses to the information requests fully complied with his Rule 8210 obligations, the record supports FINRA's finding that he failed to provide the

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16 *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *9 (May 27, 2011) (citing *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in Commission review of SRO disciplinary proceeding)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

17 15 U.S.C. § 78s(e)(1); *see, e.g., Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *6 (Jan. 6, 2006), *petition denied*, 209 F. App'x 6 (2d Cir. 2006). Evansen does not argue, and the record does not support a finding, that Rules 8210 and 2010 are, or FINRA's application of them was, inconsistent with the Exchange Act.

18 *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *5 (Jan. 30, 2009) (requiring full and prompt cooperation with requests); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008) (explaining that the obligation to cooperate with Rule 8210 requests is "unequivocal" because "delay and neglect" by recipients of such requests "undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest" and the "failure to respond impedes [FINRA]'s ability to detect misconduct that threatens investors and markets" (internal quotations and punctuation omitted)) *petition denied*, 347 F. App'x 692 (2d Cir. 2009).

information until almost six months after the initial request and well after the successive deadlines set in the information requests. We therefore sustain FINRA's finding that he violated Rules 8210 and 2010 by failing to respond promptly.

Evansen also argues that his failure to appear for the OTRs did not violate Rule 8210. He argues that his earlier written responses obviated the need to appear, and that when FINRA accepted those responses, it also accepted his representation that he "had no other information or documentation that . . . would aid in [FINRA]'s inquiry." Evansen is mistaken. It is well established that recipients of Rule 8210 requests cannot second-guess whether compliance with a particular request is necessary.[19] A failure to comply is not excused by the recipient's belief that responding or appearing would not yield useful information for the investigation—the request triggers an obligation to respond "even if [the recipient's] response [is] a statement that he believed he had already provided [FINRA] with the information it had requested."[20] Moreover, even if a former associated person cannot provide the information sought by OTR, he or she "nonetheless has the obligation 'to explain the deficiencies in [his or her] responses or answer as completely as [he or she is] able.'"[21] Here, when FINRA terminated his suspension it specifically notified Evansen that it reserved the right to ask additional questions and request additional information.

Finally, Evansen argues that he did not act with the state of mind necessary to violate Rule 8210, claiming that his whistleblowing efforts show that he would not deliberately "miss a hearing, by an examiner in District Seven on [his] own license."[22] But scienter is not an element

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19 *See Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 WL 1494527, at *5 & n.20 (Apr. 17, 2014) (stating that an associated person may not "take it upon [himself] to determine whether [a Rule 8210 request] is material to [a FINRA] investigation of [his] conduct"); *Louis F. Albanese*, Exchange Act Release No. 39280, 1997 WL 665082, at *4 n.12 (Oct. 27, 1997) ("[R]egardless of what other information [FINRA] may have had, Albanese was required to provide on-the-record testimony as requested by [FINRA].").

20 *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *4 (Nov. 8, 2007) (internal quotations omitted), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

21 *Joseph Patrick Hannan,* Exchange Act Release No. 40438, 53 SEC 854, 1998 WL 611732, at *3 (Sept. 14, 1998) (internal citations omitted); *see also id.* at *4 (confirming that a former associated person had "an obligation to make himself available and to provide whatever information he possessed to [FINRA]").

22 He further claims that his whistleblowing communications with the Commission and FINRA are evidence of the legitimacy of his appeal. But his whistleblowing efforts are not relevant to the Rule 8210 violations. *See Asensio & Co.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *15 (Dec. 20, 2012) ("Efforts to expose stock fraud, regardless of motive, do not indicate a greater likelihood of compliance with Rule 8210, which pertains to an associated person's cooperation with FINRA investigations."). Further, we find that there is no evidence that FINRA's investigation, disciplinary proceeding, or sanctions were retaliation for any purported whistleblowing efforts. *See infra* Sections II.C.5-7.

of a Rule 8210 violation.[23] We therefore sustain FINRA's finding that Evansen's failure to appear for the OTRs violated Rules 8210 and 2010.

B. FINRA maintained jurisdiction to file its complaint against Evansen.

Under FINRA Bylaw Article V, Section 4(a)(i), FINRA maintains jurisdiction over formerly associated persons for two years after their FINRA registration ends, *i.e.*, "two years after the effective date of termination of registration." We reject Evansen's contention that the two-year window for FINRA's continuing jurisdiction closed before FINRA filed its complaint on June 12, 2012. Evansen claims that his employment and association with Jesup ended before the Firm filed with FINRA a Form U5 Uniform Termination Notice for Securities Industry Registration. But "the termination upon which [FINRA's] continuing jurisdiction is predicated is not termination of employment or association [with a member firm], but termination of *registration.*"[24]

Evansen's jurisdictional challenge fails because it ignores the express terms of FINRA's continuing jurisdiction under Section 4(a)(i) and is contrary to FINRA's system of continuing jurisdiction and registration set forth in its bylaws. Evansen contends that his own actions opened FINRA's two-year window of continuing jurisdiction—even before FINRA received the notice for terminating his registration. This is incorrect. FINRA is in charge of its own registration system and requires filings from its members, including on Forms U5, to administer registration changes and the consequences that flow from changes in registration status.[25] A person who becomes registered remains registered until FINRA (not the registered person) ends the registration, based, among other things, on the Forms U5 it receives.[26] A registered person cannot unilaterally terminate his or her FINRA registration before FINRA receives the

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23 *Berger*, 2008 WL 4899010, at *11. As explained below, whistleblowing is not a defense to a Rule 8210 violation.

24 *Donald M. Bickerstaff*, Exchange Act Release No. 35607, 1995 WL 237230, at *2 (Apr. 17, 1995) (emphasis in original) (interpreting a prior version of the bylaw and finding that a pending examination "prevented the termination of [Bickerstaff's] registration from becoming effective").

25 *See generally* FINRA Bylaws Article V (describing registration process); *Notice of Filing of Proposed Rule Change Relating to Proposed Changes to Forms U4 and U5*, Exchange Act Release No. 59616, 2009 WL 1212330, at *8 (Mar. 20, 2009) (confirming that "the authority to declare the effective date of termination for purposes of FINRA registration resides with FINRA").

26 FINRA deems any "natural person who is registered" to be a "person associated with a member." FINRA Bylaws, Article I(rr) (defining "person associated with a member" as including, among others, "a natural person who is registered" with FINRA and a person "engaged in the investment banking or securities business who is directly or indirectly . . . controlled by a member, whether or not such person is registered or exempt from registration . . .").

prescribed form.[27] Moreover, the registered person receives a copy of the form filed with FINRA, with express reminders that he or she will "continue to be subject to the jurisdiction of regulators for at least two years after [his or her] registration is terminated" and that FINRA "determines the effective date of termination of registration."[28]

Evansen claims that his employment and association with Jesup ended on May 29, 2010,[29] but that Jesup failed to file the Form U5 within thirty days as required. He contends that it is unfair for Jesup's late filing to delay the two-year window of continuing jurisdiction. But as explained above, the two-year window opens when FINRA terminates the registration, and FINRA must be able to rely on its receipt of notices to set a date certain for terminating registration.[30] Here, the two-year jurisdictional window opened on July 14, 2010. In any case, FINRA's June 12, 2012 complaint would have been timely even if Jesup had filed the Form U5 thirty days after May 29, 2010.

Evansen argues that Bylaw Article V, Section 4(a)(iii) applies to him instead of Section 4(a)(i). Under Section 4(a)(iii), the two-year window begins to run after *association* ends, not registration. But Section 4(a)(iii) applies only to persons who were formerly associated in an unregistered capacity.[31] Because Evansen was formerly associated in a registered capacity,

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27 FINRA Bylaws Article V, Section 3(a) (requiring member firm to notify FINRA "following the termination of the [registered person's] association" with the member firm and to "concurrently" provide a copy of the FINRA termination notice to the registered person).

28 We take official notice, pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, of the Form U5, available at http://www.finra.org/sites/default/files/Form_U5_060115.pdf (last visited June 16, 2015).

29 Evansen cites a Jesup W-2 and paycheck as evidence of the end of his association. We treat Evansen's resubmission of this evidence as a motion to adduce pursuant to Rule of Practice 452. Although these documents are not relevant to FINRA's jurisdiction in this case, we admit them as an exercise of discretion to address his contentions.

30 *See* FINRA Bylaws Article V, Section 3(a) (stating that a member firm's failure to give 30 days' notice of termination of association will result in a late fee, but that FINRA "may in its discretion declare the termination effective at any time"); Instructions to Form U5 (stating that "[t]he SRO/jurisdiction determines the effective date of termination of registration").

31 The specific terms of Sections 4(a)(i) and (ii) apply to persons who were registered when formerly associated while the general terms of Section 4(a)(iii) apply to persons who were previously associated but unregistered. *See generally Baltimore Nat. Bank v. State Tax Commission of Md.*, 297 U.S. 209, 215 (1936) ("It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling." (internal citations omitted)); *Reed A. Hatkoff*, Exchange Act Release No. 33087, 51 SEC 769, 1993 WL 430292, at *3 (Oct. 21, 1993) (rejecting a formerly registered person's attempt to claim status as an "unassociated person" to avoid FINRA jurisdiction when the interpretation would "allow an associated person to immunize himself from being probed regarding his wrongdoing by the simple device of leaving the industry").

Section 4(a)(i) applies. As explained above, under Section 4(a)(i), the two-year window began on "the effective date of termination of registration."

Finally, Evansen challenges FINRA's jurisdiction by citing the Exchange Act definition of an associated person, which includes an exception for persons acting in a solely clerical or ministerial role.[32] Evansen contends that his association ended when he gave notice of his resignation to Jesup in April 2010 and then performed clerical work at the end of his tenure. But the exception is limited to certain Commission administrative proceedings under Section 15(b) of the Exchange Act; it does not apply to the FINRA registration or continuing jurisdiction bylaws or to FINRA disciplinary proceedings that we review pursuant to Exchange Act Section 19(e). And even if a FINRA registered person could unilaterally terminate his registration while continuing to perform work for a member firm, Evansen has not substantiated his claim that his responsibilities at Jesup were solely clerical beginning from April 2010.[33]

For the foregoing reasons, we find that the complaint was timely filed under FINRA Bylaw Article V, Section 4 and that FINRA had jurisdiction for purposes of these proceedings.

B. FINRA provided Evansen with a fair proceeding.

FINRA must provide procedural protections in its disciplinary proceedings pursuant to Exchange Act Sections 15A(b)(8) and 15A(h)(1).[34] Evansen makes several procedural arguments concerning the sufficiency of the Rule 8210 requests, timing of the OTRs, and entry of default. He also argues that the proceedings were unfair and were the result of selective prosecution, bias, and retaliation for his whistleblowing activities. For the reasons set forth below, we reject his arguments and find that FINRA provided Evansen with a fair proceeding.[35]

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32 Exchange Act Section 3(a)(18), 15 U.S.C. § 78c(a)(18) (defining associated person to include "any employee . . . except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof)").

33 In order to establish that he resigned in April, Evansen introduced a personal e-mail to another potential employer in which he stated that he "officially notified my company, my general manager and compliance" of his plans. But because Evansen did not send this message to Jesup, it is not relevant evidence of his resignation or the end of his association and, in fact, Evansen previously argued that he resigned in early June 2010. And this e-mail casts doubt on Evansen's claim that his work during May 2010 was purely clerical because it stated that he was "facilitating a seamless transition with my clients with other brokers."

34 Exchange Act Section 15A(b)(8), 15 U.S.C. § 78*o*-3(b)(8), as relevant here, requires FINRA to provide a fair procedure for disciplining persons associated with members. Section 15A(h)(1), 15 U.S.C. § 78*o*-3(h)(1), in relevant part, requires that FINRA bring specific charges; notify such person of, and give him an opportunity to defend against, the charges; and keep a record of the proceedings.

35 Evansen asserts that he has been deprived of due process. We have long held that the requirements of constitutional due process do not apply to FINRA proceedings because FINRA

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1. FINRA sent proper notice of the information requests in 2010.

We reject Evansen's claim that the Rule 8210 requests were deficient because FINRA sent them to his CRD address on record instead of searching for an alternative address or contacting him by cell phone or e-mail. During the period at issue, Evansen was subject to FINRA's continuing jurisdiction, and, as a result, he was required to update and receive mail at his CRD address on record.[36] A Rule 8210 notice is deemed received when mailed to the formerly registered individual's last known residential address reflected in the CRD.[37] Thus, when the Rule 8210 requests and disciplinary complaints were mailed to Evansen's CRD address they were "deemed to have been received there, whether or not [he] actually receive[d] them."[38] When Evansen registered with FINRA, he agreed to comply with these continuing obligations and to be bound by these rules.[39] Here, CRD printouts in the record establish that FINRA

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is not a state actor. *See, e.g., Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *6 n.40 (Mar. 19, 2013) (citing cases). Nevertheless, the Exchange Act provisions requiring fair procedures in FINRA disciplinary proceeding give rise to "due-process-like" requirements. *D'Alessio v. SEC*, 380 F.3d 112, 121, 123 (2d Cir. 2004). Thus, we consider Evansen's arguments in light of these statutory fairness requirements.

36 In order to facilitate FINRA investigations, former registered persons must cooperate with FINRA investigations for "at least two years *after* an individual's registration has been terminated by the filing of" a Form U5, and are also required to update their CRD mailing address during that period. NASD Reminds Registered Persons of Continuing Obligation to Update NASD Records, NASD Notice to Members 97-31, 1997 WL 1909798, at *1-2 (May 1, 1997) (emphasis in original) ("Continuing Obligation Notice"); *see Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *6 & n.33 (Dec. 11, 2006) (stating that "a failure to respond to [FINRA] in connection with an investigation . . . is not excused by that person's having temporarily moved from the address listed in the CRD" and that persons have "a continuing duty to . . . receive and read mail sent to [them] at" the CRD address).

FINRA may retain jurisdiction for longer than two years if there are pending disciplinary complaints or an amended Form U5. *See* Continuing Obligation Notice, 1997 WL 1909798, at *2 (noting "even if a Form U5 has been filed, the termination of an individual's registration does not take effect until all disciplinary complaints against them are resolved" and that the SRO "may retain jurisdiction over a registered individual for four years after the original Form U5 is filed" if an amended Form U5 is filed two years after the original Form U5); FINRA Bylaws, Article V, Sections 3(a), 4(a).

37 Rule 8210(d) ("A notice under this Rule shall be deemed received by the . . . formerly registered person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository.").

38 Continuing Obligation Notice, 1997 WL 1909798, at *1.

39 Bylaws, Article IV, Section 2(a)(1) (requiring registered persons to agree, as a condition to membership, to comply with FINRA Bylaws, rules, and regulations); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131, at *12 n.36 (Dec. 11, 2014)

(continued...)

investigative staff complied with the Rule 8210(d) requirements when it sent each of the requests for information and OTRs, including when the staff mailed the final request to Evansen's Wisconsin CRD address on record.

Rule 8210(d) provides for an exception if the FINRA staff responsible for sending the notice "has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate" and requires the notice to be mailed to "any other more current address . . . known to" the person responsible for the mailing. But this exception did not apply here. There is no evidence that the FINRA investigative staff had actual knowledge that Evansen was staying in New Jersey when they sent the requests. In fact, Evansen first mentioned to FINRA that he had temporarily relocated *after* FINRA had sent the first two Rule 8210 requests. At that time, FINRA investigators reminded Evansen that he was deemed to have received notice of the information requests at his Florida CRD address. The purpose of the CRD address requirements is to ensure that FINRA is able to rely on its records when sending notices, and, accordingly, persons subject to those requirements "cannot shift the burden of keeping [address] information current" to FINRA.[40]

2. *FINRA sent proper notices of the OTRs in 2012.*

With respect to the OTR notices that FINRA sent in April 2012, Evansen argues that he did not receive proper notice because they were sent to his old Florida CRD address after he sent his updated Wisconsin address to FINRA. To support this claim, on appeal to the NAC he introduced a letter dated and notarized on March 27, 2012 (the "Address Change Letter") in which he requested that the CRD be updated to reflect his Wisconsin address. On appeal to the Commission, he further seeks to adduce a May 2, 2012 letter from FINRA's Registration and Disclosure Department (the "CRD Response") acknowledging receipt of Evansen's "request dated March 27, 2012 for an address change" and stating that "we have updated Web CRD with your new address."[41]

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(citing *Toni Valentino*, Exchange Act Release No. 4925, 54 SEC 330, 2004 WL 3000098, at *5 (Feb. 13, 2004) (finding that that, by registering, a registered representative "consent[s] to abide by [FINRA's] rules")); *Erenstein*, 2007 WL 3306103, at *6 ("Erenstein's contractual relationship with [FINRA], entered into when he became an associated person with [a FINRA] member, included his agreement to abide by all its rules.").

40 *See Pearson*, 2006 WL 3590274, at *6; *see also Alan Howard Gold*, Exchange Act Release No. 33675, 51 SEC 998, 1994 WL 62099, at *3 (Feb. 24, 1994) (noting that the applicant could not "shift the burden of keeping [CRD] information current from the individual, who possess the information, to the Exchange, which does not").

41 On appeal Evansen seeks to adduce this CRD Response and other documents that he claims are relevant to his whistleblower-related actions, including (i) FINRA's 2012 Year in Review and Annual Financial Report, which Evansen claims reflected the results of his 2011 whistleblower report; (ii) an SEC press release dated May 14, 2014 which he claims also resulted from his 2011 whistleblower report; (iii) Evansen's letter to FINRA dated May 21, 2013 describing the 1993 criminal conviction of a former regional director of the FINRA district office

(continued...)

Neither of these letters shows that the April 2012 OTR notices were required to be sent to Evansen's Wisconsin address under Rule 8210(d). First, these letters do not show that the FINRA staff that sent the OTR notices actually knew Evansen's Wisconsin address in April when they sent them. Rather, the record includes evidence indicating that the CRD showed the Florida address on April 13, 2012 and April 25, 2012 when these notices were sent and that Evansen used his Florida address in his June 2011 correspondence with FINRA investigative staff. Second, the correspondence cited by Evansen was with the FINRA Registration Department, but his contention relies on a Rule 8210 exception that applies to the actual knowledge of the staff sending the notice—not the Registration Department. Third, even if the Rule 8210(d) exception applied to the actual knowledge of the Registration Department staff, Evansen has not demonstrated that his Address Change Letter was sent or received for processing by that department before investigative staff sent the April 13 and April 25 OTR notices. The Address Change Letter was dated and notarized on March 27, 2012, but the CRD Response Letter states that it was processed by the Registration Department on May 2—after the two April OTR notices had been sent.[42]

Moreover, Evansen independently violated Rule 8210 when he failed to appear or even respond to the final OTR notice. Evansen concedes that this notice and the complaint were sent to his Wisconsin address and that his father signed a certified mail notice for them, but he claims that FINRA failed to prove personal service. Evansen claims that personal service was not

(...continued)
that conducted the investigation; and (iv) a June 14, 2013 Reuters article describing Evansen's May 21, 2013 letter and the official's resignation. FINRA opposes Evansen's motion.

Rule of Practice 452 requires that the party seeking to adduce evidence "show with particularity that such additional evidence is material and that there were reasonable grounds to adduce such evidence previously." 17 C.F.R. § 201.452. We find that Evansen has not shown reasonable grounds for failing to introduce the evidence at an earlier stage, or demonstrated that any of this evidence is material to the Rule 8210 violations, but as an exercise of discretion, we admit the CRD Response and Evansen's May 21, 2013 letter, which were sent to or from FINRA before Evansen filed his July 3, 2014 appeal to the Commission. We also take official notice, pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, of the publicly available FINRA 2012 annual report, the May 14, 2014 press release, and the June 14, 2013 Reuters article.

But none of these documents affects the outcome here. They do not demonstrate that FINRA failed to comply with notice requirements or excuse Evansen's violations. Nor do they support Evansen's claim that FINRA's investigation was triggered by his purported whistleblowing, which, as noted above, began only after FINRA began its investigation.

42 As Evansen points out, the May 2 letter stating that the CRD had been updated is inconsistent with the FINRA affidavit stating that a May 9 CRD check showed Evansen's Florida address. Evansen contends that this inconsistency is evidence of perjury or bad faith on the part of FINRA investigative staff. But the May 9 CRD check was not dispositive because the relevant notices were mailed on April 13 and April 25. Other evidence shows that investigative staff checked the CRD record on May 10, saw the Wisconsin address, and sent a third OTR notice to the Wisconsin address.

properly achieved because his father had vision and mobility problems when he signed.[43] Evansen also argues that his attendance at the last OTR was not required because the return receipt for the notice was not signed until May 17, two business days before the May 21 OTR.

Under Rule 8210(d), as a formerly registered person, Evansen was deemed to have received the requisite constructive notice of the final OTR when the notice was sent to his most recent CRD address. For the final OTR, Evansen does not dispute that the notice was sent to the correct CRD address.[44] While Rule 8210 requires personal service for persons "formerly associated with a member in an *unregistered* capacity" (emphasis added), this personal service requirement does not apply to Evansen because he was formerly associated in a registered capacity. And even if personal service had been required, service on his father would have complied with FINRA's personal service rule, which allows service by leaving a copy with a person of suitable age and discretion who resides at the address.[45] FINRA had no obligation to confirm the mobility and vision of persons who signed certified mail receipts. Contrary to his claim that he received only two business days' notice of the final OTR, Evansen was deemed to have received the notice under FINRA rules when it was sent on May 10, not when the return receipt was signed.[46]

3. Evansen did not seek to reschedule the OTRs.

Evansen contends that he was not required to appear for the OTRs because the notices did not give him sufficient time to prepare and the last OTR conflicted with his commitment to give grand jury testimony in another matter. He suggests that FINRA was deliberately scheduling the OTRs to make it impossible for him to comply, and that his grand jury subpoena bound him to secrecy that prevented him from appearing for any OTR. To the contrary, recipients of Rule 8210 requests should contact FINRA staff to fully and promptly resolve such scheduling issues.[47] Evansen provides no explanation for his failure to reschedule and fails to substantiate his suggestion that the secrecy of the grand jury deliberations excused his failure to

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[43] Evansen claims that "No documents were EVER personally handed to me; no documents were EVER left at my office, and NO documents were ever left with someone of . . . 'suitable age and discretion.'" But Evansen does not explain how he learned about the final OTR, the disciplinary action, or the other FINRA documents sent to his Wisconsin CRD address.

[44] *See Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 1683913, at *3 (Apr. 18, 2013); *see also* Rule 9134(b)(1) (providing that "[p]apers served on a natural person may be served at the natural person's residential address, as reflected in the [CRD]"); Rule 9134(a)(3) ("Service by mail is complete upon mailing.").

[45] *See* FINRA Rule 9134(a)(1) (indicating that personal service "may be accomplished by . . . leaving a copy . . . with a person of suitable age and discretion residing therein").

[46] *See supra* text accompanying notes 37 and 44.

[47] *CMG Inst. Trading*, 2009 WL 223617, at *7 ("If Applicants had a problem meeting the deadline set by [FINRA], they should have 'raised, discussed, and resolved [it] with the [FINRA] staff in the cooperative spirit and prompt manner contemplated by the Rules.'" (internal citation omitted)).

provide on-the-record testimony for a FINRA investigation of his own conduct.[48] Nor is there any evidence that the FINRA investigative staff had any knowledge of Evansen's schedule. Moreover, Evansen's consistent pattern of failing to respond to Rule 8210 requests or related FINRA notices until there is an imminent threat of discipline casts doubt on his claim that he had genuine scheduling or grand jury secrecy concerns.

4. FINRA procedures for the default and NAC decision were appropriate.

Evansen contends that the NAC improperly denied him the opportunity for oral argument. Under FINRA Rule 9344(a), the NAC may issue a decision "on the basis of the record and other documents" without oral argument if the appealing party did not answer the complaint and "fail[ed] to show good cause for the failure to participate." Like the NAC, we find that Evansen failed to show good cause for his failure to participate in the proceeding below; accordingly, the NAC properly denied the request for oral argument on that ground.

FINRA Rule 9269(a)(1) authorizes a Hearing Officer to issue a default decision if a respondent fails to answer a complaint within the time afforded under Rule 9215. Evansen contends that the default was improper. He claims that he had good cause for his failure to appear and that the hearing had "no legal significance" because he did not know about it and was not properly served with the complaint or notice of the hearing. As explained above, there is no merit to these claims. Two notices of the complaint were properly served at the Wisconsin CRD address pursuant to FINRA Rules 9131 and 9134.[49] The certified mail receipts were returned to FINRA with signatures. The second notice specifically warned that failure to answer could result in a default, and the hearing officer followed the default procedures in Rule 9269.[50] Under these circumstances, Evansen has not demonstrated good cause for his failure to participate or any error in the NAC's decision to forgo oral argument.

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48 *See* Fed. R. Crim. P. Note 2 to subdivision 6(e) (confirming that the "rule does not impose any obligation of secrecy on witnesses"); *cf. United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) (explaining that the secrecy requirements did not apply to "testimony . . . sought . . . for its intrinsic value in the furtherance of a lawful investigation" and that the rule "is intended only to protect against disclosure of what is said or what takes place in the grand jury room").

49 Like Rule 8210(d), FINRA Rule 9134(b)(1) focuses on the actual knowledge of the person sending the mailing:

> Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated.

50 Evansen filed his NAC appeal after receiving a notice of the default.

5. *Evansen's whistleblower defense is without merit.*

Evansen argues that FINRA issued the Rule 8210 requests, instituted this disciplinary proceeding, and imposed sanctions to retaliate for: (a) Evansen's former association with Jesup, his purported whistleblowing, or the fact that he conducted such activities through an attorney disfavored by FINRA; or (b) his letter dated May 21, 2013 describing the criminal record of a former FINRA official involved in the investigation.

Evansen's retaliation claims are not supported by the chronology of events in this matter or other evidence. Evansen claims that he began whistleblowing to the Commission in May 2011. But FINRA issued the first two Rule 8210 requests in November and December 2010, which was *before* Evansen began his purported whistleblower activities. In addition, each of the Rule 8210 requests stated that FINRA was investigating "Form U5 Filings and Complaint Disclosures" by Newbridge regarding allegations that Evansen engaged in wrongdoing in customer accounts—a legitimate and routine basis for FINRA investigation.[51]

Further, Evansen offers no evidence that FINRA investigators knew about his purported whistleblowing in June 2011, when FINRA told him that it reserved the right to ask further questions or pursue further disciplinary action under Rule 8210. And Evansen sent his letter regarding the former FINRA official in May 2013—*after* the Hearing Panel issued its decision, after he appealed to the NAC, and after the NAC ordered a supplement to the record. Although the NAC decision followed Evansen's letter, he fails to substantiate his assertion that the NAC decision was in retaliation for the letter or for whistleblowing.

In any case, whistleblowing "does not provide [an applicant] with an affirmative defense or immunity from sanction" for his own misconduct, and improper FINRA motives are not defenses to the underlying violations.[52] We have found no evidence that the Newbridge filings were an improper basis for a FINRA investigation.

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51 *See, e.g.*, *Mullins*, 2012 WL 423413, at *5 (stating that "FINRA launched an investigation of the events at issue in this proceeding after Morgan Stanley filed a Form U5 with FINRA"); *Houston,* 2011 WL 6392264, at *5 ("After [the firm] terminated Houston, [FINRA] staff began an investigation into his possible misconduct at the firm."); *Richard A. Neaton*, Exchange Act Release No. 655598, 2011 WL 5001956, at *3 (Oct. 20, 2011) ("Shortly after Securian submitted the amended Form U5, FINRA's Department of Enforcement . . . commenced an investigation of Neaton."); *see also* Continuing Obligation Notice, 1997 WL 1909798, at *2 ("For at least two years after an individual's registration has been terminated by the filing of a [Form U5], the NASD may use Rule 8210 to investigate whether the individual violated any of the NASD's rules and may bring disciplinary action if the individual fails to comply with Rule 8210.").

52 *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 WL 3228694, at *13 (Nov. 8, 2006).

6. Evansen was not subject to selective prosecution.

Evansen argues that he was subject to selective prosecution for his religious beliefs, which he claims were reflected in his Rule 8210 responses and in his blog, or for exercising his speech rights as a whistleblower.[53] To establish a claim of selective prosecution, an applicant must demonstrate that he was unfairly singled out for enforcement action when others who were similarly situated were not, and that that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right.[54] Here, there is no evidence substantiating Evansen's speculation that he was unfairly singled out for investigation or enforcement based on any of those grounds. Rather, as noted above, FINRA's investigation was triggered by filings relating to Evansen's conduct in customer accounts, and FINRA routinely investigates such filings and routinely prosecutes violations of Rule 8210.[55] Moreover, none of the documents that Evansen cites demonstrate any link between Evansen's religious beliefs and the requests at issue in these proceedings. Nor is there evidence that FINRA's investigation, which began in 2010, was triggered by his whistleblowing, which did not begin until May 2011. Evansen has not shown that FINRA's investigative staff was aware of the blog, its religious content, or his whistleblowing efforts when it began its investigation.[56]

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53 For instance, Evansen responded to the Rule 8210 requests with what he describes as a "sensational golf story with significant religious overtones" and his blog asserted the religious significance of certain numbers.

54 *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992); *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 WL 1113518, at *7 (Apr. 26, 2006) (rejecting selective prosecution claim by noting proceedings charging similar violations).

Evansen cites 42 U.S.C. § 1983 in support of his selective prosecution claim, but offers no precedent or analysis indicating that the statute establishes an affirmative defense in FINRA disciplinary proceedings. *See* 42 U.S.C. § 1983 (creating a private right of action for violations of civil rights under color of law). As noted, we consider Evansen's arguments in light of the Exchange Act's fairness requirements. *See supra* notes 34 and 35 and accompanying text.

55 *Shellenbach v. SEC*, 989 F.2d 907, 911 (7th Cir. 1993) (stating "[w]e need not ponder petitioner's theories about a conspiracy among 'rogue' staff members, however, because courts will not inquire into a prosecutor's ill motive unless there is a showing of selective enforcement" or "an attempt to discriminate by arbitrary classification"); *Nicholas T. Avello*, Exchange Act Release No. 46780, 2002 WL 31487442, at *7 n.19 (Nov. 7, 2002) ("Avello has failed to bring to light any evidence of—much less establish—any improper motive on the part of the NASD.").

56 In his reply brief, Evansen asserts that he cited his blog in correspondence to FINRA's Regional Chief Counsel, but he does not identify the date of this purported correspondence or show that religious content in the blog influenced FINRA's Rule 8210 requests.

7. Evansen does not demonstrate any unfairness or bias in the NAC decision.

Evansen also alleges that FINRA's investigation relied on biased or unfair investigative methods. He asserts that FINRA investigative staff improperly contacted (a) his former Newbridge customers in 2009 and 2012, (b) the notary of his Address Change Letter on May 10, 2012, and (c) his former Jesup supervisor in 2014. As an initial matter, we note that the Exchange Act procedural requirements do not extend to FINRA investigations because "[t]he purpose of an investigation is to 'determine whether the SRO's investigation has produced evidence meriting further proceedings' —not to determine whether a violation has actually occurred."[57] Evansen does not show that FINRA's efforts to contact others prevented him from responding to Rule 8210 requests or answering the complaint. And, if FINRA's investigative staff repeatedly contacted the notary on May 10, 2012 about Evansen's Address Change Letter as he claims, that would suggest that the staff first learned about this letter and his Wisconsin address on that date—*i.e.*, after staff had already sent the first two OTR requests to the Florida address in April. Similarly, any communications between FINRA investigators and his former customers or supervisors do not raise any logical inference that the Rule 8210 requests at issue here were improper and had no bearing on whether Evansen violated Rule 8210 or whether the NAC properly found the violations charged.

Evansen also contends that staff from a FINRA district office engaged in perjury and that the staff's affidavit and other NAC submissions contained inaccurate and misleading dates. Evansen's challenges do not establish any deliberate misconduct by staff and, in any case, do not bear on the substantial evidence establishing his Rule 8210 violations. For instance, Evansen disputes the exact dates of correspondence that he sent to and received from investigative staff between June 9 and June 13, 2011.[58] But as noted above, these disputes are moot because the June 2011 bar at issue was terminated on June 14, 2011 and his responses were more than six months late—regardless of when during the four-day period at issue he sent them. Evansen also disputes the FINRA affidavit, which states that staff first learned his CRD Wisconsin address on May 10, 2012. As noted above, this claim is not determinative because evidence—apart from the disputed affidavit—shows that the April 2012 requests were sent to the CRD addresses on record at that time. Finally, contrary to Evansen's contention that the index of evidence submitted to the NAC suggested a misleading chronology, we do not find that the NAC was improperly influenced by the order in which the documents were listed on the index.

Nor has Evansen demonstrated how any other purported procedural errors before his NAC appeal prevented him from complying with his Rule 8210 obligations or participating in the proceeding. For instance, Evansen argues that FINRA's Department of Registration and Disclosure sent a September 2012 letter incorrectly stating that the deadline for appealing to the NAC had passed. But rather than prejudicing his defense, the NAC considered his appeal timely

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57 *Cody*, 2011 WL 2098202, at *16.

58 The staff stated that Evansen's response to information requests was received on Monday, June 13, 2011 while Evansen claims that he first faxed the response the previous Friday, June 10. Evansen also argues that the letter confirming the automatic June 2011 bar was sent on June 9, 2011 rather than the June 10, 2011 date cited by the Division.

filed on October 1, 2012. He further claims that the investigative staff improperly denied him discovery of the CRD Response. But there is no support for Evansen's contention that he was entitled to discovery under FINRA's rules after he failed to answer the complaint.[59]

Evansen further contends that the NAC orders to supplement the record and to extend the briefing deadlines demonstrated a deficiency in its decisional process. To the contrary, the NAC order to supplement the record demonstrated that FINRA's "procedures . . . seem to have worked as intended"[60] and confirm that the NAC conducted a de novo review of the evidence and Evansen's arguments.[61] It is the opinion of the NAC, not the Hearing Panel, that is the final FINRA action subject to our review.[62] He offers no reason to believe that extensions to the briefing schedule were improper or prejudiced his defenses to the Rule 8210 violations.[63]

Finally, on appeal to the Commission, Evansen asserts that the NAC decision was in retaliation for his May 21, 2013 letter about a former FINRA official or to cover-up wrongdoing by FINRA staff. But he offers no evidence that his letter motivated the NAC's decision, and as noted, the NAC's order to supplement the record demonstrates its de novo review of the evidence

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59 Under Rule 9251(d) and (a)(1), a respondent's answer in a disciplinary proceeding generally triggers an obligation to provide discovery of evidence "prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings." Here, it is undisputed that Evansen never filed an answer to trigger this discovery rule and there is no indication that the letter would have been covered by the rule if he had. Moreover, Rule 9251(g) states that a failure to make a document available does not give rise to a right of rehearing or amended decision "unless the [r]espondent establishes that the failure to make the [d]ocument available was not harmless error." Here, even if the letter were covered by Rule 9251, we do not find any evidence of prejudice because Evansen had already received this same letter from another FINRA department.

60 *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *15 (Nov. 15, 2003).

61 *Harry Friedman*, Exchange Act Release No. 64486, 2011 WL 1825025, at *7 & n.22 (citing authority) (May 3, 2011) ("[T]he NAC reviews the Hearing Panel's decision de novo and has broad discretion to modify [its] decisions and sanctions."). On appeal from a Hearing Panel decision, the NAC "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction." *Id.* & n.23.

62 *Erenstein*, 2007 WL 3306103, at *8; *see also Frank J. Custable, Jr.*, Exchange Act Release No. 33324, 51 SEC 855, 1993 WL 522322, at *7 n.22 (Dec. 10, 1993) ("Even if a member of the staff were biased, that would not mean that the NASD decision is biased.").

63 Evansen argues that amendments to the briefing schedule were unfair because the NAC had warned that further extensions would not be granted. But the NAC retained discretion to grant those extensions despite any prior warnings. *See* FINRA Rules 9322(a) and 9313(a)(2) (authorizing the NAC, and counsel to the NAC, to extend filing deadlines).

and Evansen's arguments.[64] In any case, our independent review cures any bias that may have existed below.[65] We have reviewed the record and Evansen's arguments and find that the record supports FINRA's findings of violation, and that Evansen was afforded fair procedures to challenge those findings. Evansen chose not to answer the disciplinary charges until after he defaulted and faced disciplinary consequences for his failures to do so.[66]

Accordingly, for the foregoing reasons, we find that Evansen engaged in the conduct found by FINRA, that such conduct violates Rule 8210, and that Rule 8210 is, and was applied in a manner, consistent with the purposes of the Exchange Act.

III. Sanction

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find, "having due regard for the public interest and the protection of investors," that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[67] As part of this review, we must consider any aggravating or mitigating factors,[68] and whether the sanctions imposed by FINRA are remedial and not punitive.[69] Though not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).[70]

The Sanction Guidelines state that "[a]ggregation or batching of violations may be appropriate for purposes of determining sanctions" and that "numerous, similar violations may

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64 It is well established that "[a]dverse rulings, by themselves, generally do not establish improper bias." *Mitchell M. Maynard*, Investment Advisers Act Release No. 2875, 2009 WL 1362796, at *9 (May 15, 2009) (citing *Scott Epstein*, Exchange Act Release No. 59238, 2009 WL 223611, at *18 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010)).

65 *Brokaw*, 2013 WL 6044123, at *15.

66 Parties should develop the record before the FINRA hearing panel rather than adducing it on appeal to the NAC or the Commission. *Cf. Goldstein*, 2014 WL 1494527, at *9 (finding that "requiring an associated person to submit to disciplinary proceedings before determining the scope of FINRA's authority to request information does not violate the fairness requirements of the Exchange Act," and that this requirement "serves an important public interest by promoting the development of a record at the SRO level and giving the SRO an opportunity to resolve disputes").

67 15 U.S.C. § 78s(e)(2). Evansen does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

68 *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

69 *See Paz*, 494 F.3d at 1065 ("The purpose of the order [must be] remedial, not penal.") (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)).

70 *John Joseph Plunkett,* Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

warrant higher sanctions since the existence of multiple violations may be treated as an aggravating factor."[71] The Sanction Guidelines also provide specific guidance for Rule 8210 violations. They state that a bar should be the standard sanction if the individual did not respond to a request in any manner or responded only after FINRA filed a complaint.[72] The Sanction Guidelines further state that a bar should be the standard sanction for a partial but incomplete response unless the individual "demonstrate[s] that the information provided substantially complied with all aspects of the request."[73]

The Sanction Guidelines describe several "principal considerations" for partial or untimely responses, including: the importance of the information requested from FINRA's perspective; the number of requests, the time the applicant took to respond, and the degree of regulatory pressure required to obtain a response; and, for a partial but incomplete response, whether the applicant "thoroughly explains valid reason[s] for the deficiencies."[74]

A. FINRA's imposition of a bar was neither excessive nor oppressive.

We sustain the sanction imposed by the NAC because we find that a bar is consistent with the considerations in the Sanction Guidelines and is neither excessive nor oppressive. As FINRA noted, Evansen's complete failure to respond to its OTR notices and his failure to respond to its information requests until after a complaint had been issued, each individually merit a bar under the Sanction Guidelines. Together with Evansen's failure to respond to disciplinary proceedings until after he was suspended or barred, these violations demonstrate Evansen's longstanding indifference to his Rule 8210 responsibilities and unwillingness to abide by basic prerequisites to association with any FINRA member firm.

The sanction analysis applied by FINRA was consistent with its Sanction Guidelines and with relevant Commission precedent. The Sanction Guidelines specifically consider the importance of the information sought; the number of notices and warnings, the degree of regulatory pressure, and the length of time required to obtain any responses; and the absence of any valid explanation for the violative conduct.

The information sought by FINRA was important. Each of the requests concerned an investigation of serious wrongdoing in customer accounts by Evansen. And contrary to Evansen's claims that his eventual responses to the information requests rendered FINRA's later OTR requests unimportant or moot, the Sanction Guidelines expressly indicate that the importance of any Rule 8210 request is assessed from FINRA's perspective. FINRA was entitled to require Evansen's on-the-record testimony to follow up on his written responses without having to justify or explain the need for the follow-up. FINRA's letters notifying him of the

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71 FINRA Sanction Guidelines at 4 (2013).

72 *Id.* at 33 & 33 n.1.

73 *Id.* at 33.

74 *Id.*

OTRs clearly stated that Evansen was obligated to appear under Rule 8210 and specifically indicated that their purpose was to discuss accounts of his former customers at Newbridge.

When Evansen did respond to FINRA's requests for information, he did so only after significant delay and after FINRA exerted significant regulatory pressure through two Rule 8210 requests, two suspension notices, and a letter warning him that full compliance was the only way to avoid a bar. Even then, Evansen did not send any response until the automatic effective date of the bar and more than six months after FINRA's first request. FINRA was never able to secure Evansen's attendance or testimony at any OTR, despite the possibility of disciplinary action under Rule 8210. Evansen did not respond to the disciplinary proceeding until after his failure to answer FINRA's two notices of the complaint resulted in a default decision and he was barred. We have stated repeatedly that an SRO "should not have to bring a disciplinary proceeding in order to obtain compliance with its rules governing investigations."[75] Evansen's failure to respond until a FINRA bar had already been imposed, and the extensive regulatory resources expended to reach that point, aggravate the seriousness of his violations.[76]

Evansen has not provided any valid explanation for his violations or for his failure to respond to these disciplinary proceedings until he defaulted. We already have rejected his notice and jurisdiction arguments, as well as his due process and procedural contentions. He has no excuse for his failure to comply with FINRA's requests or to follow FINRA procedures for contesting the violations, especially in light of the numerous opportunities FINRA afforded him to do so and the warnings it gave about the consequences of failing to respond.

Nor do we find any mitigating factors here. Evansen argues that he is not a threat to investors because he has not been sued since 2000, the Newbridge complaints have been resolved, he responded to FINRA's 2011 information requests, and he appeared for interviews with Florida regulators in 2009 and 2010. He further claims that his whistleblowing efforts reflect his attempts to protect investors. Although it was Newbridge, rather than Evansen, that was sued by the customers, his BrokerCheck record confirms that the complaints alleging misconduct in Evansen's Newbridge customer accounts resulted in settlements of $150,000, $125,000, and $37,500. And his refusal to cooperate with FINRA's investigation thwarted FINRA's ability to determine whether he should be subject to discipline based on those

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75 *Berger*, 2008 WL 4899010, at *8 (internal quotation omitted).

76 A partial but incomplete response merits a bar when, as in this case, the circumstances as a whole demonstrate a "willingness to defy the regulatory process and impede FINRA's investigation into potentially serious misconduct." *Goldstein*, 2014 WL 1494527, at *12; *cf. Houston,* 2011 WL 6392264, at *8 (remanding a bar based on a complete failure to respond when applicant responded to some Rule 8210 requests before the complaint was filed and submitted an answer to the disciplinary proceeding); *Plunkett*, 2013 WL 2898033, at *14 (finding that FINRA's sanction analysis did not take into account applicant's compliance with several earlier Rule 8210 requests during the same investigation). FINRA's Sanction Guidelines expressly indicate that failure to respond until after FINRA files a complaint, as here, triggers the presumption of a complete failure to respond.

complaints, thus undermining FINRA's ability to protect the public.[77] Evansen's self-professed willingness to expose misconduct by others does not demonstrate a public interest in permitting his association with a member firm or mitigate the seriousness of his violations.

Nor is the seriousness of Evansen's violative conduct mitigated by the age of this case. We note that the age of this case is partly a function of Evansen's own pattern of ignoring and delaying FINRA's investigation. His unwillingness to submit to FINRA interviews, procedures, or jurisdiction to respond to allegations of serious securities-related misconduct demonstrates his continuing unfitness for association with a FINRA member firm.

The NAC also found that Evansen's explanations for his failures to respond are evidence of a serious risk that he would engage in a similar pattern of delay and uncooperative conduct in any future association. We agree. For instance, Evansen asserted that his travels prevented him from responding and that FINRA had an obligation to provide him with personal service at an address that did not appear in the CRD records. In light of the multiple warnings and notices he received, these claims amount to little more than attempting to shift his burden to comply to FINRA and denying that Rule 8210's procedures and requirements apply to him. There is a serious risk that he would continue to do so in any future associations.[78]

B. FINRA's sanction is remedial and not punitive.

We find the bar remedial and not punitive. We have stressed that "FINRA must rely on Rule 8210 to obtain information . . . to carry out its investigations and fulfill its regulatory mandate" and its "obligation to police the activities of its members and associated persons."[79] Failure to respond to Rule 8210 requests "impedes [FINRA]'s ability to detect misconduct that threatens investors and markets."[80] It is therefore "critically important to the self-regulatory system that members and associated persons cooperate with [FINRA] investigations."[81]

Although Evansen does not profess a desire to be associated with a FINRA member firm, he could seek to associate absent a bar. His longstanding failure to cooperate demonstrates that permitting him to associate would present a continuing danger to the public interest in securing voluntary cooperation with investigations and, ultimately, detecting and preventing industry

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77 *Berger*, 2008 WL 4899010, at *7.

78 *See Paz Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *8 (Apr. 11, 2008) ("Because Mizrachi thus has demonstrated a disregard for his duty to . . . respond to requests sent to [his] CRD address[] while he is out of the country, NASD faces a great risk of being unable to obtain from Applicants information necessary for the protection of investors."), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

79 *CMG Institutional Trading*, 2009 WL 223617, at *15, *5 (quoting *Paz*, 2008 WL 1697153, at *4).

80 *Berger*, 2008 WL 4899010, at *4 (Nov. 14, 2008).

81 *Erenstein*, 316 F. App'x at 871.

misconduct. We find that the bar will protect the public by preventing Evansen from impeding regulatory investigations, and that it will serve as a deterrent to other securities professionals tempted to evade FINRA's investigations.[82]

Accordingly, for the foregoing reasons, we find that the sanction imposed on Evansen is neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue.[83]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

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82 *See Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (noting that deterrence may be considered as part of the overall remedial inquiry in determining sanctions).

83 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 75531 / July 27, 2015

Admin. Proc. File No. 3-15964

In the Matter of the Application of

DAVID KRISTIAN EVANSEN

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by FINRA against David Kristian Evansen is hereby sustained.

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. 75544 / July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16705

In the Matter of IFuture.com, Inc., Interlotto International Holdings, Inc., ISee3D, Inc., Kaw Acquisition Corp., and Lane Co. #7, 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 IFuture.com, Inc., Interlotto International Holdings, Inc., ISee3D, Inc., Kaw Acquisition Corp., and Lane Co. #7, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. IFuture.com, Inc. (CIK No. 1125680) is an Ontario corporation located in Toronto, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IFuture.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended September 29, 2000.

2. Interlotto International Holdings, Inc. (CIK No. 1373762) is a dissolved Nevada corporation located in Toronto, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Interlotto is

registered with the Commission pursuant to Exchange Act Section 12(g). Interlotto is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2007, and having not filed any annual reports.

3. ISee3D, Inc. (CIK No. 1050030) is a Canadian corporation located in Westmount, Quebec, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ISee3D is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F/R registration statement on July 13, 2000, which reported a net loss of over $1.19 million (Canadian) for the three months ended March 31, 2000.

4. Kaw Acquisition Corp. (CIK No. 1119176) is a permanently revoked Nevada corporation located in Westport, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Kaw Acquisition is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2003.

5. Lane Co. #7, Inc. (CIK No. 1347009) is a forfeited Delaware corporation located in Fairfield, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lane Co. #7 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, 2006, which reported a net loss of $7,000 from the company's November 2, 2005 inception to June 30, 2006.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4149 / July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16706

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

I.

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

II.

After an investigation, the Division of Enforcement alleges:

A. RESPONDENT

1. Uppal is 37 years old and is currently incarcerated at the Federal Correctional Institution in Morgantown, West Virginia. From at least July 2007 until September 2013, Uppal was the principal and sole member of Jefferson Smith Trading Co., LLC ("Jefferson Smith"), a Michigan corporation. Uppal described Jefferson Smith to investors as a hedge fund of which he was the general partner. Uppal represented to investors that he would use the proceeds of their investments in Jefferson Smith to buy and sell securities on their behalf, and at times he did in fact trade securities for Jefferson Smith investors. As such, Uppal was associated with an investment adviser from 2007 to 2013. Neither Uppal nor Jefferson Smith has ever been registered with the Commission in any capacity.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On August 14, 2014, Uppal pled guilty to one count of wire fraud in violation of Title 18 of the United States Code Section 1343 before the United States District Court for the Eastern District of Michigan, in United States v. Sachin Uppal, No. 14-cr-20354. On December 16, 2014, the Court entered a judgment against Uppal based on the wire fraud charge, sentenced him to 64 months imprisonment followed by 36 months of supervised release, and ordered him to pay restitution of $3,867,187 to the 14 victims of his fraudulent scheme.

3. The count of the criminal indictment to which Uppal pled guilty alleged, among other things, that Uppal devised and knowingly executed a scheme to obtain money and funds from Jefferson Smith 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 July 2007 to September 2013, Uppal perpetrated a scheme to defraud the Jefferson Smith 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.

III.

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

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

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

IV.

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

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

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

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

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75532 / July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16704

In the Matter of **MEAD JOHNSON NUTRITION COMPANY** **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 Mead Johnson Nutrition Company ("Mead Johnson" 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 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:

[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.

Summary

1. This matter concerns violations of the books and records and internal controls provisions of the Foreign Corrupt Practices Act ("FCPA") by Mead Johnson. The violations, which occurred in connection with the operations of Mead Johnson's subsidiary in China, took place up through 2013.

2. The conduct at issue relates primarily to the misuse of marketing and sales funds in China. Despite prohibitions in the FCPA and Mead Johnson's internal policies, certain employees of Mead Johnson's majority-owned subsidiary in China, Mead Johnson Nutrition (China) Co., Ltd. ("Mead Johnson China"), made improper payments to certain health care professionals ("HCPs") at state-owned hospitals in China to recommend Mead Johnson's nutrition products to, and provide information about, expectant and new mothers. These payments were made to assist Mead Johnson China in developing its business. For the period from 2008 through 2013, Mead Johnson China paid approximately $2,070,000 to HCPs in improper payments and derived profits therefrom of approximately $7,770,000.

3. Mead Johnson China failed to accurately reflect the improper payments in its books and records. Mead Johnson China's books and records were consolidated into Mead Johnson's books and records, thereby causing Mead Johnson's consolidated books and records to be inaccurate. Mead Johnson failed to devise and maintain an adequate system of internal accounting controls over Mead Johnson China's operations sufficient to prevent and detect the improper payments that occurred over a period of years.

Respondent

4. **Mead Johnson** is a Delaware corporation headquartered in Glenview, Illinois. The company's common stock has been registered with the Commission pursuant to Section 12(b) of the Exchange Act and listed on the NYSE since February 11, 2009. The company is a global manufacturer and marketer of infant formula and child nutrition products. Mead Johnson has subsidiaries throughout the world, including Mead Johnson China, and the financial results of its subsidiaries are consolidated into the financial statements of Mead Johnson. Mead Johnson's total revenues for 2013 were $4.2 billion.

Facts

5. Mead Johnson has established internal policies to comport with the FCPA and local laws, and to prevent related illegal and unethical conduct. Mead Johnson's internal policies include prohibitions against providing improper payments and gifts to HCPs that would influence their recommendation of Mead Johnson's products.

6. Mead Johnson began doing business in China in the 1990s, and in 1995 constructed a manufacturing plant in Guangzhou, China. From 2008 through 2013, Mead Johnson China's geographic presence grew from 28 to 241 cities in China.

Mead Johnson China's Improper Payments to HCPs

7. A portion of Mead Johnson China's marketing efforts during the 2008 to 2013 period was through the medical sector, which included marketing through healthcare facilities and HCPs. Despite the prohibitions in the FCPA and Mead Johnson's internal policies, certain employees of Mead Johnson China improperly compensated HCPs, who were foreign officials under the FCPA, to recommend Mead Johnson's infant formula to, and to improperly provide contact information for, expectant and new mothers.

8. Funding for those payments came from funds generated by discounts provided to Mead Johnson China's network of distributors.

9. Mead Johnson China uses third-party distributors to market, sell and distribute product in China. Some of Mead Johnson China's funding of its marketing and sales practices were effected through discounts provided to the distributors. Pursuant to contracts between Mead Johnson China and its distributors, Mead Johnson China provided the distributors a discount for Mead Johnson's products that was allocated for, among other purposes, funding certain marketing and sales efforts of Mead Johnson China. This form of funding was referred to as "Distributor Allowance."

10. Although the Distributor Allowance contractually belonged to the distributors, certain members of Mead Johnson China's workforce exercised some control over how the money was spent, and certain Mead Johnson China employees provided specific guidance to distributors concerning the use of the funds. Mead Johnson China staff also maintained certain records related to Distributor Allowance expenditure by distributors. In addition, Mead Johnson China used some of the funds to reimburse Mead Johnson China's sales personnel for a portion of their marketing and other expenditures on behalf of Mead Johnson China.

11. Mead Johnson China's sales personnel marketed product through medical channels, including healthcare facilities. These sales personnel encouraged HCPs at the healthcare facilities to recommend Mead Johnson products to mothers and to collect contact information of the mothers for Mead Johnson China's marketing purposes. To incentivize HCPs to recommend Mead Johnson product and collect information from the mothers, these sales personnel improperly paid HCPs, providing cash and other incentives, contrary to Mead Johnson's internal policies. The Distributor Allowance was the funding source for the cash and other incentives paid to HCPs.

Mead Johnson Failed to Make and Keep Accurate Books and Records and Devise and Maintain an Adequate Internal Control System

12. The Distributor Allowance funds contractually belonged to the distributors, but were in large part under Mead Johnson China's control. Mead Johnson China's employees

maintained certain records related to the Distributor Allowance, including records reflecting payments to HCPs. However, those records were incomplete and did not reflect that a portion of Distributor Allowance was being used contrary to Mead Johnson's policies.

13. Mead Johnson failed to devise and maintain an adequate system of internal controls over the operations of Mead Johnson China to ensure that Mead Johnson China's method of funding marketing and sales expenditures through its distributors was not used for unauthorized purposes, such as the improper compensation of HCPs. The use of the Distributor Allowance to improperly compensate HCPs was contrary to management's authorization and Mead Johnson's internal policies. Mead Johnson failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that Mead Johnson China's funding of marketing and sales expenditures through third-party distributors was done in accordance with management's authorization.

Internal Investigation and Remedial Efforts

14. In 2011, Mead Johnson received an allegation of possible violations of the FCPA in connection with the Distributor Allowance in China. In response, Mead Johnson conducted an internal investigation, but failed to find evidence that Distributor Allowance funds were being used to make improper payments to HCPs. Thereafter, Mead Johnson China discontinued Distributor Allowance funding to reduce the likelihood of improper payments to HCPs, and discontinued all practices related to compensating HCPs by 2013. Mead Johnson did not initially self-report the 2011 allegation of potential FCPA violations and did not thereafter promptly disclose the existence of this allegation in response to the Commission's inquiry into this matter.

15. As a result of its second internal investigation commenced in 2013, Mead Johnson undertook significant remedial measures including: termination of senior staff at Mead Johnson China; updating and enhancing financial accounting controls; significantly revising its compliance program; enhancing Mead Johnson's compliance division, adding positions including a second senior-level position; establishing new business conduct controls and third party due-diligence procedures and contracts; establishing a unit in China that monitors compliance and controls in China on an on-going basis; and providing employees with a method to have immediate access the company's policies and requirements.

16. Despite not self-reporting the 2011 allegation of potential FCPA violations or promptly disclosing the existence of this allegation in response to the Commission's inquiry into this matter, Mead Johnson subsequently provided extensive and thorough cooperation. Mead Johnson voluntarily provided reports of its investigative findings; shared its analysis of documents and summaries of witness interviews; and responded to the Commission's requests for documents and information and provided translations of key documents. These actions assisted the Commission staff in efficiently collecting valuable evidence, including information that may not have been otherwise available to the staff.

Legal Standards and Violations

17. Under Section 21C(a) of the Exchange Act, the Commission may impose a cease-and-desist order upon any person who is violating, has violated, or is about to violate any provision of the Exchange Act or any regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such a violation.

18. Section 13(b)(2)(A) of the Exchange Act requires every issuer with a class of securities registered pursuant to Section 12 of the Exchange Act to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

19. Section 13(b)(2)(B) of the Exchange Act requires such issuers to, among other things, devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that the transactions are (i) executed in accordance with management's general or specific authorization; (ii) recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles ("GAAP") or any other applicable criteria; and (iii) recorded as necessary to maintain accountability for assets.

20. Up through 2013, certain Mead Johnson China employees made payments to HCPs using funds maintained by third parties. These funds and payments from the funds were not accurately reflected on Mead Johnson China's books and records. The books and records of Mead Johnson China were consolidated into Mead Johnson's books and records. As a result of the misconduct of Mead Johnson China, Mead Johnson failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected its transactions as required by Section 13(b)(2)(A) of the Exchange Act.

21. Up through 2013, Mead Johnson failed to devise and maintain an adequate system of internal accounting controls to ensure that Mead Johnson China's method of funding marketing and sales expenditures through third-party distributors was not used for unauthorized purposes, such as improperly compensating Chinese HCPs to recommend Mead Johnson's products. As a result of such failure, the improper payments to HCPs occurred contrary to management's authorizations, in violation of Section 13(b)(2)(B) of the Exchange Act.

IV.

On the basis of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the Respondent's Offer.

Accordingly, it is hereby ORDERED that:

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

B. Pursuant to Section 21(B)(a)(2) of the Exchange Act, Mead Johnson shall, within ten (10) days of entry of this Order, pay disgorgement of $7,770,000, prejudgment interest of $1,260,000, and a civil monetary penalty in the amount of $3,000,000 for a total payment of $12,030,000 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;

(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 Mead Johnson Nutrition Company 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 Karen L. Martinez, Regional Director, Salt Lake Regional Office, Securities and Exchange Commission, 351 South West Temple, Suite 6.100, Salt Lake City, Utah 84101.

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. 75537 / July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16354

In the Matter of **David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, RTAG Inc. d/b/a Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND ORDERING CONTINUATION OF PROCEEDINGS AGAINST JOSE F. CARRIO**

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 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Ordering Continuation of Proceedings against Jose F. Carrio ("Carrio").[1]

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[1]On January 23, 2015, the Commission instituted public administrative and cease-and-desist proceedings pursuant to:

(a) Sections 15(b) and 21C of the Exchange Act against Carrio and co-respondents Carrio, Karasik & Associates, LLP ("CKA"), and Michael J. Salovay ("Salovay");

(b) Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Exchange Act against co-respondents David B. Havanich, Jr. ("Havanich"), Carmine A. DellaSala ("DellaSala"), and Matthew D. Welch ("Welch");

(c) Sections 15(b) and 21C of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against co-respondents Richard Hampton Scurlock, III ("Scurlock") and Dennis K. Karasik ("Karasik"); and,

II.

Carrio 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, Carrio consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Ordering Continuation of Proceedings Against Jose F. Carrio ("Order"), as set forth below.

III.

On the basis of this Order and Carrio's Offer, the Commission finds that:[2]

A. RESPONDENTS

1. Havanich is 49 years old and resides in Jupiter, Florida. He was the co-founder, president, and director of Diversified Energy Group, Inc. ("Diversified") and is the president and director of St. Vincent de Paul Childrens Foundation Inc. ("St. Vincent"), a non-operating, non-profit corporation.

2. DellaSala is 54 years old and resides in Jupiter, Florida. DellaSala was the co-founder, vice president of business development, and director of Diversified and is the vice president and director of St. Vincent. DellaSala previously held a series 3 commodities license at various times between 1988 and 2002 while associated with 10 different commodities firms. In addition, DellaSala previously was a registered representative of SEC-registered broker dealers Meyers Pollock Robbins, Inc. and Joseph Charles & Assoc., Inc. between February 1997 and May 1997. The state of Kansas issued a cease-and-desist order against DellaSala as president of Apex Petroleum, Inc. ("Apex") in December 1995 in connection with the offer and sale of Apex securities. In the Matter of Apex Petroleum, Inc., et. al, Docket No. 96E046 (December 20, 1995).

3. Welch is 35 years old and resides in Gainesville, Florida. He was the vice president of investor relations of Diversified and is a board member of St. Vincent. Welch previously held a series 3 commodities license from approximately 2000-2002.

4. Scurlock is 38 years old and resides in Lexington, Kentucky. Scurlock is the owner and president, and therefore an associated person of, RTAG, a Kentucky registered

(c) Sections 15(b) and 21C of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against co-respondents Richard Hampton Scurlock, III ("Scurlock") and Dennis K. Karasik ("Karasik"); and,

(d) Sections 15(b) and 21C of the Exchange Act and Section 203(e) of the Advisers Act against RTAG Inc. d/b/a Retirement Tax Advisory Group ("RTAG").

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

investment adviser. Between 1999 and 2005, in ascending order, Scurlock was a registered representative of SEC-registered broker-dealers IDS Life Insurance Company ("IDS Life"), Ameriprise Financial Services, Inc., Ameritas Investment Corp., and Synergy Investment Group, LLC.

5. RTAG is a Kentucky corporation and a Kentucky registered investment adviser. Scurlock is the owner and president of RTAG.

6. Carrio is 50 years old and resides in York, Pennsylvania. He is the co-founder and 50% owner of CKA, a limited liability partnership doing business in Baltimore County, Maryland. Carrio was not registered as a broker-dealer nor associated with a registered broker-dealer during the relevant period. Between 1989 and 2006, in ascending order, Carrio was a registered representative of SEC-registered broker-dealers First Investors Corporation, The Prudential Insurance Company of America, Pruco Securities Corporation, Equity Services, Inc., and New England Securities. On April 1, 2014 the Securities Division of the Office of the Maryland Attorney General ("Maryland AG") issued a consent order against Carrio in connection with his offer and sale of Diversified's bonds ordering that he cease and desist from violating certain of Maryland's anti-fraud and registration statutes and that he pay a $1,499,315.87 penalty which was waived based on his sworn financial statements. The consent order also permanently barred Carrio from engaging in the securities or investment advisory business in Maryland. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

7. Karasik is 60 years old and resides in Reisterstown, Maryland. He is the co-founder and 50% owner of CKA. Between 1984 and 2013, in ascending order, Karasik was a registered representative of SEC-registered broker-dealers NEL Equity Services Corporation, MML Investors Services, Inc., VIP Financial Companies, Inc., Equity Services Inc., New England Securities, Multi-Financial Securities Corporation, and H. Beck, Inc. Between 2009 and 2013, Karasik was an investment adviser representative of, and associated with, first Multi-Financial Securities Corporation and later H. Beck, Inc, both dually registered as broker-dealers and investment advisers. Karasik was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and CKA. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).[3] On July 8, 2014, by consent, FINRA imposed a bar from association with any FINRA member firm against Karasik in connection with Karasik's offer and sale of Diversified's bonds. Dennis Keith Karasik, Letter of Acceptance, Waiver and Consent, No. 2012034750401 (Jul. 8, 2014).

8. CKA is a limited liability partnership doing business in Baltimore County, Maryland. CKA states it is an independent financial services firm for wealth management issues. Carrio and Karasik each own 50% of CKA. CKA was not registered as a broker-dealer or an investment advisor during the relevant period. CKA was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and Karasik. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

9. Salovay is 44 years old and resides in Pittsburgh, Pennsylvania. Salovay's current employment status is unknown. Between 1997 and 2007, in ascending order, Salovay was

[3]In addition, the Maryland consent order revoked Karasik's Maryland investment adviser representative registration.

a registered representative of SEC-registered broker-dealers IDS Life, American Express Financial Advisors Inc., Metropolitan Life Insurance Company, Metlife Securities Inc., First Security Investments, Inc., Midsouth Capital, Inc., Nations Financial Group, Inc. and Natcity Investments, Inc. In October 2008, he settled an action with FINRA related to his failure to disclose material information on a Form U4 by agreeing to a nine-month suspension and a $5,000 fine.

B. OTHER RELEVANT ENTITIES

1. Diversified was a Delaware corporation founded by Havanich and DellaSala in 2006 and located in Tequesta, Florida. Diversified was dissolved on April 28, 2014. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and commodities trading in the futures market. Diversified filed nine Form Ds with the Commission between 2007 and 2012 claiming exemptions under Rules 504 and 506 of the Securities Act of 1933 ("Securities Act") for approximately $19 million in stock and bonds in nine purportedly separate offerings but did not file Forms D for an additional $8 million in stock and bonds in five other purported separate offerings. Diversified has never been registered with the Commission nor registered any offering of securities under the Securities Act or a class of securities under the Exchange Act.

C. SUMMARY

1. Between 2006 and 2012, Diversified and its principal officers, Havanich, DellaSala, and Welch, raised at least $17.4 million from approximately 440 investors nationwide through a series of fraudulent, unregistered offerings of stock and bonds. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and also engaged in commodities trading in the futures market. Ultimately, as its disclosed use of proceeds expanded, Diversified used a portion of the investor funds to buy fractional interests in oil and gas wells, cattle, a hydrogen device that purported to increase gas mileage on vehicles, trade commodities contracts, and invest in real estate. Diversified, Havanich, DellaSala, and Welch made material misrepresentations and omissions about Diversified's financial performance and use of industry experts and technologies in Diversified's offering material and correspondence to investors. Havanich, DellaSala, and Welch also touted their affiliation with a charity organization in Diversified's offering materials but that charity never had any substantive charitable activities.

2. Starting in 2009, Diversified also hired unregistered sales agents to sell Diversified's bonds paying them commissions of 5% or 10% of the investor proceeds. Diversified and DellaSala employed the unregistered sales agents to raise money for Diversified even after receiving an email and other correspondence from Diversified's outside counsel detailing the limits on Diversified's use of unregistered sales agents. Diversified's top grossing independent sales agents were (1) Scurlock and his state registered investment advisory firm RTAG, (2) Carrio, Karasik, and their limited liability partnership CKA, and (3) Salovay. Collectively, they earned approximately $985,000 in transaction-based compensation in connection with their sales activities.

D. OFFER AND SALE OF UNREGISTERED SECURITIES

1. Beginning in 2006 and continuing through approximately 2008, Diversified submitted to potential investors one or more versions of a private placement memoranda ("PPM"), offering to sell Diversified common stock at per share prices ranging from 20 cents to $1.55 (the "Stock Offerings").

2. As a result of the Stock Offerings, Diversified raised approximately $910,304 from 160 investors both inside and outside the State of Florida.

3. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Stock Offerings.

4. No exemption from registration existed with respect to the Stock Offerings.

5. Between 2006 and 2008, there was no period of six months or more in which there was no offer or sale of Diversified's stock.

6. Beginning in approximately 2009 and continuing through 2012, Diversified submitted to potential investors various versions of a brochure, PPM, and business plan as part of offers to sell Diversified bonds with maturities between 12 and 24 months and paying annual interest rates between 8% and 10.25% (the "Bond Offerings"). Some of the bonds included an option to purchase Diversified common stock.

7. As a result of the Bond Offerings, Diversified raised approximately $16.5 million from 280 investors both inside and outside the State of Florida.

8. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Bond Offerings.

9. No exemption from registration existed with respect to the Bond Offerings.

10. Between 2009 and 2012, there was no period of six months or more in which there was no offer or sale of Diversified's bonds.

11. DellaSala, Havanich, and Welch participated in the Stock Offerings and the Bond Offerings by undertaking the offerings, by drafting and reviewing the brochures and business plans, reviewing and approving the PPMs, engaging sales agents to sell the bonds, facilitating Diversified's website, participating in presentations to potential investors, and soliciting potential investors for at least one stock offering using "lead lists." In addition, Havanich and DellaSala touted Diversified's securities on radio broadcasts, where Havanich appeared under his own name and DellaSala appeared under the alias "Jim Clark."

E. DIVERSIFIED AND DELLASALA'S USE OF UNREGISTERED SALES AGENTS

1. Starting in April 2009, Diversified had a formal contract, titled Finder's Fee Agreement ("Finders agreement") that it used to employ unregistered sales agents to act as commissioned sales agents.

2. The unregistered sales agents solicited investors and received a commission of either 5% or 10% from Diversified based on the amount invested.

3. Diversified participated in the unregistered sales agents' solicitation of investment in Diversified bonds by entering into written agreements with the unregistered sales agents, paying them a commission, and supplying them with brochures, PPMs, and business plans relating to Diversified bonds. DellaSala participated in the unregistered sales agents' solicitation of investment in Diversified bonds by paying them commissions in his role as a principal of Diversified.

4. In connection with their efforts to obtain purchasers for Diversified bonds, the unregistered sales agents used the mails or means or instrumentality of interstate commerce.

5. The unregistered sales agents were either not associated with any registered brokers or dealers or were engaged in sales activities that occurred outside and without the knowledge of the broker-dealers with which they were associated.

F. THE UNREGISTERED SALES AGENTS' INVOLVEMENT IN THE SALE OF DIVERSIFIED'S BONDS

1. Scurlock and RTAG

a. Scurlock entered into a Finders agreement with Diversified in December 2009. That agreement stated Scurlock would be paid a 5% commission for each investor that purchased Diversified's bonds although in practice he was actually paid a 10% commission.

b. While RTAG did not enter into a Finders agreement with Diversified, starting in February 2012, Diversified paid commissions to RTAG instead of directly to Scurlock.

c. Between January 2010 and March 2012, Scurlock recommended Diversified's bonds to RTAG's clients and other investors, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in Diversified bonds, fielded investor inquiries, and handled investor funds.

d. Scurlock and RTAG collectively received approximately $448,000 in transaction-based compensation for selling Diversified bonds to approximately 50 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

2. Carrio, Karasik, and CKA

a. In November 2009, Carrio entered into a Finders agreement with Diversified that paid him a 10% commission for each investor that purchased Diversified's bonds.

b. While Karasik and CKA did not enter into Finders agreements with Diversified, starting in December 2010, Carrio and CKA began equally sharing Diversified commissions. Karasik received either all or a supermajority of the Diversified commissions paid to CKA as some of the commissions were used to pay CKA expenses.

c. Between December 2009 and March 2012 Carrio, Karasik, and CKA recommended the bonds to CKA clients, provided prospective investors with offering documents, discussed the returns of the bond offerings with prospective investors, weighed in on the merits of the bond investment, provided and directed prospective investors to complete the paperwork necessary for an investment in the bonds, and, as to Karasik and CKA, handled investor funds.

d. Carrio, Karasik, and CKA collectively received approximately $434,974 in transaction-based compensation for selling Diversified's bonds to approximately 40 investors.

e. Between December 2009 and March 2012, Carrio and CKA were not registered as broker-dealers or associated with a registered broker-dealer.

f. Between December 2010 and March 2012, Karasik's activities occurred outside and without the knowledge of the broker-dealers with which he was associated during the relevant time.

3. Salovay

a. Salovay entered into a Finders agreement with Diversified in July 2009. That agreement provided that Salovay would be paid a 10% commission for each investor that purchased Diversified bonds.

b. Between August 2009 and March 2012, Salovay recommended Diversified's bonds to his insurance clients, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in the bonds, fielded investor inquiries, and handled investor funds.

c. Salovay received approximately $101,790 in transaction-based compensation for selling Diversified's bonds to approximately 20 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

G. MISREPRESENTATIONS AND OMISSIONS TO INVESTORS

During the course of the Bond Offerings, Diversified, Havanich, DellaSala, and Welch made numerous false and misleading statements and omissions, many of which are described below. At the time these statements and omissions were made, Diversified, Havanich, DellaSala, and Welch either knew, or should have known, or were severely reckless in not knowing their false and misleading nature.

1. Misrepresentations and Omissions Concerning Diversified's Financial Performance

a. The PPMs Respondents distributed beginning in 2009 and continuing through 2010 list "Operating Deficits" as one of several risk factors, stating: "The expenses of operating the Company may exceed its income, thereby requiring that the difference be paid out of the Company's capital, reducing the Company's investments and potential for profitability." Diversified omitted disclosures regarding Diversified's current or past profitability, stating only that "[a]dditional financial information is available on a confidential basis upon request." In fact, Diversified's incurring of losses was not a mere contingency. To the contrary, Diversified had suffered steadily rising losses from its inception, as described below:

YEAR	NET INCOME (LOSS)
2006	(31,200)
2007	(257,975)
2008	(564,347))
2009	(672,749)
2010	(1,114,901)

b. While Diversified's October 2011 PPM disclosed that Diversified had recently sustained losses, it omitted the five-year history of losses.

c. In addition, Diversified's brochures paint a rosy picture of the company, claiming consistently over a three-year period of deepening insolvency that its bonds would produce "reliable monthly cash flow," were backed by "continually growing" assets, and were "[s]uperior to traditional fixed income instruments," while omitting that Diversified's survival depended upon its ability to borrow greater and greater sums.

d. In a brochure distributed in 2009 to prospective bond purchasers:

i. Diversified claimed one of Diversified's "Revenue Sources" was a "Hedge Account (for asset protection)," which earned an average monthly return on investment of 14.73%.

ii. Diversified represented that as of June 2009, Diversified had $2,126,269 in "Oil and Gas Assets," and that its "Asset Allocation" was 39% "Oil and Gas Acquisition" and 61% "Hedging Portfolio," implying that its Hedging Portfolio was worth $3,325,703.

iii. Diversified presented a bar chart comparing the three year returns of the "Trading Strategy History" with the returns on the "S&P." According to the chart, the trading strategy returned 82.70% in 2006, 138.70% in 2007, and 29.4% in 2008, for a three year average of 83.60%.

e. In brochures distributed in 2010, Diversified included a chart showing Diversified's "4 YR Average Strategy History" producing an average annual return of 90.9%.

f. In brochures distributed in 2010 and 2011, Diversified included a chart showing Diversified's "5 YR Average Strategy History" producing an average annual return of 79.4%

g. As Diversified, Havanich, DellaSala, and Welch knew, the representations in the brochures distributed in 2009 and 2010 were false and misleading as to material matters. In fact, in 2006 and 2007, Diversified had no hedging assets and had engaged in no commodities trading. In 2008, Diversified never had more than $6500 in hedging assets and Diversified's portfolio had an annual return of -95%. During June 2009, Diversified had far less than $3,325,703 in its hedging portfolio—during this period the value of the Diversified portfolio ranged from $38,000 to $75,000.

h. On March 30, 2010, Welch signed and sent to at least 9 individuals in Pennsylvania who had bought Diversified bonds a letter stating: "Due to the tremendous demand for [Diversified] Bonds, and the favorable financial position in which the company finds itself, management has decided to 'call' the existing bonds and is providing you a complete repayment" of principal and interest. This statement was false and misleading:

i. as of March 30, 2010, Diversified was not in a "favorable" financial condition but had been suffering significant and increasing losses since its inception;

ii. Diversified was not calling all of its bonds, as the letter implied, but rather was only calling bonds sold to some Pennsylvania investors; and

iii. Diversified's motivation for calling the bonds was not related to the demand for Diversified's bonds or Diversified's financial condition; rather, Diversified called the bonds because Pennsylvania regulatory authorities had raised questions regarding the legality of Diversified's sale of bonds to Pennsylvania residents.

i. Within approximately one month, several of the Pennsylvania investors reinvested their returned capital and some later invested additional funds.

2. <u>Misrepresentations Concerning Diversified's Use of Industry Experts and Technologies</u>

a. In business plans distributed to prospective investors between 2006 and 2011, Diversified stated, "Diversified will from time to time retain the advice and recommendation of experts based on the prospects we are looking at. ... [T]he company will look to hire the best qualified individuals to evaluate each new prospect before we make an investment."

b. In business plans distributed to prospective investors between at least 2009 and 2011, Diversified stated, "[t]he key is working with *our geologists* and industry partners to find the best prospects that meet the companies risk to reward ratio." (emphasis added).

c. Diversified's website stated that its business strategy includes, among other things, acquiring "proven producing properties which meet the standards of management and *our* independent reservoir engineering firm." (emphasis added).

d. In several 2009 and 2010 versions of Diversified's investor power point presentations, shown at investor summits in various cities and led by Havanich, DellaSala, and Welch, Diversified included the names of an independent geologist and a reservoir engineering firm as part of its "independent team."

e. In a business plan provided to a mid-2009 investor, Diversified stated, "[w]e utilize advanced 3-D seismic imaging, drilling and completion technologies to systematically evaluate domestic onshore oil and natural gas reserves." Later Diversified business plans utilized similar language until late 2010 when the language was ultimately changed to read, "...Diversified Energy Group focuses its acquisition and development activities in provinces where we believe technology and the knowledge of our technical staff can effectively maximize return and reduce risk...."

f. Diversified stated in each of its marketing brochures that it had "[a]n Experienced Location and Acquisition Team boasting a proven track record with such companies as Chesapeake Energy, Marathon Oil, Union Pacific, Hess and Torch Energy, to name a few."

g. The foregoing statements were false and misleading. In fact:

i. Diversified did not hire geologists or a reservoir engineering firm as represented to evaluate the oil and gas wells in which it invested. Diversified made at least 93 separate investments in at least 44 oil and gas prospects between 2006 and 2011, the majority of which were in producing oil and gas wells. While Diversified did retain a geologist in early 2007, that geologist only provided Diversified with 15 reports related to *non-producing* oil and gas prospects and it did not retain an independent reservoir engineering firm in connection with any of its investments;

ii. Diversified never had 3-D seismic imaging, drilling and completion technologies;

iii. Diversified did not have a technical staff; and,

iv. DellaSala, Havanich, and Welch were the sole members of Diversified's "location and acquisition team" and they had never worked with any of the major energy companies listed in the brochures.

H. HAVANICH, DELLASLA, AND WELCH TOUTED THEIR AFFILIATION WITH ST. VINCENT

1. In September 2006, shortly before the start of Diversified's capital raising activities, Havanich and DellaSala created St. Vincent. St. Vincent has no relationship to the St. Vincent de Paul Catholic voluntary organization.

2. In Diversified's business plans, Diversified described St. Vincent as "a non-profit corporation to benefit children in need around the world," and described DellaSala and Havanich as officers and directors of St. Vincent, and Welch as member of St. Vincent's board.

3. St. Vincent never raised any money for children or had any substantive charitable activities.

I. VIOLATIONS

As a result of the conduct described above, Carrio willfully violated Section 15(a) of the Exchange Act, which makes it unlawful for any broker or dealer to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless such broker or dealer is registered or associated with a registered broker-dealer.

IV.

Pursuant to his Offer, Carrio agrees that disgorgement is appropriate, and further agrees to additional proceedings in this proceeding to determine (a) the amount of such disgorgement, plus prejudgment interest if ordered, and (b) whether a civil penalty is appropriate, and the amount of any such penalty, pursuant to Sections 21B and 21C of the Exchange Act. In connection with such additional proceedings, Carrio agrees: (a) he will be precluded from arguing that he did not violate the federal securities laws described in this Offer; (b) he may not challenge the validity of this Offer; (c) solely for the purposes of such additional proceedings, the allegations of the Offer 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 affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.

V.

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 Carrio's Offer, and to continue proceedings to determine the amount of disgorgement and civil penalties.

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

A. Carrio cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Carrio be, and hereby is:

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

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

C. Any reapplication for association by Carrio 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 Carrio, 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. Carrio shall pay disgorgement, and additional proceedings shall be held to determine (i) the amount of such disgorgement, plus prejudgment interest if ordered, and (ii) whether a civil penalty is appropriate, and the amount of any such penalty.

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. 75538 / July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16354

In the Matter of **David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, RTAG Inc. d/b/a Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND ORDERING CONTINUATION OF PROCEEDINGS AGAINST CARRIO, KARASIK & ASSOCIATES, LLP**

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 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Ordering Continuation of Proceedings against Carrio, Karasik & Associates, LLP ("CKA").

II.

CKA 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 CKA and the subject matter of these proceedings, which are admitted, CKA consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Ordering Continuation of Proceedings Against Carrio, Karasik & Associates, LLP ("Order"), as set forth below.[1]

III.

On the basis of this Order and CKA's Offer, the Commission finds that:[2]

A. RESPONDENTS

1. Havanich is 49 years old and resides in Jupiter, Florida. He was the co-founder, president, and director of Diversified Energy Group, Inc. ("Diversified") and is the president and director of St. Vincent de Paul Childrens Foundation Inc. ("St. Vincent"), a non-operating, non-profit corporation.

2. DellaSala is 54 years old and resides in Jupiter, Florida. DellaSala was the co-founder, vice president of business development, and director of Diversified and is the vice president and director of St. Vincent. DellaSala previously held a series 3 commodities license at various times between 1988 and 2002 while associated with 10 different commodities firms. In addition, DellaSala previously was a registered representative of SEC-registered broker dealers Meyers Pollock Robbins, Inc. and Joseph Charles & Assoc., Inc. between February 1997 and May 1997. The state of Kansas issued a cease-and-desist order against DellaSala as president of Apex Petroleum, Inc. ("Apex") in December 1995 in connection with the offer and sale of Apex securities. In the Matter of Apex Petroleum, Inc., et. al, Docket No. 96E046 (December 20, 1995).

3. Welch is 35 years old and resides in Gainesville, Florida. He was the vice president of investor relations of Diversified and is a board member of St. Vincent. Welch previously held a series 3 commodities license from approximately 2000-2002.

4. Scurlock is 38 years old and resides in Lexington, Kentucky. Scurlock is the owner and president, and therefore an associated person of, RTAG, a Kentucky registered investment adviser. Between 1999 and 2005, in ascending order, Scurlock was a registered

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[1]On January 23, 2015, the Commission instituted public administrative and cease-and-desist proceedings pursuant to:

(a) Sections 15(b) and 21C of the Exchange Act against CKA and co-respondents Jose F. Carrio ("Carrio") and Michael J. Salovay ("Salovay");

(b) Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Exchange Act against co-respondents David B. Havanich, Jr. ("Havanich"), Carmine A. DellaSala ("DellaSala"), and Matthew D. Welch ("Welch");

(c) Sections 15(b) and 21C of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against co-respondents Richard Hampton Scurlock, III ("Scurlock") and Dennis K. Karasik ("Karasik"); and,

(d) Sections 15(b) and 21C of the Exchange Act and Section 203(e) of the Advisers Act against RTAG Inc. d/b/a Retirement Tax Advisory Group ("RTAG").

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

representative of SEC-registered broker-dealers IDS Life Insurance Company ("IDS Life"), Ameriprise Financial Services, Inc., Ameritas Investment Corp., and Synergy Investment Group, LLC.

5. RTAG is a Kentucky corporation and a Kentucky registered investment adviser. Scurlock is the owner and president of RTAG.

6. Carrio is 50 years old and resides in York, Pennsylvania. He is the co-founder and 50% owner of CKA, a limited liability partnership doing business in Baltimore County, Maryland. Carrio was not registered as a broker-dealer nor associated with a registered broker-dealer during the relevant period. Between 1989 and 2006, in ascending order, Carrio was a registered representative of SEC-registered broker-dealers First Investors Corporation, The Prudential Insurance Company of America, Pruco Securities Corporation, Equity Services, Inc., and New England Securities. On April 1, 2014 the Securities Division of the Office of the Maryland Attorney General ("Maryland AG") issued a consent order against Carrio in connection with his offer and sale of Diversified's bonds ordering that he cease and desist from violating certain of Maryland's anti-fraud and registration statutes and that he pay a $1,499,315.87 penalty which was waived based on his sworn financial statements. The consent order also permanently barred Carrio from engaging in the securities or investment advisory business in Maryland. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

7. Karasik is 60 years old and resides in Reisterstown, Maryland. He is the co-founder and 50% owner of CKA. Between 1984 and 2013, in ascending order, Karasik was a registered representative of SEC-registered broker-dealers NEL Equity Services Corporation, MML Investors Services, Inc., VIP Financial Companies, Inc., Equity Services Inc., New England Securities, Multi-Financial Securities Corporation, and H. Beck, Inc. Between 2009 and 2013, Karasik was an investment adviser representative of, and associated with, first Multi-Financial Securities Corporation and later H. Beck, Inc, both dually registered as broker-dealers and investment advisers. Karasik was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and CKA. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).[3] On July 8, 2014, by consent, FINRA imposed a bar from association with any FINRA member firm against Karasik in connection with Karasik's offer and sale of Diversified's bonds. Dennis Keith Karasik, Letter of Acceptance, Waiver and Consent, No. 2012034750401 (Jul. 8, 2014).

8. CKA is a limited liability partnership doing business in Baltimore County, Maryland. CKA states it is an independent financial services firm for wealth management issues. Carrio and Karasik each own 50% of CKA. CKA was not registered as a broker-dealer or an investment advisor during the relevant period. CKA was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and Karasik. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

9. Salovay is 44 years old and resides in Pittsburgh, Pennsylvania. Salovay's current employment status is unknown. Between 1997 and 2007, in ascending order, Salovay was a registered representative of SEC-registered broker-dealers IDS Life, American Express Financial

[3] In addition, the Maryland consent order revoked Karasik's Maryland investment adviser representative registration.

Advisors Inc., Metropolitan Life Insurance Company, Metlife Securities Inc., First Security Investments, Inc., Midsouth Capital, Inc., Nations Financial Group, Inc. and Natcity Investments, Inc. In October 2008, he settled an action with FINRA related to his failure to disclose material information on a Form U4 by agreeing to a nine-month suspension and a $5,000 fine.

B. OTHER RELEVANT ENTITIES

1. Diversified was a Delaware corporation founded by Havanich and DellaSala in 2006 and located in Tequesta, Florida. Diversified was dissolved on April 28, 2014. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and commodities trading in the futures market. Diversified filed nine Form Ds with the Commission between 2007 and 2012 claiming exemptions under Rules 504 and 506 of the Securities Act of 1933 ("Securities Act") for approximately $19 million in stock and bonds in nine purportedly separate offerings but did not file Forms D for an additional $8 million in stock and bonds in five other purported separate offerings. Diversified has never been registered with the Commission nor registered any offering of securities under the Securities Act or a class of securities under the Exchange Act.

C. SUMMARY

1. Between 2006 and 2012, Diversified and its principal officers, Havanich, DellaSala, and Welch, raised at least $17.4 million from approximately 440 investors nationwide through a series of fraudulent, unregistered offerings of stock and bonds. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and also engaged in commodities trading in the futures market. Ultimately, as its disclosed use of proceeds expanded, Diversified used a portion of the investor funds to buy fractional interests in oil and gas wells, cattle, a hydrogen device that purported to increase gas mileage on vehicles, trade commodities contracts, and invest in real estate. Diversified, Havanich, DellaSala, and Welch made material misrepresentations and omissions about Diversified's financial performance and use of industry experts and technologies in Diversified's offering material and correspondence to investors. Havanich, DellaSala, and Welch also touted their affiliation with a charity organization in Diversified's offering materials but that charity never had any substantive charitable activities.

2. Starting in 2009, Diversified also hired unregistered sales agents to sell Diversified's bonds paying them commissions of 5% or 10% of the investor proceeds. Diversified and DellaSala employed the unregistered sales agents to raise money for Diversified even after receiving an email and other correspondence from Diversified's outside counsel detailing the limits on Diversified's use of unregistered sales agents. Diversified's top grossing independent sales agents were (1) Scurlock and his state registered investment advisory firm RTAG, (2) Carrio, Karasik, and their limited liability partnership CKA, and (3) Salovay. Collectively, they earned approximately $985,000 in transaction-based compensation in connection with their sales activities.

D. OFFER AND SALE OF UNREGISTERED SECURITIES

1. Beginning in 2006 and continuing through approximately 2008, Diversified submitted to potential investors one or more versions of a private placement memoranda ("PPM"), offering to sell Diversified common stock at per share prices ranging from 20 cents to $1.55 (the "Stock Offerings").

2. As a result of the Stock Offerings, Diversified raised approximately $910,304 from 160 investors both inside and outside the State of Florida.

3. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Stock Offerings.

4. No exemption from registration existed with respect to the Stock Offerings.

5. Between 2006 and 2008, there was no period of six months or more in which there was no offer or sale of Diversified's stock.

6. Beginning in approximately 2009 and continuing through 2012, Diversified submitted to potential investors various versions of a brochure, PPM, and business plan as part of offers to sell Diversified bonds with maturities between 12 and 24 months and paying annual interest rates between 8% and 10.25% (the "Bond Offerings"). Some of the bonds included an option to purchase Diversified common stock.

7. As a result of the Bond Offerings, Diversified raised approximately $16.5 million from 280 investors both inside and outside the State of Florida.

8. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Bond Offerings.

9. No exemption from registration existed with respect to the Bond Offerings.

10. Between 2009 and 2012, there was no period of six months or more in which there was no offer or sale of Diversified's bonds.

11. DellaSala, Havanich, and Welch participated in the Stock Offerings and the Bond Offerings by undertaking the offerings, by drafting and reviewing the brochures and business plans, reviewing and approving the PPMs, engaging sales agents to sell the bonds, facilitating Diversified's website, participating in presentations to potential investors, and soliciting potential investors for at least one stock offering using "lead lists." In addition, Havanich and DellaSala touted Diversified's securities on radio broadcasts, where Havanich appeared under his own name and DellaSala appeared under the alias "Jim Clark."

E. DIVERSIFIED AND DELLASALA'S USE OF UNREGISTERED SALES AGENTS

1. Starting in April 2009, Diversified had a formal contract, titled Finder's Fee Agreement ("Finders agreement") that it used to employ unregistered sales agents to act as commissioned sales agents.

2. The unregistered sales agents solicited investors and received a commission of either 5% or 10% from Diversified based on the amount invested.

3. Diversified participated in the unregistered sales agents' solicitation of investment in Diversified bonds by entering into written agreements with the unregistered sales agents, paying them a commission, and supplying them with brochures, PPMs, and business plans relating to Diversified bonds. DellaSala participated in the unregistered sales agents' solicitation of investment in Diversified bonds by paying them commissions in his role as a principal of Diversified.

4. In connection with their efforts to obtain purchasers for Diversified bonds, the unregistered sales agents used the mails or means or instrumentality of interstate commerce.

5. The unregistered sales agents were either not associated with any registered brokers or dealers or were engaged in sales activities that occurred outside and without the knowledge of the broker-dealers with which they were associated.

F. THE UNREGISTERED SALES AGENTS' INVOLVEMENT IN THE SALE OF DIVERSIFIED'S BONDS

1. Scurlock and RTAG

a. Scurlock entered into a Finders agreement with Diversified in December 2009. That agreement stated Scurlock would be paid a 5% commission for each investor that purchased Diversified's bonds although in practice he was actually paid a 10% commission.

b. While RTAG did not enter into a Finders agreement with Diversified, starting in February 2012, Diversified paid commissions to RTAG instead of directly to Scurlock.

c. Between January 2010 and March 2012, Scurlock recommended Diversified's bonds to RTAG's clients and other investors, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in Diversified bonds, fielded investor inquiries, and handled investor funds.

d. Scurlock and RTAG collectively received approximately $448,000 in transaction-based compensation for selling Diversified bonds to approximately 50 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

2. Carrio, Karasik, and CKA

a. In November 2009, Carrio entered into a Finders agreement with Diversified that paid him a 10% commission for each investor that purchased Diversified's bonds.

b. While Karasik and CKA did not enter into Finders agreements with Diversified, starting in December 2010, Carrio and CKA began equally sharing Diversified commissions. Karasik received either all or a supermajority of the Diversified commissions paid to CKA as some of the commissions were used to pay CKA expenses.

c. Between December 2009 and March 2012 Carrio, Karasik, and CKA recommended the bonds to CKA clients, provided prospective investors with offering documents, discussed the returns of the bond offerings with prospective investors, weighed in on the merits of the bond investment, provided and directed prospective investors to complete the paperwork necessary for an investment in the bonds, and, as to Karasik and CKA, handled investor funds.

d. Carrio, Karasik, and CKA collectively received approximately $434,974 in transaction-based compensation for selling Diversified's bonds to approximately 40 investors.

e. Between December 2009 and March 2012, Carrio and CKA were not registered as broker-dealers or associated with a registered broker-dealer.

f. Between December 2010 and March 2012, Karasik's activities occurred outside and without the knowledge of the broker-dealers with which he was associated during the relevant time.

3. Salovay

a. Salovay entered into a Finders agreement with Diversified in July 2009. That agreement provided that Salovay would be paid a 10% commission for each investor that purchased Diversified bonds.

b. Between August 2009 and March 2012, Salovay recommended Diversified's bonds to his insurance clients, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in the bonds, fielded investor inquiries, and handled investor funds.

c. Salovay received approximately $101,790 in transaction-based compensation for selling Diversified's bonds to approximately 20 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

G. MISREPRESENTATIONS AND OMISSIONS TO INVESTORS

During the course of the Bond Offerings, Diversified, Havanich, DellaSala, and Welch made numerous false and misleading statements and omissions, many of which are described below. At the time these statements and omissions were made, Diversified, Havanich, DellaSala, and Welch either knew, or should have known, or were severely reckless in not knowing their false and misleading nature.

1. Misrepresentations and Omissions Concerning Diversified's Financial Performance

a. The PPMs Respondents distributed beginning in 2009 and continuing through 2010 list "Operating Deficits" as one of several risk factors, stating: "The expenses of operating the Company may exceed its income, thereby requiring that the difference be paid out of the Company's capital, reducing the Company's investments and potential for profitability." Diversified omitted disclosures regarding Diversified's current or past profitability, stating only that "[a]dditional financial information is available on a confidential basis upon request." In fact, Diversified's incurring of losses was not a mere contingency. To the contrary, Diversified had suffered steadily rising losses from its inception, as described below:

YEAR	NET INCOME (LOSS)
2006	(31,200)
2007	(257,975)
2008	(564,347))
2009	(672,749)
2010	(1,114,901)

b. While Diversified's October 2011 PPM disclosed that Diversified had recently sustained losses, it omitted the five-year history of losses.

c. In addition, Diversified's brochures paint a rosy picture of the company, claiming consistently over a three-year period of deepening insolvency that its bonds would produce "reliable monthly cash flow," were backed by "continually growing" assets, and were "[s]uperior to traditional fixed income instruments," while omitting that Diversified's survival depended upon its ability to borrow greater and greater sums.

d. In a brochure distributed in 2009 to prospective bond purchasers:

i. Diversified claimed one of Diversified's "Revenue Sources" was a "Hedge Account (for asset protection)," which earned an average monthly return on investment of 14.73%.

ii. Diversified represented that as of June 2009, Diversified had $2,126,269 in "Oil and Gas Assets," and that its "Asset Allocation" was 39% "Oil and Gas Acquisition" and 61% "Hedging Portfolio," implying that its Hedging Portfolio was worth $3,325,703.

iii. Diversified presented a bar chart comparing the three year returns of the "Trading Strategy History" with the returns on the "S&P." According to the chart, the trading strategy returned 82.70% in 2006, 138.70% in 2007, and 29.4% in 2008, for a three year average of 83.60%.

e. In brochures distributed in 2010, Diversified included a chart showing Diversified's "4 YR Average Strategy History" producing an average annual return of 90.9%.

f. In brochures distributed in 2010 and 2011, Diversified included a chart showing Diversified's "5 YR Average Strategy History" producing an average annual return of 79.4%

g. As Diversified, Havanich, DellaSala, and Welch knew, the representations in the brochures distributed in 2009 and 2010 were false and misleading as to material matters. In fact, in 2006 and 2007, Diversified had no hedging assets and had engaged in no commodities trading. In 2008, Diversified never had more than $6500 in hedging assets and Diversified's portfolio had an annual return of -95%. During June 2009, Diversified had far less than $3,325,703 in its hedging portfolio—during this period the value of the Diversified portfolio ranged from $38,000 to $75,000.

h. On March 30, 2010, Welch signed and sent to at least 9 individuals in Pennsylvania who had bought Diversified bonds a letter stating: "Due to the tremendous demand for [Diversified] Bonds, and the favorable financial position in which the company finds itself, management has decided to 'call' the existing bonds and is providing you a complete repayment" of principal and interest. This statement was false and misleading:

i. as of March 30, 2010, Diversified was not in a "favorable" financial condition but had been suffering significant and increasing losses since its inception;

ii. Diversified was not calling all of its bonds, as the letter implied, but rather was only calling bonds sold to some Pennsylvania investors; and

iii. Diversified's motivation for calling the bonds was not related to the demand for Diversified's bonds or Diversified's financial condition; rather, Diversified called the bonds because Pennsylvania regulatory authorities had raised questions regarding the legality of Diversified's sale of bonds to Pennsylvania residents.

i. Within approximately one month, several of the Pennsylvania investors reinvested their returned capital and some later invested additional funds.

2. <u>Misrepresentations Concerning Diversified's Use of Industry Experts and Technologies</u>

a. In business plans distributed to prospective investors between 2006 and 2011, Diversified stated, "Diversified will from time to time retain the advice and recommendation of experts based on the prospects we are looking at. … [T]he company will look to hire the best qualified individuals to evaluate each new prospect before we make an investment."

b. In business plans distributed to prospective investors between at least 2009 and 2011, Diversified stated, "[t]he key is working with *our geologists* and industry partners to find the best prospects that meet the companies risk to reward ratio." (emphasis added).

c. Diversified's website stated that its business strategy includes, among other things, acquiring "proven producing properties which meet the standards of management and *our* independent reservoir engineering firm." (emphasis added).

d. In several 2009 and 2010 versions of Diversified's investor power point presentations, shown at investor summits in various cities and led by Havanich, DellaSala, and Welch, Diversified included the names of an independent geologist and a reservoir engineering firm as part of its "independent team."

e. In a business plan provided to a mid-2009 investor, Diversified stated, "[w]e utilize advanced 3-D seismic imaging, drilling and completion technologies to systematically evaluate domestic onshore oil and natural gas reserves." Later Diversified business plans utilized similar language until late 2010 when the language was ultimately changed to read, "…Diversified Energy Group focuses its acquisition and development activities in provinces where we believe technology and the knowledge of our technical staff can effectively maximize return and reduce risk…."

f. Diversified stated in each of its marketing brochures that it had "[a]n Experienced Location and Acquisition Team boasting a proven track record with such companies as Chesapeake Energy, Marathon Oil, Union Pacific, Hess and Torch Energy, to name a few."

g. The foregoing statements were false and misleading. In fact:

i. Diversified did not hire geologists or a reservoir engineering firm as represented to evaluate the oil and gas wells in which it invested. Diversified made at least 93 separate investments in at least 44 oil and gas prospects between 2006 and 2011, the majority of which were in producing oil and gas wells. While Diversified did retain a geologist in early 2007, that geologist only provided Diversified with 15 reports related to *non-producing* oil and gas prospects and it did not retain an independent reservoir engineering firm in connection with any of its investments;

ii. Diversified never had 3-D seismic imaging, drilling and completion technologies;

iii. Diversified did not have a technical staff; and,

iv. DellaSala, Havanich, and Welch were the sole members of Diversified's "location and acquisition team" and they had never worked with any of the major energy companies listed in the brochures.

H. HAVANICH, DELLASLA, AND WELCH TOUTED THEIR AFFILIATION WITH ST. VINCENT

1. In September 2006, shortly before the start of Diversified's capital raising activities, Havanich and DellaSala created St. Vincent. St. Vincent has no relationship to the St. Vincent de Paul Catholic voluntary organization.

2. In Diversified's business plans, Diversified described St. Vincent as "a non-profit corporation to benefit children in need around the world," and described DellaSala and Havanich as officers and directors of St. Vincent, and Welch as member of St. Vincent's board.

3. St. Vincent never raised any money for children or had any substantive charitable activities.

I. VIOLATIONS

As a result of the conduct described above, CKA willfully violated Section 15(a) of the Exchange Act, which makes it unlawful for any broker or dealer to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless such broker or dealer is registered or associated with a registered broker-dealer.

IV.

Pursuant to its Offer, CKA agrees that disgorgement is appropriate, and further agrees to additional proceedings in this proceeding to determine (a) the amount of such disgorgement, plus prejudgment interest if ordered, and (b) whether a civil penalty is appropriate, and the amount of any such penalty, pursuant to Sections 21B and 21C of the Exchange Act. In connection with such additional proceedings, CKA agrees: (a) it will be precluded from arguing that it did not violate the federal securities laws described in this Offer; (b) it may not challenge the validity of this Offer; (c) solely for the purposes of such additional proceedings, the allegations of the Offer 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 affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.

V.

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 CKA's Offer, and to continue proceedings to determine the amount of disgorgement and civil penalties.

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

A. CKA cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. CKA be, and hereby is:

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

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

C. Any reapplication for association by CKA 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 CKA, 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. CKA shall pay disgorgement, and additional proceedings shall be held to determine (i) the amount of such disgorgement, plus prejudgment interest if ordered, and (ii) whether a civil penalty is appropriate, and the amount of any such penalty.

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. 75539 / July 28, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4147 / July 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16354

In the Matter of David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, RTAG Inc. d/b/a Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay, Respondents.	ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND ORDERING CONTINUATION OF PROCEEDINGS AGAINST DENNIS K. KARASIK

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 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Ordering Continuation of Proceedings against Dennis K. Karasik ("Karasik").

II.

Karasik 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, Karasik consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 203(f) of the Advisers Act and Ordering Continuation of Proceedings Against Dennis K. Karasik ("Order"), as set forth below.[1]

III.

On the basis of this Order and Karasik's Offer, the Commission finds that:[2]

A. RESPONDENTS

1. Havanich is 49 years old and resides in Jupiter, Florida. He was the co-founder, president, and director of Diversified Energy Group, Inc. ("Diversified") and is the president and director of St. Vincent de Paul Childrens Foundation Inc. ("St. Vincent"), a non-operating, non-profit corporation.

2. DellaSala is 54 years old and resides in Jupiter, Florida. DellaSala was the co-founder, vice president of business development, and director of Diversified and is the vice president and director of St. Vincent. DellaSala previously held a series 3 commodities license at various times between 1988 and 2002 while associated with 10 different commodities firms. In addition, DellaSala previously was a registered representative of SEC-registered broker dealers Meyers Pollock Robbins, Inc. and Joseph Charles & Assoc., Inc. between February 1997 and May 1997. The state of Kansas issued a cease-and-desist order against DellaSala as president of Apex Petroleum, Inc. ("Apex") in December 1995 in connection with the offer and sale of Apex securities. In the Matter of Apex Petroleum, Inc., et. al, Docket No. 96E046 (December 20, 1995).

3. Welch is 35 years old and resides in Gainesville, Florida. He was the vice president of investor relations of Diversified and is a board member of St. Vincent. Welch previously held a series 3 commodities license from approximately 2000-2002.

4. Scurlock is 38 years old and resides in Lexington, Kentucky. Scurlock is the owner and president, and therefore an associated person of, RTAG, a Kentucky registered

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[1]On January 23, 2015, the Commission instituted public administrative and cease-and-desist proceedings pursuant to:

(a) Sections 15(b) and 21C of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Karasik and co-respondent Richard Hampton Scurlock, III ("Scurlock");

(b) Sections 15(b) and 21C of the Exchange Act against and co-respondents Jose F. Carrio ("Carrio"), Carrio, Karasik & Associates, LLP ("CKA"), and Michael J. Salovay ("Salovay");

(c) Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Exchange Act against co-respondents David B. Havanich, Jr. ("Havanich"), Carmine A. DellaSala ("DellaSala"), and Matthew D. Welch ("Welch"); and

(d) Sections 15(b) and 21C of the Exchange Act and Section 203(e) of the Advisers Act against RTAG Inc. d/b/a Retirement Tax Advisory Group ("RTAG").

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

investment adviser. Between 1999 and 2005, in ascending order, Scurlock was a registered representative of SEC-registered broker-dealers IDS Life Insurance Company ("IDS Life"), Ameriprise Financial Services, Inc., Ameritas Investment Corp., and Synergy Investment Group, LLC.

5. RTAG is a Kentucky corporation and a Kentucky registered investment adviser. Scurlock is the owner and president of RTAG.

6. Carrio is 50 years old and resides in York, Pennsylvania. He is the co-founder and 50% owner of CKA, a limited liability partnership doing business in Baltimore County, Maryland. Carrio was not registered as a broker-dealer nor associated with a registered broker-dealer during the relevant period. Between 1989 and 2006, in ascending order, Carrio was a registered representative of SEC-registered broker-dealers First Investors Corporation, The Prudential Insurance Company of America, Pruco Securities Corporation, Equity Services, Inc., and New England Securities. On April 1, 2014 the Securities Division of the Office of the Maryland Attorney General ("Maryland AG") issued a consent order against Carrio in connection with his offer and sale of Diversified's bonds ordering that he cease and desist from violating certain of Maryland's anti-fraud and registration statutes and that he pay a $1,499,315.87 penalty which was waived based on his sworn financial statements. The consent order also permanently barred Carrio from engaging in the securities or investment advisory business in Maryland. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

7. Karasik is 60 years old and resides in Reisterstown, Maryland. He is the co-founder and 50% owner of CKA. Between 1984 and 2013, in ascending order, Karasik was a registered representative of SEC-registered broker-dealers NEL Equity Services Corporation, MML Investors Services, Inc., VIP Financial Companies, Inc., Equity Services Inc., New England Securities, Multi-Financial Securities Corporation, and H. Beck, Inc. Between 2009 and 2013, Karasik was an investment adviser representative of, and associated with, first Multi-Financial Securities Corporation and later H. Beck, Inc, both dually registered as broker-dealers and investment advisers. Karasik was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and CKA. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).[3] On July 8, 2014, by consent, FINRA imposed a bar from association with any FINRA member firm against Karasik in connection with Karasik's offer and sale of Diversified's bonds. Dennis Keith Karasik, Letter of Acceptance, Waiver and Consent, No. 2012034750401 (Jul. 8, 2014).

8. CKA is a limited liability partnership doing business in Baltimore County, Maryland. CKA states it is an independent financial services firm for wealth management issues. Carrio and Karasik each own 50% of CKA. CKA was not registered as a broker-dealer or an investment advisor during the relevant period. CKA was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and Karasik. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

9. Salovay is 44 years old and resides in Pittsburgh, Pennsylvania. Salovay's current employment status is unknown. Between 1997 and 2007, in ascending order, Salovay was

[3] In addition, the Maryland consent order revoked Karasik's Maryland investment adviser representative registration.

a registered representative of SEC-registered broker-dealers IDS Life, American Express Financial Advisors Inc., Metropolitan Life Insurance Company, Metlife Securities Inc., First Security Investments, Inc., Midsouth Capital, Inc., Nations Financial Group, Inc. and Natcity Investments, Inc. In October 2008, he settled an action with FINRA related to his failure to disclose material information on a Form U4 by agreeing to a nine-month suspension and a $5,000 fine.

B. OTHER RELEVANT ENTITIES

1. Diversified was a Delaware corporation founded by Havanich and DellaSala in 2006 and located in Tequesta, Florida. Diversified was dissolved on April 28, 2014. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and commodities trading in the futures market. Diversified filed nine Form Ds with the Commission between 2007 and 2012 claiming exemptions under Rules 504 and 506 of the Securities Act of 1933 ("Securities Act") for approximately $19 million in stock and bonds in nine purportedly separate offerings but did not file Forms D for an additional $8 million in stock and bonds in five other purported separate offerings. Diversified has never been registered with the Commission nor registered any offering of securities under the Securities Act or a class of securities under the Exchange Act.

C. SUMMARY

1. Between 2006 and 2012, Diversified and its principal officers, Havanich, DellaSala, and Welch, raised at least $17.4 million from approximately 440 investors nationwide through a series of fraudulent, unregistered offerings of stock and bonds. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and also engaged in commodities trading in the futures market. Ultimately, as its disclosed use of proceeds expanded, Diversified used a portion of the investor funds to buy fractional interests in oil and gas wells, cattle, a hydrogen device that purported to increase gas mileage on vehicles, trade commodities contracts, and invest in real estate. Diversified, Havanich, DellaSala, and Welch made material misrepresentations and omissions about Diversified's financial performance and use of industry experts and technologies in Diversified's offering material and correspondence to investors. Havanich, DellaSala, and Welch also touted their affiliation with a charity organization in Diversified's offering materials but that charity never had any substantive charitable activities.

2. Starting in 2009, Diversified also hired unregistered sales agents to sell Diversified's bonds paying them commissions of 5% or 10% of the investor proceeds. Diversified and DellaSala employed the unregistered sales agents to raise money for Diversified even after receiving an email and other correspondence from Diversified's outside counsel detailing the limits on Diversified's use of unregistered sales agents. Diversified's top grossing independent sales agents were (1) Scurlock and his state registered investment advisory firm RTAG, (2) Carrio, Karasik, and their limited liability partnership CKA, and (3) Salovay. Collectively, they earned approximately $985,000 in transaction-based compensation in connection with their sales activities.

D. OFFER AND SALE OF UNREGISTERED SECURITIES

1. Beginning in 2006 and continuing through approximately 2008, Diversified submitted to potential investors one or more versions of a private placement memoranda ("PPM"), offering to sell Diversified common stock at per share prices ranging from 20 cents to $1.55 (the "Stock Offerings").

2. As a result of the Stock Offerings, Diversified raised approximately $910,304 from 160 investors both inside and outside the State of Florida.

3. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Stock Offerings.

4. No exemption from registration existed with respect to the Stock Offerings.

5. Between 2006 and 2008, there was no period of six months or more in which there was no offer or sale of Diversified's stock.

6. Beginning in approximately 2009 and continuing through 2012, Diversified submitted to potential investors various versions of a brochure, PPM, and business plan as part of offers to sell Diversified bonds with maturities between 12 and 24 months and paying annual interest rates between 8% and 10.25% (the "Bond Offerings"). Some of the bonds included an option to purchase Diversified common stock.

7. As a result of the Bond Offerings, Diversified raised approximately $16.5 million from 280 investors both inside and outside the State of Florida.

8. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Bond Offerings.

9. No exemption from registration existed with respect to the Bond Offerings.

10. Between 2009 and 2012, there was no period of six months or more in which there was no offer or sale of Diversified's bonds.

11. DellaSala, Havanich, and Welch participated in the Stock Offerings and the Bond Offerings by undertaking the offerings, by drafting and reviewing the brochures and business plans, reviewing and approving the PPMs, engaging sales agents to sell the bonds, facilitating Diversified's website, participating in presentations to potential investors, and soliciting potential investors for at least one stock offering using "lead lists." In addition, Havanich and DellaSala touted Diversified's securities on radio broadcasts, where Havanich appeared under his own name and DellaSala appeared under the alias "Jim Clark."

E. DIVERSIFIED AND DELLASALA'S USE OF UNREGISTERED SALES AGENTS

1. Starting in April 2009, Diversified had a formal contract, titled Finder's Fee Agreement ("Finders agreement") that it used to employ unregistered sales agents to act as commissioned sales agents.

2. The unregistered sales agents solicited investors and received a commission of either 5% or 10% from Diversified based on the amount invested.

3. Diversified participated in the unregistered sales agents' solicitation of investment in Diversified bonds by entering into written agreements with the unregistered sales agents, paying them a commission, and supplying them with brochures, PPMs, and business plans relating to Diversified bonds. DellaSala participated in the unregistered sales agents' solicitation of investment in Diversified bonds by paying them commissions in his role as a principal of Diversified.

4. In connection with their efforts to obtain purchasers for Diversified bonds, the unregistered sales agents used the mails or means or instrumentality of interstate commerce.

5. The unregistered sales agents were either not associated with any registered brokers or dealers or were engaged in sales activities that occurred outside and without the knowledge of the broker-dealers with which they were associated.

F. THE UNREGISTERED SALES AGENTS' INVOLVEMENT IN THE SALE OF DIVERSIFIED'S BONDS

1. Scurlock and RTAG

a. Scurlock entered into a Finders agreement with Diversified in December 2009. That agreement stated Scurlock would be paid a 5% commission for each investor that purchased Diversified's bonds although in practice he was actually paid a 10% commission.

b. While RTAG did not enter into a Finders agreement with Diversified, starting in February 2012, Diversified paid commissions to RTAG instead of directly to Scurlock.

c. Between January 2010 and March 2012, Scurlock recommended Diversified's bonds to RTAG's clients and other investors, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in Diversified bonds, fielded investor inquiries, and handled investor funds.

d. Scurlock and RTAG collectively received approximately $448,000 in transaction-based compensation for selling Diversified bonds to approximately 50 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

2. Carrio, Karasik, and CKA

a. In November 2009, Carrio entered into a Finders agreement with Diversified that paid him a 10% commission for each investor that purchased Diversified's bonds.

b. While Karasik and CKA did not enter into Finders agreements with Diversified, starting in December 2010, Carrio and CKA began equally sharing Diversified commissions. Karasik received either all or a supermajority of the Diversified commissions paid to CKA as some of the commissions were used to pay CKA expenses.

c. Between December 2009 and March 2012 Carrio, Karasik, and CKA recommended the bonds to CKA clients, provided prospective investors with offering documents, discussed the returns of the bond offerings with prospective investors, weighed in on the merits of the bond investment, provided and directed prospective investors to complete the paperwork necessary for an investment in the bonds, and, as to Karasik and CKA, handled investor funds.

d. Carrio, Karasik, and CKA collectively received approximately $434,974 in transaction-based compensation for selling Diversified's bonds to approximately 40 investors.

e. Between December 2009 and March 2012, Carrio and CKA were not registered as broker-dealers or associated with a registered broker-dealer.

f. Between December 2010 and March 2012, Karasik's activities occurred outside and without the knowledge of the broker-dealers with which he was associated during the relevant time.

3. Salovay

a. Salovay entered into a Finders agreement with Diversified in July 2009. That agreement provided that Salovay would be paid a 10% commission for each investor that purchased Diversified bonds.

b. Between August 2009 and March 2012, Salovay recommended Diversified's bonds to his insurance clients, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in the bonds, fielded investor inquiries, and handled investor funds.

c. Salovay received approximately $101,790 in transaction-based compensation for selling Diversified's bonds to approximately 20 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

G. MISREPRESENTATIONS AND OMISSIONS TO INVESTORS

During the course of the Bond Offerings, Diversified, Havanich, DellaSala, and Welch made numerous false and misleading statements and omissions, many of which are described below. At the time these statements and omissions were made, Diversified, Havanich, DellaSala, and Welch either knew, or should have known, or were severely reckless in not knowing their false and misleading nature.

1. Misrepresentations and Omissions Concerning Diversified's Financial Performance

a. The PPMs Respondents distributed beginning in 2009 and continuing through 2010 list "Operating Deficits" as one of several risk factors, stating: "The expenses of operating the Company may exceed its income, thereby requiring that the difference be paid out of the Company's capital, reducing the Company's investments and potential for profitability." Diversified omitted disclosures regarding Diversified's current or past profitability, stating only that "[a]dditional financial information is available on a confidential basis upon request." In fact, Diversified's incurring of losses was not a mere contingency. To the contrary, Diversified had suffered steadily rising losses from its inception, as described below:

YEAR	NET INCOME (LOSS)
2006	(31,200)
2007	(257,975)
2008	(564,347))
2009	(672,749)
2010	(1,114,901)

b. While Diversified's October 2011 PPM disclosed that Diversified had recently sustained losses, it omitted the five-year history of losses.

c. In addition, Diversified's brochures paint a rosy picture of the company, claiming consistently over a three-year period of deepening insolvency that its bonds would produce "reliable monthly cash flow," were backed by "continually growing" assets, and were "[s]uperior to traditional fixed income instruments," while omitting that Diversified's survival depended upon its ability to borrow greater and greater sums.

d. In a brochure distributed in 2009 to prospective bond purchasers:

i. Diversified claimed one of Diversified's "Revenue Sources" was a "Hedge Account (for asset protection)," which earned an average monthly return on investment of 14.73%.

ii. Diversified represented that as of June 2009, Diversified had $2,126,269 in "Oil and Gas Assets," and that its "Asset Allocation" was 39% "Oil and Gas Acquisition" and 61% "Hedging Portfolio," implying that its Hedging Portfolio was worth $3,325,703.

iii. Diversified presented a bar chart comparing the three year returns of the "Trading Strategy History" with the returns on the "S&P." According to the chart, the trading strategy returned 82.70% in 2006, 138.70% in 2007, and 29.4% in 2008, for a three year average of 83.60%.

e. In brochures distributed in 2010, Diversified included a chart showing Diversified's "4 YR Average Strategy History" producing an average annual return of 90.9%.

f. In brochures distributed in 2010 and 2011, Diversified included a chart showing Diversified's "5 YR Average Strategy History" producing an average annual return of 79.4%

g. As Diversified, Havanich, DellaSala, and Welch knew, the representations in the brochures distributed in 2009 and 2010 were false and misleading as to material matters. In fact, in 2006 and 2007, Diversified had no hedging assets and had engaged in no commodities trading. In 2008, Diversified never had more than $6500 in hedging assets and Diversified's portfolio had an annual return of -95%. During June 2009, Diversified had far less than $3,325,703 in its hedging portfolio—during this period the value of the Diversified portfolio ranged from $38,000 to $75,000.

h. On March 30, 2010, Welch signed and sent to at least 9 individuals in Pennsylvania who had bought Diversified bonds a letter stating: "Due to the tremendous demand for [Diversified] Bonds, and the favorable financial position in which the company finds itself, management has decided to 'call' the existing bonds and is providing you a complete repayment" of principal and interest. This statement was false and misleading:

i. as of March 30, 2010, Diversified was not in a "favorable" financial condition but had been suffering significant and increasing losses since its inception;

ii. Diversified was not calling all of its bonds, as the letter implied, but rather was only calling bonds sold to some Pennsylvania investors; and

iii. Diversified's motivation for calling the bonds was not related to the demand for Diversified's bonds or Diversified's financial condition; rather, Diversified called the bonds because Pennsylvania regulatory authorities had raised questions regarding the legality of Diversified's sale of bonds to Pennsylvania residents.

i. Within approximately one month, several of the Pennsylvania investors reinvested their returned capital and some later invested additional funds.

2. <u>Misrepresentations Concerning Diversified's Use of Industry Experts and Technologies</u>

a. In business plans distributed to prospective investors between 2006 and 2011, Diversified stated, "Diversified will from time to time retain the advice and recommendation of experts based on the prospects we are looking at. ... [T]he company will look to hire the best qualified individuals to evaluate each new prospect before we make an investment."

b. In business plans distributed to prospective investors between at least 2009 and 2011, Diversified stated, "[t]he key is working with *our geologists* and industry partners to find the best prospects that meet the companies risk to reward ratio." (emphasis added).

c. Diversified's website stated that its business strategy includes, among other things, acquiring "proven producing properties which meet the standards of management and *our* independent reservoir engineering firm." (emphasis added).

d. In several 2009 and 2010 versions of Diversified's investor power point presentations, shown at investor summits in various cities and led by Havanich, DellaSala, and Welch, Diversified included the names of an independent geologist and a reservoir engineering firm as part of its "independent team."

e. In a business plan provided to a mid-2009 investor, Diversified stated, "[w]e utilize advanced 3-D seismic imaging, drilling and completion technologies to systematically evaluate domestic onshore oil and natural gas reserves." Later Diversified business plans utilized similar language until late 2010 when the language was ultimately changed to read, "...Diversified Energy Group focuses its acquisition and development activities in provinces where we believe technology and the knowledge of our technical staff can effectively maximize return and reduce risk...."

f. Diversified stated in each of its marketing brochures that it had "[a]n Experienced Location and Acquisition Team boasting a proven track record with such companies as Chesapeake Energy, Marathon Oil, Union Pacific, Hess and Torch Energy, to name a few."

g. The foregoing statements were false and misleading. In fact:

i. Diversified did not hire geologists or a reservoir engineering firm as represented to evaluate the oil and gas wells in which it invested. Diversified made at least 93 separate investments in at least 44 oil and gas prospects between 2006 and 2011, the majority of which were in producing oil and gas wells. While Diversified did retain a geologist in early 2007, that geologist only provided Diversified with 15 reports related to *non-producing* oil and gas prospects and it did not retain an independent reservoir engineering firm in connection with any of its investments;

ii. Diversified never had 3-D seismic imaging, drilling and completion technologies;

iii. Diversified did not have a technical staff; and,

iv. DellaSala, Havanich, and Welch were the sole members of Diversified's "location and acquisition team" and they had never worked with any of the major energy companies listed in the brochures.

H. HAVANICH, DELLASLA, AND WELCH TOUTED THEIR AFFILIATION WITH ST. VINCENT

1. In September 2006, shortly before the start of Diversified's capital raising activities, Havanich and DellaSala created St. Vincent. St. Vincent has no relationship to the St. Vincent de Paul Catholic voluntary organization.

2. In Diversified's business plans, Diversified described St. Vincent as "a non-profit corporation to benefit children in need around the world," and described DellaSala and Havanich as officers and directors of St. Vincent, and Welch as member of St. Vincent's board.

3. St. Vincent never raised any money for children or had any substantive charitable activities.

I. VIOLATIONS

As a result of the conduct described above, Karasik willfully violated Section 15(a) of the Exchange Act, which makes it unlawful for any broker or dealer to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless such broker or dealer is registered or associated with a registered broker-dealer.

IV.

Pursuant to his Offer, Karasik agrees that disgorgement is appropriate, and further agrees to additional proceedings in this proceeding to determine (a) the amount of such disgorgement, plus prejudgment interest if ordered, and (b) whether a civil penalty is appropriate, and the amount of any such penalty, pursuant to Sections 21B and 21C of the Exchange Act. In connection with such additional proceedings, Karasik agrees: (a) he will be precluded from arguing that he did not violate the federal securities laws described in this Offer; (b) he may not challenge the validity of this Offer; (c) solely for the purposes of such additional proceedings, the allegations of the Offer 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 affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.

V.

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 Karasik's Offer, and to continue proceedings to determine the amount of disgorgement and civil penalties.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Karasik cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Karasik be, and hereby is:

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

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

C. Any reapplication for association by Karasik 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 Karasik, 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. Karasik shall pay disgorgement, and additional proceedings shall be held to determine (i) the amount of such disgorgement, plus prejudgment interest if ordered, and (ii) whether a civil penalty is appropriate, and the amount of any such penalty. and civil penalties, in amounts to be determined by additional proceedings.

By the Commission.

Brent J. Fields
Secretary

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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75541; File No. SR-NSCC-2015-802)

July 28, 2015

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Advance Notice to Establish a Prefunded Liquidity Program As Part of NSCC's Liquidity Risk Management

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010[1] ("Clearing Supervision Act") and Rule 19b-4(n)(1)(i)[2] under the Securities Exchange Act of 1934, notice is hereby given that on June 26, 2015, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the advance notice SR-NSCC-2015-802 ("Advance Notice") as described in Items I and II, which Items have been prepared by NSCC. The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This Advance Notice is filed by NSCC in connection with a proposed liquidity program to raise prefunded liquidity through the issuance and private placement of short-term, unsecured notes ("Prefunded Liquidity Program"), which will consist of a combination of commercial paper notes and extendible notes. The Prefunded Liquidity Program would supplement NSCC's existing default liquidity risk management resources.

1 12 U.S.C. 5465(e)(1).

2 17 CFR 240.19b-4(n)(1)(i).

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A) and (B) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments on the Advance Notice have not been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Description of Change

NSCC proposes to establish the Prefunded Liquidity Program in order to raise prefunded liquidity and diversify its liquidity resources through the private placement of unsecured debt, consisting of a combination of short-term promissory notes ("Commercial Paper Notes"), and extendible-term promissory notes ("Extendible Notes", together with the Commercial Paper Notes, "Notes"), to institutional investors in an aggregate amount not to exceed $5 billion. The proceeds from the Prefunded Liquidity Program would supplement NSCC's existing liquidity resources, which collectively provide NSCC with liquidity to complete end-of-day settlement in the event of the default of an NSCC Member.[3]

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3 Terms not defined herein are defined in NSCC's Rules and Procedures ("Rules") available at http://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf. The events that constitute a Member default are specified in NSCC's Rule 46

Terms of the Prefunded Liquidity Program. NSCC has engaged an issuing and paying agent, as well as certain placement agent dealers, to develop a program to issue the Notes. The Notes would be issued to institutional investors through a private placement and offered in reliance on an exemption from registration under Section 4(a)(2) of the Securities Act of 1933.[4] NSCC would be party to certain transaction documents required to establish the Prefunded Liquidity Program, including an issuing and paying agent agreement, and a dealer agreement with each of the placement agent dealers. The dealer agreements would each be based on the standard form of dealer agreement for commercial paper programs, which is published by the Securities Industry and Financial Markets Association. The material terms and conditions of the Prefunded Liquidity Program are summarized below.

The Prefunded Liquidity Program would be established as a combination of both Commercial Paper Notes, which typically have shorter maturities, and Extendible Notes, which typically have longer maturities, in order to facilitate the staggering of the maturities of the issued Notes. NSCC intends to structure the Prefunded Liquidity Program such that the maturities of the issued Notes are staggered to avoid concentrations of maturing liabilities. The average maturity of the aggregate Notes outstanding issued under the Prefunded Liquidity Program is broadly estimated to range between three and six months. The Commercial Paper Notes and the Extendible Notes

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(Restrictions on Access to Services), which provides that NSCC's Board of Directors may suspend a Member or prohibit or limit a Member's access to NSCC's services in enumerated circumstances; this includes default in delivering funds or securities to NSCC, or a Member's experiencing such financial or operational difficulties that NSCC determines, in its discretion, that restriction on access to services is necessary for its protection and for the protection of its membership.

4 15 U.S.C. 77d(4)(a)(2) [sic].

would be represented by one or more master notes issued in the name of The Depository Trust Company ("DTC"), or its nominee. The Notes would be issued only through the book-entry system of DTC and would not be certificated.

The Commercial Paper Notes would either be interest bearing or be sold at a discount from their face amount, and the Extendible Notes would be interest bearing. Interest payable on the Notes would be at market rates customary for such type of debt and reflective of the creditworthiness of NSCC. The Commercial Paper Notes would have a maturity not to exceed 397 calendar days from the date of issue, and would not be redeemable by NSCC prior to maturity, nor would they contain any provision for extension, renewal, automatic rollover or voluntary prepayment. The Extendible Notes would have an initial maturity of 397 calendar days from the date of issue. However, each month following the date of issue, the holder of an Extendible Note would be permitted to elect to extend the maturity of all or a portion of the principal amount of such Extendible Note for an additional 30 calendar days. A holder of an Extendible Note would be permitted to continue to extend its Extendible Note up to the final maturity date, which is expected to be a maximum of six years from the date of issue. If a holder of an Extendible Note fails to exercise its right to extend the maturity of all or a portion of the Extendible Note, such portion of the Extendible Note would be deemed to be represented by a new note ("Non-Extended Note"), and NSCC would have the option to redeem any Non-Extended Note in whole, but not in part, at any time prior to the maturity date of that Non-Extended Note, which would be 12 months from the date on which they opted not to extend.

NSCC would hold the proceeds from the issuance of the Notes in a cash deposit account at the Federal Reserve Bank of New York ("FRBNY").[5] Pending the establishment of NSCC's account at the FRBNY, however, such proceeds would be maintained in accounts with creditworthy financial institutions in accordance with DTCC's Investment Policy.[6] NSCC currently invests its Clearing Fund deposits in the same manner, and acceptable investments under DTCC's Investment Policy include reverse repurchase agreements, money market mutual fund investments, bank deposits and commercial paper bank sweep deposits. In all cases, these amounts would be available to draw to complete settlement as needed.

NSCC Liquidity Risk Management. As a central counterparty ("CCP"), NSCC occupies an important role in the securities settlement system by interposing itself between counterparties to financial transactions, thereby reducing the risk faced by its Members and contributing to global financial stability. NSCC's liquidity risk management framework plays an integral part in NSCC's ability to perform this role, and is designed to ensure that NSCC maintains sufficient liquid resources to timely meet its payment (principally settlement) obligations with a high degree of confidence.

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5 Pursuant to Section 806(a) under Title VIII of the Clearing Supervision Act, and Section 234.6 of the Federal Reserve Regulation HH promulgated thereunder, NSCC, as a designated systemically important financial market utility ("SIFMU") under the Clearing Supervision Act, has applied for a cash deposit account at the FRBNY, as well as subscription to ancillary FRBNY services that will facilitate the use of the requested cash deposit account. See 12 U.S.C. 5465(a); 12 CFR 234.6. The application is pending with the FRBNY as of the date of this filing.

6 NSCC manages investment risk, including the custody and overnight investment of Clearing Fund cash, through the corporate Investment Policy, which establishes credit and concentration exposure limits on NSCC's investment counterparties and governs NSCC's investments of cash, including the custody and overnight investment of Clearing Fund cash.

NSCC's liquidity needs are driven by the requirement to complete end-of-day settlement, on an ongoing basis, in the event of Member default. If an NSCC Member defaults, as a CCP for the cash markets, NSCC will need to complete settlement of guaranteed transactions on the failing Member's behalf from the date of default through the remainder of the settlement cycle (currently three days for securities that settle on a regular way basis in the U.S. equities markets).

NSCC measures and manages its liquidity risk by performing daily simulations that measure the amount of liquidity that would be required by NSCC in a number of scenarios, including amounts required over the settlement cycle in the event that the Member or Member family to which NSCC has the largest aggregate liquidity exposure defaults. NSCC seeks to maintain qualified liquidity resources in an amount sufficient to meet this requirement. NSCC's existing liquidity resources include: (1) the cash in NSCC's Clearing Fund; (2) the cash that would be obtained by drawing upon NSCC's committed 364-day credit facility with a consortium of banks; and (3) additional cash deposits, known as "Supplemental Liquidity Deposits", designed to cover the heightened liquidity exposure arising around monthly option expiry periods, required from those Members whose activity would pose the largest liquidity exposure to NSCC.[7] The proceeds from the Prefunded Liquidity Program would supplement these liquidity resources. Further, NSCC would consider the proceeds from the Prefunded Liquidity Program to be qualifying liquidity resources under NSCC's Rule 4A.

By providing NSCC with additional, prefunded, and readily available liquidity resources to be used to complete end-of-day settlement as needed in the event of a

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[7] Supplemental Liquidity Deposits are described in NSCC Rule 4A, supra Note 1 [sic].

Member default, the proposed Prefunded Liquidity Program would provide additional certainty, stability, and safety to NSCC, its Members, and the U.S. equities market that it serves. The Prefunded Liquidity Program is also designed to reduce NSCC's concentration risk with respect to its liquidity resources since it is anticipated that many of the potential institutional investors who would be purchasers of the Notes are not currently providing liquidity resources to NSCC.

The Prefunded Liquidity Program was developed in coordination with a standing advisory group, the Clearing Agency Liquidity Council ("CALC"), which includes representatives of NSCC's Members and participants of NSCC's affiliate, the Fixed Income Clearing Corporation. The CALC was established in 2013 in order to facilitate dialogue between these clearing agencies and their participants regarding liquidity initiatives.[8]

Anticipated Effect on and Management of Risk

NSCC's consistent ability to timely complete settlement is a key part of NSCC's role as a CCP and allows NSCC to mitigate counterparty risk within the U.S. markets. In order to sufficiently perform this key role in promoting market stability, it is critical that NSCC has access to liquidity resources to enable it to complete end-of-day settlement, notwithstanding the default of a Member. NSCC believes that the overall impact of the Prefunded Liquidity Program on risks presented by NSCC would be to reduce the liquidity risks associated with NSCC's operation as a CCP by providing it with an additional source of liquidity to complete end-of-day settlement in the event of a Member

[8] Reference to the establishment of the CALC was made in the Commission's order approving the proposed rule changes implementing the Supplemental Liquidity Deposits. Securities Exchange Act Release No. 70999 (December 5, 2013), 78 FR 75413 (December 11, 2013) (File No. SR-NSCC-2013-02).

default. NSCC further believes that a reduction in its liquidity risk would reduce systemic risk and would have a positive impact on the safety and soundness of the clearing system.

While the Prefunded Liquidity Program, like any liquidity resource, would involve certain risks, most of these risks are standard in any commercial paper or extendible note program. One risk associated with the Prefunded Liquidity Program would be the risk that NSCC does not have sufficient funds to repay issued Notes when they mature. NSCC believes that this risk is extremely remote, as the proceeds of the Prefunded Liquidity Program would be used only in the event of a Member default, and NSCC would replenish that cash, as it would replenish any of its liquidity resources that are used to facilitate settlement in the event of a Member default, with the proceeds of the close out of that defaulted Member's portfolio. This notwithstanding, in the event that proceeds from the close out are insufficient to fully repay a liquidity borrowing, then NSCC would look to its loss waterfall to repay any outstanding liquidity borrowings. NSCC would further mitigate this risk by structuring the Prefunded Liquidity Program so that the maturity dates of the issued Notes are sufficiently staggered, which would provide NSCC with time to complete the close out of a defaulted Member's portfolio. A second risk is that NSCC may be unable to issue new Notes as issued Notes mature. This risk is mitigated by the fact that NSCC maintains a number of different liquidity resources, described above, and would not depend on the Prefunded Liquidity Program as its sole source of liquidity. As such, NSCC believes that the significant systemic risk mitigation benefits of providing NSCC with additional, prefunded liquidity resources outweigh these risks.

Consistency with Clearing Supervision Act. By supplementing NSCC's existing liquidity resources with prefunded liquidity, the proposed Prefunded Liquidity Program would contribute to NSCC's goal of assuring that NSCC has adequate liquidity resources to meet its settlement obligations notwithstanding the default of any of its Members. As such, the proposed Prefunded Liquidity Program is consistent with Section 805(b)(1) of the Clearing Supervision Act, the objectives and principles of which specify the promotion of robust risk management, promotion of safety and soundness, reduction of systemic risks and support of the stability of the broader financial system.[9]

III. Date of Effectiveness of the Advance Notice, and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. NSCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing NSCC with prompt written notice of the extension. The proposed change may be implemented in less than 60 days from the date the Advance Notice is filed, or the date further information requested by the Commission is received, if the Commission notifies NSCC in writing that it does not object to the proposed change and authorizes NSCC to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

[9] 12 U.S.C. 5464(b)(1).

NSCC shall post notice on its website of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NSCC-2015-802 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NSCC-2015-802. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's website (http://dtcc.com/legal/sec-rule-filings.aspx). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NSCC-2015-802 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

By the Commission.

Robert W. Errett
Deputy Secretary

By: Brent J. Fields
Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4150 / July 29, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16707

In the Matter of

STEPHEN M. COLEMAN

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Stephen M. Coleman ("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.5, III.6, and III.7 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.

III.

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

1. Coleman, age 59, is a resident of Chicago, Illinois. Coleman is the founder and Chief Investment Officer of Daedalus Capital, LLC ("Daedalus"), a Missouri limited liability company through which he sold securities. Daedalus' registration with the Commission as an Investment Adviser was approved November 1, 1994 and cancelled February 14, 2011. Daedalus is not currently registered with the Commission. Coleman has never been registered with the Commission, but from at least March 15, 1999 to December 31, 2009, he was registered as an Investment Adviser Representative in Missouri.

2. On January 30, 2009, the State of Missouri Office of Secretary of State Securities Division entered a Final Order to Cease and Desist and Order Imposing Civil Penalties and Costs as to All Respondents in the Matter of Stephen M. Coleman, Daedalus Capital, LLC, Chicken Little Fund Group, Daedalus ALPHA Inc., and ALPHA Strategy Fund, L.P., Case No. AP-07-41 ("Missouri Cease and Desist Order"). The Missouri Cease and Desist Order made final an October 25, 2007, State of Missouri Office of Secretary of State Securities Division Order to Cease and Desist, as amended August 27, 2008, which prohibited Coleman and Daedalus from offering and selling unregistered securities within the State of Missouri.

3. On May 21, 2012, the Nineteenth Judicial Circuit, State of Missouri Circuit Judge Division entered a Final Order and Judgment in *State of Missouri v. Daedalus Capital, L.L.C. and Stephen M. Coleman*, Case No. 10AC-CC00215 ("Missouri Court Order"), finding that, in violation of the Missouri Cease and Desist Order, Coleman and Daedalus offered and sold unregistered securities that were not exempt from registration, that they offered and sold securities without disclosing the use of the proceeds for the investment or the fact that their offer and sale violated the Missouri Cease and Desist Order, and that Coleman transacted business as an investment adviser representative in Missouri without registering as required.

4. The Missouri Court Order enjoined Coleman from offering or selling unregistered, nonexempt securities in Missouri, transacting business as an investment adviser representative in Missouri without registering or being exempt from registration, and omitting to disclose any material fact necessary in order to make a statement made, in light of the circumstances under which it is made, not misleading in connection with the offer or sale of any security in Missouri.

5. On March 4, 2015, Coleman consented to an order issued by the State of Illinois Secretary of State Securities Department in In the Matter of Daedalus Capital, LLC and Stephen M. Coleman, No. 1200150 ("Illinois Consent Order"), prohibiting Coleman and Daedalus from: (1) offering the sale of securities in or from the State of Illinois; and (2) seeking registration as an investment adviser or investment adviser reprsentative.

6. The Illinois Consent Order found that Coleman and Daedalus, while unregistered in Illinois, offered two investment vehicles — a note and an equity portfolio managed by Coleman. The Illinois Consent Order found that Coleman solicited investors in the note with promises that he

would double their money with a 0% probability of loss and that at least four individuals invested more than $346,000. The Illinois Consent Order also found that Coleman transferred $50,000 from Daedalus' bank account by check to his own bank account and used the funds to produce a play.

7. Coleman acknowledged and agreed in the Illinois Consent Order that he violated, among other provisions, Sections 12.F, 12.G, 12.J(1) and 12.J(2) of the Illinois Securities Law of 1953. Section 12.F prohibits any person from engaging in any transaction, practice or course of business in connection with the sale of securities which works or tends to work a fraud or deceit upon the purchaser or seller thereof. Section 12.G prohibits any person from obtaining money or property through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Section 12.J prohibits any person when acting as an investment advisor, investment advisor representative, or federal covered investment advisor, by any means or instrumentality, directly or indirectly (1) from employing any device, scheme or artifice to defraud any client or prospective client and (2) from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

IV.

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

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75549 / July 29, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16708

In the Matter of **Buckhead Community Bancorp, Inc.,** **Caribbean Exploration, Inc.,** **Coffee Exchange, Inc.,** **Colony Energy, Inc., and** **Watchit Media, 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 Buckhead Community Bancorp, Inc., Caribbean Exploration, Inc., Coffee Exchange, Inc., Colony Energy, Inc., and Watchit Media, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Buckhead Community Bancorp, Inc. (CIK No. 1026304) is a dissolved Georgia corporation located in Atlanta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Buckhead Community Bancorp, Inc. 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 $6,573 for the prior three months. On December 31, 2009, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of Georgia, and the case was terminated June 4, 2015.

2. Caribbean Exploration, Inc. (CIK No. 1310118) is an inactive Texas corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Caribbean Exploration, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on December 1, 2004.

3. Coffee Exchange, Inc. (CIK No. 1121806) is a revoked Nevada corporation located in McKinney, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Coffee Exchange, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 2008, which reported a net loss of $34,555 from the company's January 31, 2000 inception to September 30, 2008.

4. Colony Energy, Inc. (CIK No. 1427310) is a forfeited Delaware corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Colony Energy, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of $401,837 from the company's July 20, 2000 inception to September 30, 2008. Moreover, the company has never filed a Form 10-K.

5. Watchit Media, Inc. (CIK No. 1004963) is a void Delaware corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Watchit Media, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2006, which reported a net loss of $2,514,000 for the prior nine months. As of July 20, 2015, the company's stock (symbol "WMDA") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chair White
Commissioner Gallagher
Not participating
Commissioner Piwowar
Disapproved

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75563 /July 30, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3672 / July 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16709

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

I.

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

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

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

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II.

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

III.

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

1. Christopher Edwards, 32, a citizen and resident of the United Kingdom, was a Finance Manager in Computer Science Corporation's Nordic region from December 2008 to June 2010. He left the company in October 2010. Edwards is a Chartered Accountant in the United Kingdom.

2. Computer Sciences Corporation ("CSC"), a Nevada corporation headquartered in Falls Church, Virginia, sells information technology services. At all relevant times, CSC's common stock traded on the New York Stock Exchange.

3. On June 5, 2015, the Commission filed a complaint in the United States District Court for the Southern District of New York against Edwards in Securities and Exchange Commission v. Christopher Edwards, Civil Action Number 15-cv-4339 (RA). On July 24, 2015, the court entered an order permanently enjoining Edwards, by consent, from future violations of Sections 17(a)(1) and (3) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5(a) and (c) and 13b2-1 promulgated thereunder, and from aiding and abetting future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 promulgated thereunder. Edwards was also barred from acting as an officer or director of any public company pursuant to Section 20(e) of the Securities Act and Section 21(d)(2) of the Exchange Act for a period of four years.

4. The Commission's complaint alleged that Edwards fraudulently inflated CSC's earnings in its fiscal year 2010. Edwards recorded and maintained large amounts of "prepaid assets" on CSC's balance sheet that the company was instead required to record as expenses on its income statement. By doing so, Edwards artificially and materially overstated CSC's earnings. As a Finance Manager, Edwards was responsible for ensuring that the company recorded these expenses consistent with Generally Accepted Accounting Principles ("GAAP"). Instead, Edwards's actions resulted in CSC fraudulently overstating its consolidated operating

income by 5% for the first quarter of fiscal year 2010, and in the company materially overstating the operating income of one of its reportable segments in each quarter of that fiscal year.

IV.

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

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

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

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

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

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

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

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

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

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

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his practicing license is current and he has resolved all other disciplinary issues with the Association of Certified Chartered Accountants. However, if 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75564 / July 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16710

In the Matter of **Timothy Patterson,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b)(6) 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)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Timothy Patterson ("Respondent" or "Patterson").

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 his 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)(6) 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. Patterson was licensed to sell life insurance and annuities in Virginia by the Bureau of Insurance of the State Corporation Commission of the Commonwealth of Virginia ("Virginia Insurance Bureau") on March 8, 2011. Patterson sold insurance products through Legacy Estate Planning, LLC, an insurance agency where he was employed. Legacy Estate Planning also became licensed by the Virginia Insurance Bureau to sell life insurance and annuities on May 7, 2007 and health insurance on June 7, 2007. From November 2009 through September 2011, Patterson sold approximately $450,000 in promissory notes issued by 54Freedom and 54Freedom affiliates to at least eight of his clients, for which he received transaction-based compensation. During this time, Patterson was not registered with the Commission as a broker-dealer or associated with a registered broker-dealer.

2. On November 12, 2013, a final order was entered by consent against Patterson, enjoining him from offering or selling insurance to existing or new clients for a period of three (3) years and from future violations of the Virginia Securities Act, § 13.1-501 et seq. of the Code of Virginia and § 38.2-1809 of Title 38.2 of the Code, in the civil action entitled Commonwealth of Virginia, ex rel. State Corporation Commission v. Legacy Estate Planning LLC, Pamela S. Smith and Timothy Patterson, Case No. SEC-2013-00025. In addition to surrendering his licenses to sell insurance, Patterson was ordered to pay the Treasurer of the Commonwealth of Virginia $3,000 in monetary penalties.

5. The civil order to which Patterson consented alleged, inter alia, that Patterson offered and sold unregistered securities to Virginia consumers in the form of promissory notes and acted as an unregistered agent of the issuer, 54Freedom and 54Freedom affiliates, when he offered and sold those promissory notes. In addition, the order alleges that Patterson made materially untrue statements of fact and omissions by mischaracterizing the investment risks associated with the promissory notes and representing them as low risk alternatives to fixed income annuities. Finally, the order alleges that Patterson recommended to his clients the purchase of 54Freedom promissory notes without reasonable grounds to believe that the recommendation was suitable for his clients based upon reasonable inquiry concerning his client's investment objectives, financial situation, risk tolerance and needs, and any other relevant information.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Patterson 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. 75565 / July 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16711

In the Matter of **Pamela S. Smith,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b)(6) 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)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Pamela S. Smith ("Respondent" or "Smith").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b)(6) 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. Smith was licensed to sell life and health insurance, and annuities in Virginia by the Bureau of Insurance of the State Corporation Commission of the Commonwealth of Virginia ("Virginia Insurance Bureau") on February 1, 2001. Smith sold insurance products through Legacy Estate Planning, LLC, an insurance agency that she owned and operated. Legacy Estate Planning also became licensed by the Virginia Insurance Bureau to sell life insurance and annuities on May 7, 2007 and health insurance on June 7, 2007. From November 2009 through September 2011, Smith sold over $1.6 million in charitable gift annuities issued by 54Freedom Foundation, Inc. to at least eleven of her clients, for which she received transaction based compensation. During this time, Smith was not registered with the Commission as a broker-dealer or associated with a registered broker-dealer.

2. On November 12, 2013, a final order was entered by consent against Smith, enjoining her from offering or selling insurance to existing or new clients for a period of three (3) years and from future violations of the Virginia Securities Act, § 13.1-501 et seq. of the Code of Virginia and § 38.2-1809 of Title 38.2 of the Code, in the civil action entitled Commonwealth of Virginia, ex rel. State Corporation Commission v. Legacy Estate Planning LLC, Pamela S. Smith and Timothy Patterson, Case No. SEC-2013-00025. In addition to surrendering her licenses to sell insurance, Smith was ordered to pay the Treasurer of the Commonwealth of Virginia $10,000 in monetary penalties.

5. The civil order to which Smith consented alleged, inter alia, that Smith offered and sold unregistered securities to Virginia consumers in the form of charitable gift annuities and acted as an unregistered agent of the issuer, 54Freedom Foundation, Inc., when she offered and sold those charitable gift annuities. In addition, the order alleges that Smith made materially untrue statements of fact and omissions by improperly comparing charitable gift annuities to fixed income annuities sold by licensed insurance companies, mischaracterizing the investment risks associated with charitable gift annuities, and representing them to be low risk alternatives to fixed income annuities. Finally, the order alleges that Smith recommended to her clients the purchase of 54Freedom Foundation's charitable gift annuities without reasonable grounds to believe that the recommendation was suitable for her clients based upon reasonable inquiry concerning her client's investment objectives, financial situation, risk tolerance and needs, and any other relevant information.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Smith 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
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9871 / July 31, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75576 / July 31, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4151 / July 31, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31729 / July 31, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16713

In the Matter of **MICHAEL T. SEABOLT** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Michael T. Seabolt ("Seabolt" 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 Administrative and Cease-And-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, and 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

1. From 2009 through 2012, Respondent Michael Seabolt solicited numerous investors to direct millions of dollars to a fraudulent scheme operated by Nikolai Battoo and his two companies under the trade name Private International Wealth Management ("PIWM"). From 2004 through 2012, Seabolt was the U.S.-based salesperson for Battoo's PIWM investment program. In late 2008, Seabolt learned that Battoo's hedge funds and the PIWM investment program had significant exposure to leveraged investments in the Madoff Ponzi scheme and a failed derivative investment program. Seabolt did not inform investors about the losses suffered. Instead, Seabolt continued touting the strong performance of Battoo's PIWM investment program to prospective and existing investors and continued to distribute account statements, marketing materials, and other documents misrepresenting the historical performance of the PIWM portfolios and the value of existing investors' holdings. Since 2009, new and existing investors invested tens-of-millions of dollars with Battoo and his entities based on false information they received from Seabolt and Battoo, and Battoo subsequently misappropriated those funds.

Respondent

2. **Michael T. Seabolt**, 43, is a resident of Wellington, Florida. From 2004 through 2012, Seabolt was the primary salesperson for Battoo's PIWM investment program. Seabolt worked for Battoo pursuant to a consulting agreement between Battoo and Bolt Capital Consultants, Inc., a single-person consulting firm established by Seabolt for the purpose of working with Battoo. Seabolt also served on the Professional Executive Board for Battoo's PIWM investment program. Prior to working for Battoo, from 2002 to 2004 Seabolt worked for Sovereign International Asset Management ("SIAM"), a now-defunct Florida-based investment adviser. Seabolt was introduced to Battoo through his employment at SIAM. Until March 2015,

[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 proceedings.

Seabolt was an insurance salesperson in Florida, and he is now unemployed. Seabolt previously held a Series 7 and a Series 66 license, but he has not held licenses with a registered broker-dealer since 2004. Seabolt has never registered with the Commission and has no prior disciplinary history with the Commission.

Related Persons/Entities

3. **Nikolai Simon Battoo** ("Battoo"), 43, was an alternative investment manager who managed assets using a variety of vehicles and entities. From 2004 through 2012, Battoo raised more than $400 million from investors who directed their funds to his PIWM investment program and several hedge funds he controlled. Battoo acted as investment adviser to investors in his PIWM program through two entities that he controlled: BC Capital Group, S.A. (Panama) ("BC Panama") and BC Capital Group Ltd. (Hong Kong) ("BC Hong Kong") (collectively the "BC Capital entities"). In addition to PIWM, Battoo managed several hedge fund families through affiliated entities, including Anchor Hedge Fund Ltd. ("Anchor"), Galaxy Fund Inc., Phi R (Squared) Investment Fund Ltd. ("Phi R Squared"), and FuturesOne Diversified Fund Ltd. and FuturesOne Innovative Fund Ltd. (the "FuturesOne funds"). Battoo, a citizen of Trinidad and Tobago, maintained a residence and office in Florida until at least 2011. He currently lives in Switzerland. In September 2012, the Commission filed an emergency enforcement action in district court against Battoo, BC Panama, and BC Hong Kong, alleging that they defrauded investors located worldwide in violation of the antifraud provisions of the federal securities laws and acted as unregistered broker-dealers. On September 30, 2014, the district court entered a default judgment against Battoo, BC Panama, and BC Hong Kong, which included permanent injunctions and disgorgement, prejudgment interest, and civil penalties totaling $358,129,196.86.

4. **Alliance Investment Management, Limited** ("AIM") is a Bahamas-based company that is registered as a broker-dealer with the Securities Commission of the Bahamas. AIM is a wholly owned subsidiary of Benchmark Bahamas Limited, a publicly traded investment company listed on the Bahamas International Securities Exchange. From 2004 through 2012, AIM served as custodian for BC Panama and purported to maintain custody over the PIWM portfolio assets. On August 8, 2014, the Commission filed a complaint against AIM in United States district court, alleging that AIM participated in Battoo's fraud by facilitating Battoo's misappropriation of assets and by providing false account statements and holdings information to investors and their agents.

5. **Julian Brown** ("Brown"), age unknown, a Bahamian national and resident, is the President and a Director of AIM. Brown was a member of the Professional Executive Board and Investment Advisory Board for Battoo's PIWM investment program. Brown has never been registered in any capacity with the Commission or associated with a registrant. On August 8, 2014, the Commission filed a complaint against Brown in United States district court, alleging that Brown, through AIM, helped facilitate Battoo's fraud.

Battoo's Fraudulent Scheme

6. Battoo portrayed himself to investors as a highly successful asset manager from 2004 until September 2012, when the Commission brought an emergency injunctive action to halt his fraud. By 2012, Battoo and his BC Capital entities had raised more than $400 million from investors around the world, including more than $200 million from U.S.-based investors. Battoo managed assets through hedge funds where one of his entities was named as the fund manager, and through individual portfolios that he managed under the name PIWM. Many of the U.S. investors who invested in PIWM invested through pooled investment vehicles by pooling their funds together and investing in offshore entities that subsequently invested in PIWM.

7. Battoo built up his assets under management through both his hedge funds and the PIWM program by claiming exceptionally high risk-adjusted returns over a long time frame that included the 2007-2008 financial crisis. In 2008, however, Battoo's hedge funds suffered major losses in two areas. Battoo's hedge funds had made large, leveraged investments in Madoff feeder funds that suffered a total loss as a result of the Madoff Ponzi scheme. In addition, Battoo's hedge funds were invested heavily in fund-linked certificates whose performance was linked to Phi R Squared, a hedge fund managed by Battoo. Phi R Squared suffered substantial losses in 2008 based on impairments caused by the financial crisis, and as a result the fund-linked certificates lost 85% of their value. In total, Battoo's hedge funds lost at least $149 million due to their Madoff exposure and their investments in fund-linked certificates.

8. Battoo's PIWM investment program also suffered substantial losses in 2008 due to its high concentration of investments in Battoo's hedge funds. Rather than acknowledge these losses, Battoo put considerable effort into concealing them from his PIWM investors. For example, Battoo told investors that PIWM incurred minimal losses (between 0.5% and 0.78%) from Madoff, even though some PIWM portfolios had Madoff exposure exceeding 28%. Battoo also never disclosed the losses resulting from the fund-linked certificates.

9. PIWM portfolios lost up to 40% of their value from their exposure to Battoo's hedge funds, yet Battoo failed to inform PIWM investors about these losses. Instead, Battoo provided investors with false performance information and false account statements that reflected strong performance throughout the financial crisis.

10. In addition to concealing the substantial losses from PIWM investors, Battoo also diverted at least $45.7 million of investor funds to himself so that he could live the high life during his scheme. He spent $3 million of investor funds to fly around the world on a private plane and $11 million to renovate and furnish his 40,000-square-foot home in Switzerland. Battoo directed $5 million of investor funds to AIM, BC Panama's custodian that gave him unfettered access to investor funds. Battoo also used more than $3 million of investor funds to pay a Swiss attorney to assist him in securing immigration status in Switzerland.

11. On September 6, 2012, the Commission filed an emergency injunctive action in district court against Battoo and the entities he controlled. The Commission's complaint alleged violations of Section 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act

and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

12. On September 30, 2014, the district court entered a default judgment permanently enjoining Battoo and his BC Capital companies from violating Section 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. The district court also ordered Battoo and his two BC Capital entities to pay disgorgement, prejudgment interest, and penalty, imposed jointly and severally, totaling $358,129,196.86.

Seabolt Background

13. From 2004 through 2012, Seabolt was the primary salesperson for Battoo's PIWM investment program. Seabolt was responsible for soliciting new investments in PIWM and for managing relationships with PIWM investors and their advisers. During this period, at Battoo's direction, Seabolt traveled around the United States to meet with prospective and existing investors and their advisers and regularly spoke at investment conferences to further publicize PIWM. From 2009 to 2012, Seabolt solicited investments of millions of dollars for the PIWM program from new and existing investors. As part of his efforts, Seabolt distributed PowerPoint presentations created by Battoo to prospective investors and/or their advisors that explained the PIWM program and showed its historical performance and holdings. At times, Seabolt traveled with Battoo to attend investor meetings and conferences. Seabolt was instrumental in securing investments by PIWM investors and in facilitating the mechanics of those investments.

14. Seabolt remained a primary contact for PIWM investors and their advisers after they invested. Each month, Seabolt emailed monthly reports to investors and their advisers that reflected the holdings and performance of each investor's portfolio. These reports were generated by Battoo and/or his entities. Each quarter, Seabolt also mailed quarterly account statements to investors that Battoo and/or his entities created. Seabolt also fielded questions from investors and their advisers about the performance of their PIWM investments and coordinated contributions and redemptions. Seabolt also transmitted to investors and/or their advisors periodic newsletters prepared by Battoo providing updates on the portfolios and forecasts for upcoming periods.

Seabolt's Role in Battoo's Fraud

15. In 2008, Battoo told Seabolt about the massive exposure in Battoo's hedge funds resulting from the Madoff Ponzi scheme and the fund-linked certificates. Seabolt also attended meetings with Battoo and the hedge fund administrators, at which he learned the details and magnitude of these losses. Seabolt knew that PIWM had significant exposure to these hedge funds due to his familiarity with the investment program and his handling of reports, account statements, and marketing materials, all of which showed PIWM's investment holdings.

16. When Seabolt learned of the Madoff losses and fund-linked certificate losses in 2008, he discussed with Battoo the impact it would have on PIWM investors. Battoo told Seabolt that he would personally absorb the tens-of-millions of dollars of losses to the PIWM

portfolios. Battoo told Seabolt that he would replace the PIWM investors' exposure to the failed hedge fund investments with investments from his personal accounts so that PIWM investors would not suffer the losses. Seabolt did not take any steps to verify Battoo's fictitious story. He never informed PIWM investors of the losses suffered, nor did he relay Battoo's story about replenishing accounts with his own funds.

17. To the contrary, Seabolt continued to provide misinformation to PIWM investors. In December 2008, Seabolt distributed to PIWM investors a market commentary written by Battoo that misrepresented PIWM's exposure to Madoff. The market commentary, entitled, "The Art of Strategy Diversification," touted PIWM as highly diversified, and claimed that PIWM had only "a small nominal percentage" of indirect exposure to Madoff through a diversified hedge fund. The commentary estimated that Madoff would cause losses to PIWM investors of "well under 1.0%." Some of the recipients of this market commentary made additional investments in PIWM after December 2008.

18. In addition, Seabolt continued to send investors monthly reports and account statements prepared by Battoo that showed strong performance and that reflected only nominal exposure to Battoo's hedge funds. Each month from 2009 through September 2012, Seabolt emailed account holdings and performance reports prepared by Battoo to PIWM investors and their investment advisers, which misrepresented the PIWM portfolio holdings and historical performance and did not reflect the losses from Madoff or the fund-linked certificates.

19. Seabolt also helped facilitate Battoo's creation of fraudulent account statements that were issued to PIWM investors and their agents. Battoo regularly prepared false account statements, which purported to be issued by AIM, Battoo's custodian. Since early 2010, at the direction of Battoo, Seabolt coordinated with AIM, Battoo's custodian, on multiple occasions to obtain blank AIM letterhead so that Battoo could prepare account statements bearing AIM's logo.

20. Recipients of these fraudulent account statements continued to invest in PIWM. From 2009 through September 2012, existing investors directed more than $38 million in new investment money to Battoo.

21. Seabolt also continued to sell the PIWM program to new investors as if the 2008 losses never happened. Seabolt touted PIWM's fictitiously strong historical performance at conferences and in meetings with existing and prospective investors. He also distributed written materials that Battoo created to prospective investors that reflected PIWM's allegedly strong track record. He never mentioned to these prospective investors that PIWM had suffered massive investment losses in 2008 and instead led them to believe that PIWM had positive returns throughout the steep market declines in 2008 and 2009.

22. For example, Seabolt met with a group of prospective investors in mid and late 2009. Seabolt provided the investors with marketing materials from Battoo that claimed PIWM was well diversified for wealth preservation, even though he knew PIWM had recently suffered substantial losses from high concentrations in hedge fund and derivative investments. Seabolt also claimed that PIWM had strong historical performance and provided the investors with the inaccurate historical performance numbers Battoo provided. These investors subsequently

invested several million dollars with Battoo.

23. Battoo paid Seabolt a quarterly fee for his services, as well as an annual discretionary bonus. During period of his misconduct, Seabolt received $240,000 in compensation from Battoo, which came out of PIWM investor funds.

Violations

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

25. As a result of the conduct described above, Seabolt willfully violated 15(a) of the Exchange Act, which prohibits an unregistered broker-dealer from making use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security.

26. As a result of the conduct described above, Seabolt willfully aided and abetted and caused Battoo's, BC Panama's, and BC Hong Kong's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

27. As a result of the conduct described above, Seabolt willfully aided and abetted and caused Battoo's, BC Panama's, and BC Hong Kong's violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, which prohibit fraudulent conduct by an investment advisor.

IV.

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

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

A. Respondent Seabolt shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder.

B. Respondent Seabolt be, and hereby is:

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

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

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

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

D. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $240,000.00, prejudgment interest of $36,444.69, and a civil money penalty of $150,000.00 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600, 17 C.F.R. § 201.600, or 31 U.S.C. § 3717, as appropriate. 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 Seabolt 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 Jeffrey A. Shank, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL 60604.

E. The Commission will hold funds paid in this proceeding in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, in accordance with Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund ("Fair Fund distribution") pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended.

F. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the 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 Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

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

By the Commission.

Brent J. Fields
Secretary

Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9872 / July 31, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75577 / July 31, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4152 / July 31, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31730 / July 31, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16311

In the Matter of **RELIANCE FINANCIAL ADVISORS, LLC, TIMOTHY S. DEMBSKI and WALTER F. GRENDA, JR.,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, 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 AS TO RELIANCE FINANCIAL ADVISORS, LLC AND WALTER F. GRENDA, JR.**

I.

On December 10, 2014, the Securities and Exchange Commission ("Commission") deeming it appropriate and in the public interest, instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 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 Reliance

Financial Advisors, LLC ("Reliance Financial") and Walter F. Grenda, Jr. ("Grenda," and together with Reliance Financial, "Respondents").

II.

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, as set forth below.

III.

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

A. SUMMARY

1. Grenda founded and jointly owned Reliance Financial, an investment adviser registered with the Commission, with Timothy S. Dembski ("Dembski"). Grenda made (or used) false and misleading statements to his advisory clients at Reliance Financial in recommending and selling investments in a risky hedge fund—Prestige Wealth Management Fund, LP ("Prestige Fund" or the "Fund"), that Dembski founded along with his long-time friend, Scott M. Stephan ("Stephan").

2. Dembski and Stephan co-owned Prestige Wealth Management, LLC ("Prestige" or "General Partner"), the General Partner to the Prestige Fund. Grenda described the Prestige Fund's trading strategy to prospective investors as being fully-automated with all trades being made according to, and by, a computer algorithm (the "Algorithm").

3. Grenda sold interests in the Prestige Fund exclusively to long-standing clients of his investment advisory services at Reliance Financial, and at its predecessor entity, Reliance Financial Group ("Reliance Group"). As Grenda understood from advising these advisory clients over the years, many of them were retired or near retirement, on fixed incomes, and lacked investment acumen.

4. As Grenda knew or recklessly disregarded, the Prestige Fund was a highly risky investment. Indeed, neither Dembski nor Stephan had any experience in managing a hedge fund and, in Stephan's case, virtually no investing experience at all.

5. Nonetheless, Grenda knowingly or recklessly made or used false and misleading statements to his advisory clients in order to create the false appearance that an investment in the Prestige Fund was less risky than it really was. For example, Grenda provided his clients with a

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

private placement memorandum (the "PPM") that he knew or recklessly disregarded greatly exaggerated Stephan's experience in the securities industry.

6. Grenda's clients trusted him. Thus, at his recommendation, Grenda's clients invested approximately $8 million in the Prestige Fund. The Prestige Fund started trading in April 2011.

7. The Prestige Fund did not, however, have positive returns as advertised. In approximately October 2012 (approximately 18 months after the Fund started trading), Grenda withdrew his clients from the Prestige Fund. In approximately December 2012, the Prestige Fund collapsed, losing approximately 80% of its value, as a result of Stephan placing manual trades, contrary to the automated trading strategy sold to investors.

8. In addition, between September 2009 and December 2009, Grenda also borrowed $175,000 from two of his advisory clients (a mother and a daughter), telling them that he would use the loan to grow his business. That was not true, as Grenda knew or recklessly disregarded. Instead, Grenda used the money to, among other things, pay personal expenses and debts.

B. RESPONDENTS

9. **Reliance Financial Advisors, LLC** has been registered with the Commission as an investment adviser since January 2011, and is based in Buffalo, New York. Dembski and Grenda founded and, during the relevant time period, jointly owned Reliance Financial. Reliance Financial is defunct.

10. **Walter F. Grenda, Jr.**, age 57, resides in Buffalo, New York. In January 2011, Grenda co-founded and was Managing Partner at Reliance Financial. Prior to founding Reliance Financial, Grenda provided investment advisory services to individual clients in his role at Reliance Group. In addition, Grenda was a registered representative with a registered broker-dealer ("BD1") from approximately October 2006 through March 2011, and was a registered representative with a different registered broker-dealer ("BD2") from approximately September 2011 through July 2013.

C. OTHER RELEVANT PEOPLE AND ENTITIES

11. **Timothy S. Dembski**, age 42, resides in Lancaster, New York. In January 2011, Dembski co-founded and was Managing Partner at Reliance Financial. Also in early 2011, Dembski co-founded the Prestige Fund and its General Partner, Prestige. Prior to founding Reliance Financial and the Prestige Fund, Dembski provided investment advisory services to individual clients in his role at Reliance Group. In addition, from approximately October 2006 through March 2011, Dembski was a registered representative associated with BD1. From approximately September 2011 to July 2013, Dembski was a registered representative with BD2. Dembski is a respondent in the public administrative and cease-and-desist proceedings that the Commission instituted on December 10, 2014, discussed in Section I., above.

12. **Scott M. Stephan**, age 40, resides in Hamburg, New York. Stephan co-founded the Prestige Fund and the General Partner in early 2011 and was the Fund's Chief Investment Officer and sole portfolio manager. Prior to founding the Prestige Fund, Stephan worked at the Reliance

Group and was a registered representative with BD1 from approximately June 2009 through March 2011. Stephan is a respondent in related public administrative and cease-and desist proceedings that the Commission also instituted on December 10, 2014.

13. **Prestige Wealth Management Fund, LP**, was a private investment fund under the Investment Company Act and organized as a limited partnership under Delaware law on November 19, 2010.

14. **Prestige Wealth Management, LLC**, was a limited liability company organized in Delaware on November 12, 2010, and adviser to the Prestige Fund. Dembski and Stephan were the sole members of Prestige (which served as the General Partner to the Prestige Fund), each owning 50%. Prestige charged the Prestige Fund a 2% management fee and a 20% performance fee on an annualized basis. Prestige was not registered with the Commission.

15. **Reliance Financial Group**, was a Buffalo-based investment adviser founded and jointly owned by Dembski and Grenda from 1998 to 2011. Reliance Group was not registered with the Commission. Dembski and Grenda transferred their advisory clients from Reliance Group to Reliance Financial starting in approximately February 2011.

FACTS

D. GRENDA AND DEMBSKI HIRE STEPHAN TO WORK AT RELIANCE GROUP

16. In approximately April 2007, Grenda and Dembski hired Stephan to work for them at Reliance Group. When Stephan first started working for Grenda and Dembski, Stephan had no professional experience in the securities industry, trading securities, investing, or providing investment advice to others. Virtually all of Stephan's professional experience to that point had been collecting on—and managing others who collected on—past-due car loans. Grenda knew of (or recklessly disregarded) Stephan's prior work experience and that he had no experience in securities or investments when he was hired to work at Reliance Group.

17. Grenda and Dembski hired Stephan to assist them with telemarketing efforts for the services they offered at Reliance Group. In that role, Stephan's job was to locate new investment advisory clients for Grenda and Dembski through, among other things, placing cold calls and arranging sales seminars.

18. At no point, however, did Stephan provide Reliance Group's clients with investment advice, trade securities, or make investment decisions. At most, Stephan—from time to time—discussed investment ideas with Reliance Group's college interns, and assisted Grenda with various research tasks.

E. DEMBSKI AND STEPHAN SET UP THE PRESTIGE FUND

19. In Summer 2010, Stephan approached Grenda and Dembski about establishing a hedge fund to undertake an automated trading strategy developed by Stephan and coded into an Algorithm. The Algorithm purportedly had the following features:

a. It operated as a day-trading strategy that would hold no securities overnight;

b. It was designed to automatically buy or sell stocks and interests in Exchange Traded Funds ("ETFs") at pre-programmed times of the day and according to pre-programmed market signals; and

c. It was supposed to automatically enter a long position on a chosen stock or ETF should it go up approximately 1 to 1.5 percent and it would automatically enter a short position on a chosen stock or ETF should it go down approximately 1 to 1.5 percent. Once in a position, the Algorithm automatically would exit it after a 3 percent gain or a 1 percent loss, respectively.

20. Stephan did not undertake any real-time testing of the Algorithm, for example, by investing funds using its formula to see how it performed under actual market conditions, a fact Grenda knew or recklessly disregarded. At most, Stephan "back tested" the Algorithm, *i.e.*, looked at certain securities trading in the past to see how the Algorithm would have performed had it actually placed trades in those securities over those periods.

21. Neither Dembski nor Stephan had any experience establishing or running a hedge fund or in algorithmic or other automated trading strategies, a fact Grenda also knew or recklessly disregarded after working with them for years. Indeed, as discussed above, Stephan had little-to-no experience managing client funds or making investments.

22. Nonetheless, Dembski and Stephan (without Grenda) decided to set up the Prestige Fund to trade based on the Algorithm. In or about November 2010, Dembski and Stephan established Prestige and the Prestige Fund (the former of which served as General Partner and adviser to the Fund).

23. Grenda recommended the Fund to his advisory clients. He also played an active role in reviewing the fund documents (including the PPM). It was Grenda's intention and hope that after the Prestige Fund proved successful, Dembski and Stephan would eventually include him as an owner. In anticipation of this, at times he referred to himself in documents and filings as the "president" of, or a "partner" in, the Prestige Fund.

F. <u>GRENDA RECOMMENDS AND SELLS INVESTMENTS IN THE PRESTIGE FUND TO HIS ADVISORY CLIENTS</u>

24. From about February 2011 to March 2012, Grenda raised approximately $8 million selling interests in the Prestige Fund. The Prestige Fund's investors were comprised of Grenda's and Dembski's advisory clients at Reliance Financial and its predecessor entity. Ultimately, Grenda alone procured approximately $8 million in investments from approximately 23 of his advisory clients.

25. To come up with the money to invest in the Prestige Fund, certain of Grenda's advisory clients had to cash in variable annuities, for which they incurred approximately $290,000 in surrender fees.

26. Grenda had provided investment advice to many of his clients for years prior to their investing in the Prestige Fund. He, therefore, understood his clients' financial conditions and knew

that many were unsophisticated investors, who were retired or nearing retirement. In addition, as Grenda understood, his clients trusted him to prudently manage their finances.

27. In recommending and selling investments for the Prestige Fund, Grenda told his advisory clients that the Prestige Fund's trading would be fully automated and directed by the Algorithm.

G. GRENDA MAKES OR DISTRIBUTES MATERIALLY FALSE AND MISLEADING STATEMENTS WHEN RECOMMENDING AND SELLING INVESTMENTS IN THE PRESTIGE FUND

28. In selling the Prestige Fund, Grenda knew or recklessly disregarded: (a) that the Fund was a highly risky investment; (b) that Stephan, who developed the stategy coded into the Algorithm, had no prior experience running an algorithmic trading platform or hedge fund and, indeed, had virtually no experience trading or investing at all; and (c) Grenda's advisory clients did not know Stephan and, thus, had no reason to trust or invest with him.

29. Nonetheless, Grenda made or disseminated to his advisory clients materially false and misleading statements in order to create the appearance that the Prestige Fund was a relatively safe, in-demand investment, overseen by professional money managers.

30.. Prestige Fund's PPM, dated February 1, 2011, contained the following biography for Stephan:

> Scott M. Stephan is co-founder and Chief Investment Officer of the General Partner. He has exclusive responsibility to make the Fund's investment decisions on behalf of the General Partner. Mr. Stephan has worked in the financial services industry for over 14 years. The first half of his career he co-managed a portfolio of over $500 million for First Investors Financial Services. Afterwards, Mr. Stephan took a position as Vice President of Investments for a New York based investment company in which he was responsible for portfolio management and analysis.

31. The PPM's description of Stephan's professional experiences prior to joining Reliance Group as well as his being "responsible for portfolio management and analysis" at Reliance Group were highly misleading, if not outright false. *First*, as discussed above, Stephan had no experience in the securities industry prior to joining Reliance Group in 2007. From 1999 to 2007, Stephan was responsible for collecting, or managing a group that collected, on past due car loans. This involved managing a group within a debt-collection call center, reaching out to debtors to obtain payment, and recommending cars to be repossessed in the event of non-payment. In that position, Stephan undertook no trading, managed no securities portfolios, provided no investment advice, and made no decisions concerning securities investments. Moreover, Stephan had no responsibility for determining what car loans to purchase and the value of the loans he was responsible for collecting was far less than $500 million.

32. *Second*, upon joining Reliance Group, Stephan had little-to-no experience selecting or making investments. Indeed, Grenda and Dembski hired him to undertake telemarketing efforts. Stephan received his securities Series 7, 63 and 66 licenses only in 2009 and, even then, he advised

no clients of his own, undertook no trading, and had no control over the portfolios of the Reliance Group's clients. In fact, Stephan's only trading experience was investing approximately $1,000 that his father loaned to him in or around 2006 or 2007, which Stephan lost.

33. Grenda knew or recklessly disregarded that Stephan had no prior experience in the securities industry before joining Reliance Group, that Stephan received his securities licenses only in 2009, and that, even at Reliance Group, the so-called "New York based investment company" in the biography, Stephan had a minimal, if any, involvement managing assets, trading securities, or providing investment advice to clients.

34. Grenda knew about Stephan's professional background prior to joining Reliance Group as well as his role at Reliance Group. Therefore, Grenda—who read and approved the PPM and then gave it to advisory clients when recommending and selling the Prestige Fund to them—knew or recklessly disregarded that Stephan's biography was false and misleading. Despite this, Grenda failed to inform his advisory clients that Stephan's biography was false and misleading or otherwise to tell them the truth concerning Stephan's work experience.

35. Nonetheless, Grenda distributed the PPM to investors and prospective investors in the Prestige Fund.

H. <u>THE PRESTIGE FUND COLLAPSES</u>

36. The Prestige Fund traded using the Algorithm approximately from April 2011 to September 2011. From that point on—because the Algorithm never worked as intended—Stephan stopped using automated trading altogether. Instead, contrary to what investors were told the Prestige Fund's trading strategy would be, Stephan manually placed trades.

37. Grenda withdrew his clients' investments from the Prestige Fund in approximately October 2012, which amounted to approximately $320,000 less than their collective initial investments, for total collective losses of about 4%.

38. In December 2012, the Prestige Fund lost approximately 80% of its value as a result of Stephan manually investing and trading in stock options.

I. <u>GRENDA BORROWS MONEY FROM HIS ADVISORY CLIENTS</u>

39. In addition to the above, Grenda also made false and misleading statements and omissions to two advisory clients—a mother and daughter ("Lenders")—in order to borrow approximately $175,000 from them. In or about September 2009, Grenda asked to borrow $100,000 from the Lenders, telling them that he wanted the loan to grow his business. Trusting Grenda, the Lenders wired $100,000 to him on September 11, 2009 from the daughter's bank account.

40. Grenda did not use the money to grow his business, however. Rather, in the days immediately following the loan, Grenda used a large portion of the money—approximately 50%—to pay personal expenses and debts.

41. In or about December 2009, Grenda requested to borrow more money from the Lenders, again telling them that he wanted the loan to grow his business. Grenda also failed to tell the Lenders that he had used at least a substantial portion of the prior loan for personal expenses. On December 16, 2009, the Lenders wrote a check for an additional $75,000 to Grenda from the daughter's bank account.

42. Grenda again used a large portion of the money to pay personal expenses and debts. Grenda's statements to the Lenders that he intended to use the loans to build his business were, therefore, false and misleading as Grenda knew or recklessly disregarded. In or around February 2010, one of the Lenders visited Grenda at his business premises to inquire about the loan and he again told her that he planned to use the money to grow his business.

J. VIOLATIONS

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

44. As a result of the conduct described above, Respondents Reliance Financial and Grenda willfully violated Sections 206(1) and (2) of the Advisers Act, which prohibit an investment adviser from, respectively, "employ[ing] any device, scheme, or artifice to defraud any client or prospective client," or "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

45. As a result of the conduct described above, Respondent Grenda willfully aided and abetted and caused:

a. Prestige's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

b. Prestige's violations of Section 206(4) of the Advisers Act, which prohibits an investment adviser from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and Rule 206(4)-8 thereunder, which prohibits any investment adviser to a pooled investment vehicle from "mak[ing] 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 investor or prospective investor in the pooled investment vehicle," or "otherwise engag[ing] 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"; and

c. Reliance Financial's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and (2) the Advisers Act.

K. UNDERTAKING

46. Respondents Reliance Financial and Grenda have undertaken to dissolve Reliance Financial within thirty (30) days upon the issuance of this Order.

47. In determining whether to accept the Offer, the Commission has considered this undertaking. Respondents Reliance Financial and Grenda must certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Sanjay Wadhwa, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 1028, 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 undertaking.

COMMISSION FINDINGS

Based on the foregoing, the Commission finds that Respondents Reliance Financial and Grenda:

A. willfully violated Section 17(a) of the Securities Act;

B. willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and

C. willfully violated Sections 206(1) and (2) of the Advisers Act.

Based on the foregoing, the Commission also finds that Respondent Grenda willfully aided and abetted and caused:

A. Prestige's violations of Section 17(a) of the Securities Act;

B. Prestige's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

C. Prestige's violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder;

D. Reliance Financial's violations of Section 17(a) of the Securities Act;

E. Reliance Financial's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and

F. Reliance Financial's violations of Sections 206(1) and (2) of the Advisers Act.

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' Offer.

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

A. Respondents Reliance Financial and Grenda cease and desist from committing or causing any violations and any future violations of Sections 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Sections 206(1), 206(2), 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

B. Respondent Reliance Financial is censured.

C. Respondent Reliance Financial's registration as an investment adviser be, and hereby is, revoked.

D. Respondent Grenda be, and hereby is:

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

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

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

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by Respondent Grenda 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.

E. Respondent Grenda shall pay disgorgement of $25,000, which represents profits gained as a result of the conduct described herein, prejudgment interest of $2,410.91 and civil penalties of $50,000, to the Securities and Exchange Commission. Payment shall be made in the following installments: $2,150.30 each and every month, with payment to be received on the 1st of each and every month, starting in August 2015 and ending in August 2018. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

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

(2) 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 Walter F. Grenda, Jr. 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 Sanjay Wadhwa, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

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

V.

Is it 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 admitted by Respondent Grenda, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Grenda 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 Grenda 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

Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75583 / July 31, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31733 / July 31, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16316

In the Matter of **PAUL J. POLLACK and MONTGOMERY STREET RESEARCH, LLC,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER 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**

I.

On December 16, 2014 the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings 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 Paul J. Pollack ("Pollack") and Montgomery Street Research, LLC ("Montgomery Street") (collectively, "Respondents").

II.

In connection with 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 him 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 Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order 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 ("Order"), as set forth below.

III.

On the basis of this Order and the Offers, the Commission finds that:

SUMMARY

1. This matter arises out of trading by Pollack, as well as unregistered broker activity by Pollack and an entity he owns and controls, Montgomery Street. Through Montgomery Street, Pollack served as an outside consultant to Issuer A, a company quoted on OTC Link that is engaged in the acquisition and development of oil and natural gas reserves. In exchange for services provided to Issuer A, Pollack received various compensation, including more than 600,000 shares of Issuer A common stock.

2. From approximately January 2011 through June 2012, Pollack created a false appearance of market activity in Issuer A's stock by engaging in over 200 wash trades through his control of eight accounts at five broker-dealers. In addition, Respondents acted as unregistered brokers in raising funds on behalf of Issuer A in two private placements. Specifically, in Issuer A's common stock offering and preferred stock offering, Respondents assisted Issuer A in raising $2.9 million from 11 investors. Among other things, Respondents identified and solicited potential investors, provided financial information regarding the issuer, fielded investor inquiries, and with respect to the preferred stock offering, they received transaction-based compensation. Throughout their fund-raising for Issuer A, Respondents were not registered as brokers nor associated with a registered broker-dealer. By virtue of this conduct, Montgomery Street violated Section 15(a) of the Exchange Act, and Pollack violated Sections 9(a)(1), 10(b) and 15(a) of the Exchange Act and Rules 10b-5(a) and 10b-5(c) thereunder.

RESPONDENTS

3. **Paul J. Pollack ("Pollack")**, age 54, resides in Phoenix, Arizona. From approximately 1986 to 2002, Pollack was a registered representative associated with broker-dealers registered with the Commission. However, during the relevant period, Pollack was not registered with the Commission as a broker-dealer or associated with a registered broker-dealer. Pollack participated in an offering of Issuer A stock. Issuer A issued 45,000 shares to Pollack.

4. **Montgomery Street Research, LLC ("Montgomery Street")** is a Nevada limited liability company with its principal place of business in Phoenix, Arizona, that purports to provide equity research and consulting services. Pollack formed Montgomery Street in 2005, and he has been its sole owner and managing member since its inception. Montgomery Street is not, and has never been, registered with the Commission in any capacity. Montgomery Street participated in an offering of Issuer A stock.

5. Respondents participated in an offering of Issuer A stock, which is a penny stock.

OTHER RELEVANT ENTITIES

6. **Bhog Partners, LLC ("Bhog Partners")** is a Wyoming limited liability company that has been solely owned and controlled by Pollack since its formation in March 2012. Bhog Partners has no operations, but rather was created to allow for the deposit and trading of micro-cap stock in brokerage accounts controlled exclusively by Pollack and under Bhog Partners' name. Issuer A issued 200,000 shares to Bhog Partners. Bhog Partners has never been registered with the Commission in any capacity.

7. **Toro Holdings, LLC ("Toro Holdings")** is a Nevada limited liability company that has been solely owned and controlled by Pollack since its formation in 2006. Toro Holdings has no operations, but rather was created to allow for the deposit and trading of micro-cap stock in brokerage accounts controlled exclusively by Pollack and under Toro Holdings name. Issuer A issued 200,000 shares to Toro Holdings. Toro Holdings has never been registered with the Commission in any capacity.

8. **Giddy-Up Partners, LLC ("Giddy-Up Partners")** is a Nevada limited liability company that has been solely owned and controlled by Pollack since its formation in 2008. Giddy-Up Partners has no operations, but rather was created to allow for the deposit and trading of micro-cap stock in brokerage accounts controlled exclusively by Pollack and under Giddy-Up Partners name. Issuer A issued 220,000 shares to Giddy-Up Partners. Giddy-Up Partners has never been registered with the Commission in any capacity.

POLLACK AND MONTGOMERY STREET ACTED AS UNREGISTERED BROKERS

9. In March 2010, Issuer A entered into a letter agreement with Montgomery Street (the "Letter Agreement") for a three-year term beginning on March 2, 2010. Pursuant to the Letter Agreement, Montgomery Street was to provide "general advice to the Company, its growth strategies, and position within the public capital markets." In exchange for these services, Montgomery Street was to receive "$500,000 to be paid in the form of 80,000,000 shares of [Issuer A] Common Stock." On April 18, 2011, Issuer A declared a 1:100 reverse split of Issuer A stock, changing the number of shares due Montgomery Street under the Letter Agreement from 80,000,000 to 800,000.

10. Notwithstanding the lack of specificity of the services to be rendered pursuant to the Letter Agreement, Issuer A in fact hired Respondents to assist in raising money and to make introductions to potential investors.

11. Issuer A conducted two private placements of its securities during the three-year term of the Letter Agreement. The first offering was a sale of common stock to raise funds to cover expenses associated with Issuer A's pursuit of listing on a national exchange and to place a down payment on the acquisition of certain oil and gas leaseholds. The second offering was a sale of preferred stock and was designed to raise funds to finalize the purchase of those oil and gas leaseholds.

12. From approximately November 2010 through April 2011, Respondents participated in effecting transactions in Issuer A's common stock through their involvement at key points in the chain of distribution. Pollack, acting through Montgomery Street, among other things:

a. Identified prospective investors;

b. Solicited prospective investors in phone calls, emails, and meetings;

c. Provided at least one prospective investor with common stock offering materials, including subscription agreements; and

d. Directed interested investors on how to complete Issuer A's common stock subscription agreement and provide funds to Issuer A.

13. In addition, at Pollack's direction, an independent contractor serving as an analyst at Montgomery Street ("Analyst A") described Issuer A's business plan to potential investors; prepared investment highlights on behalf of Issuer A; distributed models regarding Issuer A's financial prospects to potential investors; fielded investor inquiries; and provided wiring instructions to interested investors.

14. Following solicitation by Respondents, nine investors purchased a total of $800,000 of Issuer A's common stock, constituting 80% of the $1,005,000 total amount raised in the offering.

15. From approximately August 2011 through November 2011, Respondents participated in effecting transactions in Issuer A's preferred stock through their involvement at key points in the chain of distribution. Pollack, acting through Montgomery Street, among other things:

a. Assisted in formulating key aspects of the offering, including the convertible stock yield, the aggregate amount sought by Issuer A in the offering, and the structure as a preferred stock offering;

b. Identified prospective investors;

c. Solicited prospective investors in phone calls, emails, and meetings;

d. Explained and fielded questions regarding Issuer A's operations, financial condition, and business prospects;

e. Provided a prospective investor with preferred stock offering materials, including a subscription agreement; and

f. Directed an interested investor to complete Issuer A's preferred stock subscription agreement and provide funds to Issuer A.

16. In addition, at Pollack's direction, Analyst A continued to maintain and distribute models regarding Issuer A's financial prospects to prospective investors.

17. Following solicitation by Respondents, three investors purchased a total of $2,100,000 of Issuer A's preferred stock, constituting 32% of the $6,600,000 total amount raised in the offering.

18. In connection with the preferred stock offering, Pollack and the CEO of Issuer A reached an oral agreement whereby Issuer A was to pay Respondents 5% of the value of Issuer A's preferred stock purchased by Pollack and Montgomery Street investors. Pursuant to their oral agreement, Respondents later received approximately $105,000 in transaction-based compensation from Issuer A.

19. Pollack and entities controlled by Pollack received 665,000 of the 800,000 shares of Issuer A common stock due pursuant to the Letter Agreement:

a. Toro Holdings was issued 100,000 shares of Issuer A common stock on or about April 28, 2011. The value of those shares on that date was $760,000;

b. Toro Holdings was issued an additional 100,000 shares of Issuer A common stock on or about June 16, 2011. The value of those shares on that date was $415,000;

c. Giddy-Up Partners was issued 120,000 shares of Issuer A common stock on or about June 16, 2011. The value of those shares on that date was $498,000;

d. Giddy-Up Partners was issued an additional 100,000 shares of Issuer A common stock on or about August 1, 2011. The value of those shares on that date was $430,000;

e. Bhog Partners was issued 200,000 shares of Issuer A common stock on or about August 23, 2011. The value of those shares on that date was $660,000; and

f. Pollack was issued 45,000 shares of Issuer A common stock on or about June 4, 2013. The value of those shares on that date was $8,100.

POLLACK MANIPULATED ISSUER A STOCK

20. From approximately December 2010 through October 2012, Pollack had exclusive trading authority over at least ten online accounts at five broker-dealers. Seven of these accounts were in the name of three entities that Pollack solely-owned and controlled, including three accounts in the name of Montgomery Street; three accounts in the name of Toro Holdings; and one account in the name of Bhog Partners.

21. From at least January 2011 through June 2012, eight Pollack-controlled accounts manipulated the market for Issuer A stock by engaging in the practice of wash trading. Wash trading is the purchase and sale of a security, either simultaneously or within a short period of time, that involves no change in the beneficial ownership of the security, as a means of creating artificial market activity. Specifically, Pollack placed buy (or sell) orders for Issuer A stock in one account he controlled, and then simultaneously or within a short period of time entered sell (or buy) orders for Issuer A stock at the exact same price in the exact same or virtually identical quantities in another account he controlled. These paired transactions had no economic impact on Pollack's position in Issuer A and applied upward pressure on the price of Issuer A stock, an otherwise thinly traded stock. By repeatedly making wash trades in the stock of Issuer A, Pollack, intended to and did, create a false or misleading appearance of active trading in the stock of Issuer A.

22. Pollack engaged in this manipulative strategy repeatedly. From approximately January 2011 through June 2012, Pollack conducted approximately 258 wash trades in Issuer A stock on 73 separate days.

23. During the 73 days in which Pollack's wash trades created a false or misleading appearance of active trading in the stock of Issuer A, Pollack (directly or through accounts he controlled) bought a total of 487,569 shares and sold a total of 584,530 shares for trading profits of approximately $206,349.

24. As a result of the conduct described above, Pollack willfully violated Section 9(a)(1) of the Exchange Act, which prohibits any person from engaging in wash sales "[f]or the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security. . ."

25. As a result of the conduct described above, Pollack willfully violated Section 10(b) of the Exchange Act and Rules 10b-5(a) and 10b-5(c) thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

26. As a result of the conduct described above, Pollack and Montgomery Street willfully violated Section 15(a)(1) of the Exchange Act, which makes it unlawful for any broker or dealer to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, certain securities unless such broker or dealer is registered with the Commission pursuant to Section 15(b) of the

Exchange Act (or, if the broker or dealer is a natural person, associated with a registered broker or dealer other than a natural person).

IV.

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

Accordingly, pursuant to Sections 15(b)(6) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Montgomery Street cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. Respondent Pollack cease and desist from committing or causing any violations and any future violations of Sections 9(a)(1), 10(b), and 15(a) of the Exchange Act and Rule 10b-5 thereunder.

C. Respondent Pollack be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;
>
> prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

D. Any reapplication for association by Pollack 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.

E. Respondents Pollack and Montgomery Street on a joint and several basis shall, within 14 days of the entry of this Order, pay disgorgement, which represents profits gained as a result of the conduct described herein of $311,349 and prejudgment interest of $31,369.78 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Respondents Pollack and Montgomery Street on a joint and several basis shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of $311,349 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury subject to Exchange Act Section 21F(g)(3). 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:

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 Paul J. Pollack and Montgomery Street Research, LLC 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 Thomas J. Krysa, Division of Enforcement, U.S. Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294-1961.

F. 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 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 this Order are true and admitted by Pollack, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Pollack 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 Pollack 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

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary